

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DAN MORALES, ATTORNEY GENERAL OF TEXAS,
Petitioner v. TRANS WORLD AIRLINES, INC., ET AL.

CASE NO: 90-1604

PLACE: Washington, D.C.

DATE: March 3, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAN MORALES, ATTORNEY GENERAL :

4 OF TEXAS, :

5 Petitioner :

6 v. : No. 90-1604

7 TRANS WORLD AIRLINES, INC. :

8 ET AL. :

9 - - - - - X

10 Washington, D.C.

11 Tuesday, March 3, 1992

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 12:59 p.m.

15 APPEARANCES:

16 STEPHEN GARDNER, ESQ., Assistant Attorney General of

17 Texas, Dallas, Texas; on behalf of the Petitioner.

18 KEITH A. JONES, ESQ., Washington, D.C.; on behalf of the

19 Respondents.

20 STEPHEN L. NIGHTINGALE, ESQ., Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.;

22 United States, as amicus curiae supporting the

23 Respondents.

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1 P R O C E E D I N G S

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 90-1604, Dan Morales, Attorney General of
5 Texas, v. Trans World Airlines.

6 Mr. Gardner.

7 ORAL ARGUMENT OF STEPHEN GARDNER

8 ON BEHALF OF THE PETITIONER

9 MR. GARDNER: Mr. Chief Justice, and may it
10 please the Court:

11 Congress did not intend to strip the State of
12 Texas of its right to use its traditional police powers to
13 protect its citizens from deceptive airline advertising.
14 Congress never suggested that Texas is not free to sue
15 individual airlines in its state courts for specific
16 violations of its general state consumer protection act,
17 yet that is precisely the result of the decision of a
18 court below. The district court entered and the court of
19 appeals sustained a sweeping injunction against Texas that
20 prohibited the State from any type of law enforcement
21 action that would regulate or restrict any aspect of the
22 individually named plaintiff airline's airfare advertising
23 or their other operations involving their rates, routes,
24 and services.

25 If I may take just a few moments to put this

1 case into context for the Court. This case arose when the
2 State of Texas and several other state attorneys general
3 wrote to a few airlines in November of 1988 advising them
4 that their practices of segmenting out certain portions of
5 their airfares from the advertised fare and putting it
6 into the fine print of the footnotes of an advertisement,
7 thereby reducing an ad from, say, \$321 to \$298, were
8 violations of their state deceptive practices laws.

9 We wrote to only five of the airlines that are
10 in this litigation. We offered those airlines an
11 opportunity to resolve this matter without litigation.
12 Rather than taking us up on that offer the airlines
13 themselves brought suit in Federal district court against
14 first, the State of Texas, and later expanded that lawsuit
15 to include 33 other state attorneys general.

16 From that lawsuit the district court entered a
17 preliminary injunction that was later converted to a
18 permanent injunction that was as I have already set forth.
19 What this case is about is the right of the State of Texas
20 to enforce its state consumer protection act to stop
21 illegal, deceptive segmenting out of surcharges. It's not
22 about anything broader than that. It is specifically not
23 about the NAAG guidelines that the airlines make a bit
24 about in their brief. We're not here before the Court on
25 enforcement of the NAAG guidelines because the states

1 never attempted to do so.

2 QUESTION: Well, Mr. Gardner, we have to decide,
3 I guess, what it is that the language that Congress used
4 means, and it chose to use language that preempts,
5 federally preempts state laws relating to rates, routes,
6 or services. That's the language it chose, relating to.

7 MR. GARDNER: Yes, Your Honor. At the same time
8 it passed it the conