

No. 89723-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

FILO FOODS, LLC, BF FOODS, LLC, ALASKA AIRLINES, INC. and  
WASHINGTON RESTAURANT ASSOCIATION,

Respondents/Cross-Appellants,

v.

THE CITY OF SEATAC,

Appellant/Cross-Respondent,

and

PORT OF SEATTLE,

Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,

Appellant/Cross-Respondent.

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BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA

M. Roy Goldberg  
SHEPPARD MULLIN RICHTER  
& HAMPTON LLP  
1300 I Street, N.W., Suite 1100 East  
Washington, D.C. 20005-3314  
Tel. (202) 218-0007

Robert J. Guite, WSBA No. 25753  
SHEPPARD MULLIN RICHTER  
& HAMPTON LLP  
Four Embarcadero Center, 17<sup>th</sup> Floor  
San Francisco, CA 94111-4109  
Tel. (415) 434-9100

Douglas W. Hall  
FORD HARRISON  
1300 19<sup>th</sup> Street, N.W., Suite 300  
Washington, D.C. 20036  
Tel. (202) 719-2065

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## INTRODUCTION

Airlines for America ("A4A") seeks affirmance of the ruling below invalidating the City of Sea-Tac's "Ordinance Setting Minimum Employment Standards for Hospitality and Transportation Industry Employers" (SMC § 7.45 or the "Ordinance") as applied to Seattle-Tacoma International Airport ("SeaTac"). Among other things, § 7.45 of the Ordinance would increase to \$15-per-hour the minimum wage for several classifications of "Transportation Workers" at SeaTac. Covered workers include, without limitation, providers of core airline services such as baggage check-in and handling, passenger check-in, wheelchair escorts, aircraft fueling, and aircraft cleaning. Although the Ordinance purports to exempt employees of "a certified air carrier," this exemption is almost if not entirely meaningless given that many airlines either (a) contract out to third parties the provision of the types of core airline services covered by the Ordinance, or (b) use other airlines to provide the services.

A4A presents this *amicus curiae* brief to present and address the following two arguments raised below by Alaska Airlines, Inc. which the lower court deemed unnecessary to resolve:

1. The Ordinance is preempted by the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b) ("ADA"), because it seeks to regulate the provision of airline services and prices. The ADA preempts state or local laws, regulations, or other provisions "having the force and effect of law related to a price, route, or service of an air carrier." The Ordinance has the force and effect of law because, among other things, it compels airline contractors to pay wages at a minimum rate of \$15 per hour. The Ordinance relates to airline services and prices because activities such as baggage handling, check-in, wheelchair escorts, aircraft-fueling and aircraft cleaning are "services" customarily provided by air carriers to or on behalf of their passengers. The Ordinance would have a direct impact on how much the airlines must pay for such services, and

therefore directly relates to prices airlines charge. Indeed, the organization behind the Ordinance (Puget Sound Sage) expressly acknowledged that the Ordinance is aimed at changing how airlines provide and pay for core services in the aftermath of deregulation. *See* Record 1029-30.

2. The Ordinance also is also preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151. State laws that attempt to regulate conduct that is arguably prohibited or protected by federal labor law, or that purport to regulate activity that Congress intentionally left unregulated, are preempted by federal law labor. The Ordinance is preempted by the RLA because it imposes significant and burdensome requirements on entities subject to the RLA, with the effect (and no doubt the goal) of attempting to strong-arm employers into voluntarily recognizing unions at SeaTac to take advantage of the provision allowing waiver of the Ordinance through a collective bargaining agreement.

#### **IDENTITY AND INTEREST OF *AMICUS CURIAE***

The identity and interest of *amicus curiae* Airlines for America are set forth in the Motion for Leave of Airlines for America to File an *Amicus Curiae* Brief, filed herewith.

#### **ISSUES OF CONCERN TO *AMICUS CURIAE***

1. Whether the Ordinance is preempted by the Airline Deregulation Act, 49 U.S.C. 41713(b), because it relates to air carrier "services" and "prices" in a manner that is not tenuous, remote or peripheral.

2. Whether the Ordinance is preempted by the Railway Labor Act, 45 U.S.C. § 151, because it attempts to regulate conduct that is arguably prohibited or protected by federal labor law, or activity that Congress intentionally left unregulated.

## STATEMENT OF THE CASE

The City of SeaTac, Washington, which neither owns nor operates SeaTac, enacted the Ordinance to require airline contractors operating at SeaTac to, among other things: (1) pay employees a minimum wage of \$15 per hour; (2) provide paid sick leave and unused vacation time; (3) offer additional hours to part-time employees before hiring new staff; and (4) remit any tips or service charges to the worker(s) who actually provided the service. (SMC §7.45.040). The Ordinance would also create a private right of action for violations. (SMC §7.45.100(A)). A4A Adopts the statement of the case set forth in the "Answering Brief and Opening Cross-Appeal of Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc. and Washington Restaurant Association" (April 2, 2014) ("Answering Br."), at 4-9.

## ARGUMENT

### **I. THE ORDINANCE IS PREEMPTED BY THE AIRLINE DEREGULATION ACT.**

Before the ADA was enacted, the Federal Aviation Act of 1958 empowered the Civil Aeronautics Board to regulate the interstate airline industry. "Pursuant to this authority, the Board closely regulated air carriers, controlling, among other things, routes, rates, and services." *Northwest, Inc. v. Ginsberg*, No. 12-462, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1422 (2014), Slip Op., at 4.

The Airline Deregulation Act ("ADA") was intended to change all that. It sought to promote "efficiency, innovation, and low prices in the airline industry through 'maximum reliance on competitive market forces and on actual and potential competition.'" *Ginsberg* at 5 (citing 49 U.S.C. 40101(a)(6), (12)(A)). The ADA "included a pre-emption provision in order to ensure that the States would not undo federal deregulation with regulation of their own." *Id.* (citation and internal quotation marks omitted). Specifically, the ADA prohibits a state or local government from enacting or enforcing "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).

In enacting the ADA, Congress did not give to state and local governments the regulatory powers it was withdrawing in favor of market forces. To the contrary, the preemption provision was included to "ensure that the States" would not "undo" deregulation of the domestic airline industry "with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). In "reducing federal economic regulation of the field . . . Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989). Recognizing this goal, the Supreme Court has repeatedly emphasized the breadth of the ADA's preemption provision. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 225-26, (1995); *id.* at 235 (Stevens, J., concurring in part and dissenting in part); *Morales*, 504 U.S. at 383-84; *see also Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 377 (2008) (Ginsburg, J., concurring) (noting the "breadth of [the] preemption language" in the Federal Aviation Administration Authorization Act of 1994 ["FAAA"], whose preemption provision, 49 U.S.C. 14501(c)(1), is in *pari materia* with that of the ADA).

A state or local ordinance which has the force and effect of law will be preempted by the ADA where it relates to air carrier "prices," "routes," or "services" in a manner that is not "tenuous," "remote," or "peripheral." *Morales*, 504 U.S. at 390. As set forth below, that is precisely the case with the Ordinance.

**A. The Ordinance Relates to Air Carrier "Services" and "Prices."**

The Ordinance relates to air carrier "services" and "prices" because it relates to multiple core air carrier "services" provided to passengers, specifically, "curbside passenger check-in services; baggage check services; wheelchair escort services; baggage handling; cargo handling; rental luggage cart services"; "security services" and "customer service" (SMC 7.45.010(M)), and relates to the "prices" that will be charged for such "services." The Ordinance also relates to

multiple additional "services" that are provided on behalf of airline passengers, specifically, "aircraft interior cleaning; aircraft carpet cleaning; aircraft washing and cleaning; aircraft water or lavatory services; aircraft fueling; ground transportation management"; "janitorial and custodial services"; and "facility maintenance services" (SMC 7.45.010(M)), and relates to the "prices" that will be charged for such "services." The Ordinance also requires payment of service charges directly to "Transportation Workers." SMC 7.45.040(A).

The Supreme Court has recognized that "services" under the ADA should be construed broadly to include core airline services, the type, scope and level of which the airlines can choose to provide pursuant to market conditions. In *Rowe*,<sup>1</sup> the Supreme Court held that a provision in the FAAA modeled after the ADA preempted a Maine state law imposing a requirement that tobacco shippers utilize a delivery service providing verification of the buyer's legal age. The Court ruled that the law related to motor carrier service because it would require carriers "to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might not dictate."<sup>2</sup> The Court stated:

The [U.S.] Solicitor General and the carrier associations claim (and Maine does not deny) that the law will require carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer). And even were that not so, the law would freeze into place services that carriers might prefer to discontinue in the future. **The Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for "competitive market forces" in determining (to a significant degree) the services that motor carriers will provide.**<sup>3</sup>

The *Rowe* Court conceded that the regulation was less "direct" than it might be, "for it tells *shippers* what to choose rather than *carriers* what to do. Nonetheless, the effect of the

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<sup>1</sup>552 U.S. 364 (2008).

<sup>2</sup>*Id.* at 372.

<sup>3</sup>*Id.* (emphasis added).

regulation was that carriers would have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate."<sup>4</sup>

The *Rowe* Court also found that a "deemed to know" provision in the Maine law was preempted. The provision created a conclusive presumption of carrier knowledge that a shipment contained tobacco when it was marked as originating from a Maine-licensed tobacco retailer or was sent by anyone Maine had specifically identified as an unlicensed tobacco retailer. The Court construed the provision as requiring "the carrier to check each shipment for certain markings and to compare it against the Maine attorney general's list of proscribed shippers." The Court stated that "[a]s with the recipient-verification provision, the 'deemed to know' provision would freeze in place and immunize from competition a service-related system that carriers do not (or in the future might not) wish to provide."<sup>5</sup>

The Supreme Court also made it clear that the connection between the Maine law and carrier rates, routes or services was more than "tenuous, remote, or peripheral":

In this case, the state law is not general, it does **not affect truckers solely in their capacity as members of the general public**, the impact is significant, and the connection with trucking is not tenuous, remote, or peripheral. **The state statutes aim directly at the carriage of goods, a commercial field where carriage by commercial motor vehicles plays a major role.** The state statutes require motor carrier operators to perform certain services, thereby limiting their ability to provide incompatible alternative services; and they do so simply because the State seeks to enlist the motor carrier operators as allies in its enforcement efforts. Given these circumstances, from the perspective of pre-emption, this case is no more "borderline" than was *Morales*.<sup>6</sup>

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<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 373.

<sup>6</sup>*Id.* at 375-76 (emphasis added).

It is clear that *Rowe* "necessarily define[d] 'service' to extend beyond prices, schedules, origins, and destinations."<sup>7</sup> Moreover, the Court made it clear that state and local governments should not be allowed to displace "competitive market forces" in determining the scope and level of services to be provided by carriers.

More recently, the Supreme Court decided *Ginsberg*, 134 S. Ct. 1422, ruling that "services" under the ADA included airline upgrades and similar fringe benefits. The Court held that the ADA preempted a customer's claim for breach of implied covenant of good faith and fair dealing because it sought to enlarge the contractual obligations that the parties voluntarily adopted regarding Northwest's frequent flyer program. The Court included within the definition of "services": "flight upgrades, accumulated mileage, loyalty program status or benefits on other airlines, and other advantages." Slip Op. at 9 (citation omitted).

Lower courts have followed the Supreme Court's direction and included a broad range of airline services within the ADA's preemption. For example, in *Air Transport Ass'n of Am. v. Cuomo*,<sup>8</sup> the Second Circuit held that the ADA preempted the requirements of the New York state "Passenger Bill of Rights." That law required airlines, among other things, to provide passengers with electricity, waste removal and adequate food and drinking water and other refreshments for ground delays of more than three hours. The court stated:

Although [the Second Circuit] has not yet defined "service" as it is used in the ADA, we have little difficulty concluding that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier. This conclusion draws considerable support

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<sup>7</sup>See *Hanni v. Am. Airlines, Inc.*, No. C 08-00732 CW, 2008 WL 1885794, at \*6 (N.D. Cal. Apr. 25, 2008) (citation omitted).

<sup>8</sup> 520 F.3d 218, 220 (2d. Cir. 2008).

from the Supreme Court's . . . unanimous opinion in *Rowe* construing 49 U.S.C. § 14501(c)(1)'s identically worded preemption provision.<sup>9</sup>

The court also stated that "[a] majority of the circuits to have construed 'service' 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, baggage handling, and food and drink-matters incidental to and distinct from the actual transportation of passengers."<sup>10</sup>

Prior to *Rowe*, *Ginsberg* and *Cuomo*, the Third and Ninth Circuits – unlike the other Circuit Courts of Appeal – had construed "service" narrowly, restricting the term to "the prices, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," and not to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage and similar amenities.<sup>11</sup> Specifically, the Ninth Circuit in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (1998) (en banc), differed from other Circuits by defining "service" narrowly, restricting the term to "the prices, origins and destinations of the point-to-point transportation of passengers, cargo, or mail." But this restrictive minority view is no longer valid in light of *Rowe* and *Ginsberg*, *supra*.<sup>12</sup>

In the *Hawaiian Inspection Fee Proceeding*, Order 2012-1-18, Docket DOT-OST-2010-0243-0029 (Jan. 23, 2012), the U.S. Department of Transportation ruled that the Hawaii Plant Quarantine Law was preempted by the ADA because "as applied to air carriers (including as to

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<sup>9</sup>*Id.* at 222.

<sup>10</sup>*Id.* at 223.

<sup>11</sup>*Id.*

<sup>12</sup>In its Reply Brief (May 1, 2014), the SeaTac Committee for Good Jobs (the "Committee") states that the "Ninth Circuit has reaffirmed and cited *Charas* after *Rowe*." Reply, at 55 n. 38. However, the Committee's first cited case – *ATA v. City and Cnty. of San Francisco*, 266 F.3d 1064, 1070-711 (9th Cir. 2001), was issued 7 years before *Rowe*. The second case, *Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010), does not mention *Rowe*, and there is no indication *Rowe* was raised or considered.

the inspection fee and potential fines)" the law was "'related to' air carrier services . . . ."<sup>13</sup> The state law was related to air carrier services "by commanding air carriers to conform their service of shipping freight by air transportation in ways not dictated by the market to bill, collect, and remit fees on behalf of its shipper customers."<sup>14</sup> DOT stated "Under the broad definition of 'service,' the Inspection Fee Statute is related to air carrier services because it directly regulates air carriers by commanding air carriers to conform their service of shipping freight by air transportation in ways not dictated by the market to bill, collect and remit fees on behalf of its shipper customers."<sup>15</sup>

In *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011), luggage skycaps at Logan International Airport sued American, alleging that the airline's institution of a \$2 service charge for bags checked at curb diverted tip revenue in violation of the Massachusetts Tip Law because passengers paid the airline rather than the skycaps. The court held that to the extent the Massachusetts Tip Law related to airlines, it was preempted by the ADA.

The Tip Law provided that "[n]o employer or other person shall demand . . . or accept from any . . . service employee . . . any payment or deduction from a tip or service charge given to such . . . service employee . . . by a patron." The gravamen of the Tip Law was that the \$2 service charge imposed by American needed to go to the skycaps because customers would reasonably expect it to. The court stated:

Importantly, the tips law does more than simply regulate the employment relationship between the skycaps and the airline; . . . the tips law has a *direct connection* to air carrier prices and services and can fairly be said to regulate both. As to the latter, American's conduct in arranging for transportation of bags at

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<sup>13</sup>*Id.* at 12.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 14.

curbside into the airline terminal en route to the loading facilities is itself a part of the "service" referred to in the federal statute, and the airline's "price" includes charges for such ancillary services as well as the flight itself.<sup>16</sup>

The fact that SMC 7.45.010(M) excludes from its definition of a covered Transportation Employer "a certified air carrier performing services for itself," does not save the Ordinance from preemption by the ADA. The airlines serving SeaTac routinely enter into contracts with third parties for the provision of core airline services, including baggage handling, customer care, security checks, aircraft fueling, wheelchair assistance, and lavatory cleaning. *See also Nat'l Fed. of the Blind v. United Airlines, Inc.*, No. C 10-04816, 2011 WL 1544524, \*5 (N.D. Cal. April 25, 2011) (treating ticketing kiosks as an airline "service").

ADA preemption applies to services provided by third parties with whom airlines contract to provide services. *See, e.g., Huntleigh Corp. v. Louisiana State Bd. of Private Sec. Examr's*, 906 F. Supp. 357, 362 (M.D. La. 1995) (ADA preempted state law governing registration and training of private security officers performing pre-departure screening as agents of air carrier); *Marlow v. AMR Servs. Corp.*, 870 F. Supp. 295, 298 (D. Haw. 1994) ("it is preposterous to assume that Congress intended to block the prosecution against air carriers of certain suits but allow those same suits to proceed against all others . . . . The defendant need not be an air carrier so long as the state laws which prohibit defendant's alleged wrongdoing 'relate to' airline routes, rates, or services"); *cf. Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002); *Tucker v. Hamilton Sundstrand Corp.*, 268 F. Supp. 2d 1360 (S.D. Fla. 2003).

The Committee's attempt to deny ADA preemption for laws directly targeting airline contractors (*see* Reply, at 53-54) is unavailing. The Committee cites *Amerijet Int'l, Inc. v.*

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<sup>16</sup>*Id.* at 87 (emphasis in original).

*Miami-Dade Cnty.*, No. 12-22304-Civ., 2014 WL 866406 (S.D. Fla. March 5, 2014), for its argument that a living wage ordinance covering airport contractors should not be preempted by the ADA. Reply, at 54. However, unlike the Ordinance at issue here, the living wage ordinance in *Amerijet* was in existence for nearly 15 years (since 1999) and was not directed towards the airline industry (*see* Part I.B below). In addition, the court determined that the contractors were providing "non-transportation functions." *Id.* at \*6. By contrast, contractors at SeaTac are providing core airline functions critical for the transportation of persons and property.<sup>17</sup>

The Committee also contends that *Marlow* and *Tucker* should be ignored because the 9th and 11th Circuits subsequently held that "whistleblower actions are *not* preempted." Reply Brief, at 54 n. 37. But this misses the point of those cases: namely that it is irrelevant whether a carrier or its contractor is providing the service impacted by the state law. Indeed, any other result would make it too simple for a local government to circumvent ADA preemption by targeting solely contractors utilized by airlines.

**B. The Ordinance Relates to Air Carrier "Services" and "Prices" in a Manner That is Not Tenuous, Remote or Peripheral.**

ADA preemption exists if a wage or employment law has more than a tenuous, remote or peripheral relationship to airline prices, routes or services. *Morales*, 504 U.S. at 390. This connection is more likely to be found if a local law either: (a) specifically targets the airline industry, *ATA v. San Francisco*, *supra*, 266 F.3d at 1073; *Cuomo*, 520 F.3d 218; or (b) "acutely interferes" with airline prices, routes or services, *Californians for Safe and Comp. Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998); *see also Calop Bus. Sys., Inc. v. City of Los Angeles*, No. CV 12-07542 MMM (RZx), 2013 WL 6182627, \*14-15 (C.D. Cal. Oct. 30,

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<sup>17</sup>The Ordinance also does not exempt certified air carriers when they perform the covered transportation support services for other airlines, as is customary in the industry.

2013) (ADA preemption possible if minimum wage law has "an acute impact on the contract price it charges any air carrier, or on the prices, routes, or services of that carrier"); *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d, 1109, 1119 (S.D. Cal. 2011) (law improperly interfered with competitive market forces by negatively impacting motor carrier operations); *Blackwell v. SkyWest Airlines*, No. 06cv0307, 2008 WL 5103195, \*18 (S.D. Cal. Dec. 3, 2008).

The relationship between the Ordinance and air carrier services and prices is not, "tenuous," "remote" or "peripheral." The Ordinance takes direct aim at a core market development resulting from deregulation: air carriers' use of contractors to provide services to passengers. An organization called Puget Sound Sage, which was directly behind the Ordinance, expressly acknowledged that the Ordinance was intended to force airlines to change how they conduct their business operations. In a report titled "First Class Airport, Poverty-Class Jobs" (May 2012), the organization stated:

[Since deregulation in 1978], U.S. airlines have relied on contractors to provide more and more passenger and aircraft services. The airlines have fostered a fierce competition between contractors that drives down overall costs, resulting in a race to be bottom by contractors for wage and benefits throughout the industry.

Rec. at 1029-30; Answering Br. at 45-56.

In addition, the monetary compensation requirements mandated by the Ordinance will directly impact air carriers in terms of the amount of money they must pay to third party contractors and other air carriers for core passenger services. Indeed the Puget Sound Sage report expressly states that "**[t]he bulk of the increased wage costs (\$33 million annually) will be absorbed by businesses operating at the airport.**" Rec. at 985 (emphasis added). Moreover, the Ordinance would unlawfully penalize air carriers for their decision to utilize third party contractors or other air carriers to provide services to or on behalf of their passengers.

Furthermore, if air carriers are required to pay materially more for such core services they will need to reflect the additional costs in the prices charged to passengers.

Finally, there is no support for the Committee's contention that "a statute is not preempted by the ADA unless it requires or *freezes in place* certain fares, routes, or services." Reply Br. at 57. Although the Court in *Rowe* expressed concern that the state tobacco delivery law "would freeze into place services that carriers might prefer to discontinue in the future" (552 U.S. at 372), it did not hold that such a "freezing" was a prerequisite to a finding of ADA preemption.<sup>18</sup>

## II. THE ORDINANCE IS PREEMPTED BY THE RAILWAY LABOR ACT.

Respondents' Answering Brief discusses why the Ordinance is preempted in its entirety by the National Labor Relations Act ("NLRA"), under the principles expressed in both *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*") and *Int'l Ass'n of Machinists v. Wis. Empl. Rels. Comm'n*, 427 U.S. 132 (1976) ("*Machinists*"). Answering Br., at 31-43. Those decisions establish that state law claims that attempt to regulate conduct that is arguably prohibited or protected by federal labor law, or that attempt to regulate activity that Congress intentionally left unregulated, are preempted. This brief separately emphasizes the preemptive effect of the RLA as well, to which *Garmon* and *Machinists* have been applied.<sup>19</sup>

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<sup>18</sup>Nor did - *Dan's City Used Cars, Inc. v. Pelkey*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1769 (2013), cited by the Committee – which, in turn, cited *Rowe*. The other case cited by the Committee – *ATA, supra*, 266 F.2d at 1071, also contains no such language.

<sup>19</sup>See, e.g., *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969); *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 321 (3d Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005); *Dunn v. Air Line Pilots Ass'n*, 836 F. Supp. 1574, 1578-80 (S.D. Fla. 1993), *aff'd*, 193 F.3d 1185 (11th Cir. 1999).

**A. Statutory Background and Purpose of the RLA.**

The RLA was enacted in 1926 and initially applied solely to the railroad industry. The Act was amended in 1934; those amendments "address[ed] primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Indep. Fed. of Flight Attendants*, 489 U.S. 426, 440 (1989). Among other things, the 1934 amendments "insured to railroad employees to organize their own unions and the right of a majority of any craft or class of employees to select the representative of that craft or class." *California v. Taylor*, 353 U.S. 553, 559 (1957). To facilitate that process, the 1934 amendments created the National Mediation Board ("NMB"), and vested it with exclusive authority to investigate and to bargain collectively through representatives of their own choosing. *Id.*

In 1936, the RLA was extended to the fledgling airline industry. *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685 (1963); 45 U.S.C. § 181. The RLA applies not just to the railroads and airlines themselves, but also to those companies that are directly or indirectly owned or controlled by rail and air carriers. 45 U.S.C. § 151, First; *id.* § 181; *Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742, 752 (5th Cir. 2003); *NetJet Servs., Inc.*, 38 N.M.B. 274, 281 (2011). Such entities, known as "derivative carriers," are subject to the RLA if their employees perform work that is traditionally done by employees of air or rail carriers, and if they are under direct or indirect ownership or control of carriers. *NetJet Servs.*, 38 N.M.B. at 281; *Verrett v. Sabre Group, Inc.*, 70 F. Supp.2d 1277, 1281 (N.D. Okla. 1999). That would include employers encompassed within the Ordinance's definition of "Transportation Employer." See *Aircraft Serv. Int'l, Inc. v. Teamsters Local 117*, 742 F.3d 1110 (9th Cir. 2014) (company that fuels 75 percent of the flights in and out of the Seattle airport subject to RLA).

The RLA was motivated by very different considerations than the NLRA. Whereas the NLRA was directed as resolving "the problem of '[depressed] wage rates and the purchasing

power of wage earners in industry,' 29 U.S.C. § 151, and 'the widening gap between wages and profit,'"<sup>20</sup> the RLA was enacted to resolve the issue of strikes resulting from labor disputes in the railroad industry and their impact on interstate commerce. *See Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. Of Adjustment*, 558 U.S. 67, 72 (2009) ("Concerned that labor disputes would lead to strikes bringing railroads to a halt, Congress enacted the [RLA] to promote peaceful and efficient resolution of those disputes."). RLA disputes fall under three categories, each with their own comprehensive resolution process: (1) representation disputes, which fall in the exclusive jurisdiction of the NMB; (2) "major" disputes – those involving the establishment and modification of collective bargaining agreements – which are subject to an "almost interminable" process that involves "rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation";<sup>21</sup> and (3) "minor" disputes – those involving disputes over the meaning and interpretation of union contracts – which are subject to mandatory arbitration. *Western Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1302-03 (1987); *United Transp. Union v. Gateway W. Ry.*, 78 F.3d 1208, 1213-14 (7th Cir. 1996).

**B. The Ordinance Impermissibly Interferes With the Collective Bargaining Process Generally, and the RLA Representation Process in Particular.**

"On numerous occasions, [the Supreme] Court has recognized that the Railway Labor Act protects and promotes collective bargaining." *California v. Taylor*, 353 U.S. at 559. The Ordinance interferes with that process by regulating conduct that was intended to be left to the "free play of economic forces," *Machinists*, 427 U.S. at 144, including, on the most basic level,

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<sup>20</sup>*Metropolitan Life Ins Co. v. Massachusetts*, 471 U.S. 724, 754 (1985) (quoting NLRA's legislative history).

<sup>21</sup>*Detroit & Toledo Shore Line R. Co. v. United Transp. Union*, 396 U.S. 142, 148-49 (1969).

whether employees of a derivative carrier will be represented by a union in the first place. The Ordinance, therefore, is preempted.<sup>22</sup>

One critical area of difference between the RLA and NLRA is with respect to the geographic scope within which organizing must occur. Under the RLA, the NMB will only process a representation petition that includes all of the employees in the relevant job classification – the "craft or class" – throughout the carrier's entire nationwide system. *Aircraft Serv. Int'l Group*, 40 NMB 43, 48-49 (2012); *Summit Airlines, Inc. v. Teamsters Local No. 295*, 628 F.2d 787, 795 (2d Cir. 1980); *see also Pennsylvania R.R. Co.*, 1 N.M.B. 23, 24 (1937) (RLA "does not authorize the [NMB] to certify representatives of small groups arbitrarily selected" and representatives "may be designated and authorized only for the whole of a craft or class employed by a carrier"). In other words, the NMB would not process an application that sought to represent a derivative carrier's aircraft fuelers (or wheelchair agents or skycaps) located just at SeaTac.

Most unions have complied with the NMB's requirement of system-wide representation, and, in fact, have succeeded in organizing hundreds of thousands of rail and airline employees on a nationwide basis. However, unions occasionally have sought to circumvent the NMB's system-wide certification standard by trying to force employers to voluntarily recognize the union at a single location. *Summit*, 628 F.2d at 795. There is little motivation for employers to extend such recognition, however – which is where the Ordinance comes in. The Ordinance quite

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<sup>22</sup>Although the following discussion focuses on the impact of the Ordinance on derivative carriers, it would apply equally to the airlines themselves when they are providing covered services to other air carriers. *See* SMC 7.45.010(M) (excluding from definition of "Transportation Employer" a "certificated air carrier performing services for itself") (emphasis added). Airlines provide covered services for other carriers, especially in the context of domestic or international alliances where the airline's partners do not have enough flying at a particular airport to warrant hiring its own ground handling staff.

plainly creates such an incentive by permitting employers a single way out from under its draconian provisions: negotiation of a collective bargaining agreement that waives those provisions. The Ordinance thus impermissibly tilts the playing field in favor of union organizing and collective bargaining.<sup>23</sup>

The Ordinance contains several provisions that would make a service provider to which it applied a substantially less attractive business partner to the airlines. In addition to increasing the minimum wage applicable at the airport by 63 percent (SMC 7.45.050), the Ordinance imposes a paid sick and safe policy that is fraught with the potential for abuse, in that it prohibits an employer from requiring medical certification of the need for that leave or from applying its attendance reliability programs to such absences (SMC 7.45.020). Employees effectively would have *carte blanche* to take leave under this provision for reasons not authorized by the Ordinance, with little or no notice and without risk of discovery. That, in turn, would have a significant effect on the employers' staffing levels and their ability to provide reliable service to the airlines. The Ordinance also would require a service provider to hire the employees of a predecessor (and to hire them in seniority order, without regard to the quality of their work) and prohibits those employees from being discharged (except for just cause) within the initial 90 days of their employment (SMC 7.45.060). This is at odds with the relationship between the airlines and the derivative carriers, under which the airlines have the right, implicitly and explicitly, to control who works on their accounts.

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<sup>23</sup>The Ordinance thus is distinguishable from the ordinance at issue in *ATA v. San Francisco*, *supra*, 266 F.3d 1064, which prohibited discrimination in providing benefits to employees with domestic partners. There, the court found that the ordinance was not preempted because it "applies to union and nonunion employees alike and neither favors nor discourages collective bargaining." *Id.* at 1078.

The one and only one way for derivative carriers to extricate themselves from the Ordinance's onerous provisions is to voluntarily recognize a union and enter into a "bona fide collective bargaining agreement" that contains an explicit waiver of the Ordinance's terms "in clear and unambiguous terms." SMC 7.45.080. Failure to do so would place a derivative carrier at a severe competitive disadvantage to a competitor who had availed itself of the waiver process. By making the alternative of remaining non-union so unattractive, the Ordinance impermissibly places its thumb on the side of compelling voluntary recognition of a union by the contractors at SeaTac. That is directly at odds with the process of representation under the RLA, particularly the carrier's right to insist that a union obtain NMB certification to represent a craft or class throughout its entire nationwide system before becoming obligated to negotiate with it. *See* 45 U.S.C. § 152, Fourth ("The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter") (emphasis added); § 152, Ninth (a carrier is obliged to "treat with the representative" of the craft or class certified by the NMB).

"The supremacy of federal law bars state regulation where the particular local rule impedes the design of congressional legislation." *Dunn*, 836 F. Supp. at 1578 (finding state law claims preempted by RLA duty of fair representation); *see also Delgado v. Aerovias de Mexico*, No. 92-2668-CIV-MARCUS, 1994 U.S. Dist. LEXIS 20567, \*23 (S.D. Fla. Sept. 13, 1994) (state law claim brought by supervisor alleging discharge based on his union activity preempted by RLA); *Bhd. of Locomotive Eng'rs v. Indus. Comm'n of Utah*, 604 F. Supp. 1417, 1423 (D. Utah 1985) (age discrimination claim based on state law forbidding mandatory retirement on the basis of age preempted because it has the "possibility of conflicting with the RLA and could be viewed as intruding impermissibly on the collective bargaining process"). That includes state

and local laws, like the Ordinance, that impact the RLA's provisions relating to the "formation and administration of labor organizations." *Dunn*, 836 F.2d at 1579-80.

*Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp.2d 950 (N.D. Cal. 2001), is instructive. That decision involved a rule adopted by the San Francisco airport commission mandating that certain employers at the airport enter into "labor peace/card check" agreements with any union that requested that the employer do so. Among other things, the agreement had to provide that the preference of the company's employees regarding union representation would be determined by a card check procedure, as opposed to the secret ballot election process on which the employer could insist under the NLRA. "The card check rule, therefore, compels employers desiring to do business at the airport to forego their right to have the union status of their employees determined by NLRB elections." *Id.* at 952-53.<sup>24</sup> The court held that the card check rule was preempted under *Garmon* "by requiring conduct that conflicts with certain options for employers that are protected by the NLRA." *Id.* at 956. Likewise, in the case at bar, the Ordinance effectively compels derivative carriers to forego their right to have the union status of their employees determined by NMB elections, and thus is preempted. *Id.*; see also *Lindsay v. Ass'n of Prof. Flight Attendants*, 581 F.3d 47, 57 (2d Cir. 2009) ("to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy"), *cert. denied*, 130 S. Ct. 3513 (2010); *PHI, Inc. v. Office & Prof'l Emples. Int'l Union, No. 06-1469*, 2007 U.S. Dist. LEXIS 80751, \*15-16 (W.D. La. 2007) (state law claim regarding failure to promptly return strikers to work preempted as

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<sup>24</sup>The rule exempted from its coverage those employers whose operations fell within the scope of the RLA, but the RLA status of the plaintiff in that case – a service provider to the airlines – had not yet been determined by the NMB. *Id.* at 953.

state statute and RLA both prohibit coercion of employees regarding membership in labor organizations).

Even in the absence of the "union carve-out," the Ordinance would be preempted because it mandates extensive terms and conditions of employment that typically are the subject of collective bargaining. Prior to *Machinists* and *Garmon*, the Supreme Court applied a similar preemption analysis to the RLA in *California v. Taylor*. That case involved a state-owned railroad operating in interstate commerce. The state took the position that the RLA did not apply to the railroad and that the wages and working conditions of its employees were governed by its civil service laws instead. 353 U.S. at 554-55. The Supreme Court held that if the RLA applied to the railroad – which it found to be the case – "then the policy of the State must give way." *Id.* at 560. In reaching this conclusion, the Court noted that the RLA "is essentially an instrument of industry-wide government," *id.* at 565, and that RLA labor contracts are negotiated for an entire, national system, consistent with Congress's intent that "a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad force," *id.* at 567; *see also Bhd. of Locomotive Eng'rs*, 604 F. Supp. at 1423 (the "unique nature of the railroad industry necessitates uniformity in agreements," and application of state law that could result in inconsistent seniority rights depending on the employee's location would undermine such uniformity). The Supreme Court's conclusion that the state could not legislate the terms and conditions of employment for the employees of a railroad that the state itself owned would apply equally here, where the ordinance purports to dictate the terms and conditions for employees and contractors of privately-owned RLA carriers. *Id.*; *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995).

Respectfully submitted: May 7, 2014

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: /s/ Robert J. Guite

Robert J. Guite, WSAB No. 25753

M. Roy Goldberg

Attorneys for *Amicus Curiae* Airlines for America

Four Embarcadero Center, 17th Floor

San Francisco, CA 94111-4109

Telephone: (415) 434-9100

Email: [rguite@sheppardmullin.com](mailto:rguite@sheppardmullin.com)

1300 I Street, NW, Suite 1100 East

Washington, D.C. 20005-3314

Telephone: (202) 218-0007

Email: [rgoldberg@sheppardmullin.com](mailto:rgoldberg@sheppardmullin.com)

OF COUNSEL

Douglas W. Hall

FORD HARRISON

1300 19<sup>th</sup> Street, N.W., Suite 300

Washington, D.C. 20036

Telephone (202) 719-2065

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 7, 2014, I arranged for service of the foregoing Motion of Airlines for *Amicus Curiae* Brief of Airlines for America, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929 Supreme@courts.wa.gov	Via Email
Wayne D. Tanaka Ogen Murphy Wallace P.L.L.C. 901 Fifth Avenue, Suite 3500 Seattle, WA 98164	Via Email and U.S. Mail <a href="mailto:wtanaka@omlaw.com">wtanaka@omlaw.com</a>
Laura Ewan Dimitri Iglitzin Jennifer L. Robbins Schwerin Campbell Barnard Iglitzin & Lavitt 18 W. Mercer Street, Suite 400 Seattle, WA 98119	Via Email and U.S. Mail <a href="mailto:ewan@workerlaw.com">ewan@workerlaw.com</a> <a href="mailto:iglitzin@workerlaw.com">iglitzin@workerlaw.com</a> <a href="mailto:robbins@workerlaw.com">robbins@workerlaw.com</a>
Timothy G. Leyh Shane P. Cramer Calfo Harrison Leyh & Eakes LLP 999 Third Avenue, Suite 400 Seattle, WA 98104 Counsel for Respondent Port of Seattle	Via Email and U.S. Mail <a href="mailto:timl@calfoharrigan.com">timl@calfoharrigan.com</a> <a href="mailto:shanec@calfoharrigan.com">shanec@calfoharrigan.com</a>
Craig Watson General Counsel for the Port of Seattle 2711 Alaskan Way (Pier 69) Seattle, WA 98121	Via Email and U.S. Mail <a href="mailto:Watson.C@portseattle.org">Watson.C@portseattle.org</a>

<p>Frank J. Chmelik  Seth Woolson  1500 Rairoad Avenue  Bellingham, WA 98225</p>	<p>Via Email and U.S. Mail  <a href="mailto:fchmelik@chmelik.com">fchmelik@chmelik.com</a></p>
<p>Christopher Howard  Averil Rothrock  Schwabe Wiliamson &amp; Wyatt  1450 Fifth Avenue, Suite 3400  Seattle, WA 98101-4010</p>	<p>Via First Class Mail  Via Email  <a href="mailto:choward@schwabe.com">choward@schwabe.com</a>  <a href="mailto:arothrock@schwabe.com">arothrock@schwabe.com</a></p>
<p>Cecilia Cordova  Pacific Alliance Law, PLLC  601 Union St. Suite 4200  Seattle, WA 98101</p>	<p>Via Email  <a href="mailto:Cecilia@cordovalawfirm.com">Cecilia@cordovalawfirm.com</a></p>
<p>Herman L. Wacker  Alaska Airlines  P.O. Box 68900  Seattle, WA 98168-0900</p>	<p>Via Email  <a href="mailto:Herman.Wacker@alaskaair.com">Herman.Wacker@alaskaair.com</a></p>
<p>Harry J.F. Korrell  Roger A. Leishman  Davis Wright Tremaine, LLP  1201 Third Avenue, Suite 2200  Seattle, WA 98101-3045</p>	<p>Via Email  <a href="mailto:HarryKorrell@dwt.com">HarryKorrell@dwt.com</a>  <a href="mailto:RogerLeishman@dwt.com">RogerLeishman@dwt.com</a></p>

/s/ Chaquenta Brooks  
Chaquenta Brooks

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**To:** Chaquenta Brooks  
**Cc:** wtanka@omlaw.com; ewan@workerlaw.com; iglitzin@workerlaw.com; robbins@workerlaw.com; timl@calfoharrigan.com; shanec@calfoharrigan.com; watson.c@portseattle.org; fchmelik@chmelik.com; choward@schwabe.com; arothrock@schwabe.com; cecilia@cordovalawfirm.com; herman.wacker@alaskaair.com; harrykorrell@dwt.com; rogerleishman@dwt.com; Roy Goldberg  
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Dear Sir/Madame,

Attached please find the Motion of Airlines for America for Permission to File *Amicus Curiae* Brief and Airlines for America's *Amicus Curiae* Brief. Service to the parties via email and/or U.S. First Class Mail.

Robert J. Guite, WSBA No. 25753  
Sheppard Mullin Richter & Hampton, LLP  
Four Embarcadero Center, 17<sup>th</sup> Floor  
San Francisco, CA 94111

M. Roy Goldberg, Esq.  
Sheppard Mullin Richter & Hampton, LLP  
1300 I Street, NW, 11<sup>th</sup> Floor East  
Washington, DC 20005

Thank you.

Chaquenta Brooks  
Legal Secretary to Roy Goldberg,  
Christopher M. Loveland and Carrie Ross  
202.218.0017 | direct  
[CBrooks@sheppardmullin.com](mailto:CBrooks@sheppardmullin.com)

## **SheppardMullin**

Sheppard Mullin Richter & Hampton LLP  
1300 I Street, NW, 11th Floor East  
Washington, DC 20005-3314  
202.218.0000 | main  
[www.sheppardmullin.com](http://www.sheppardmullin.com)

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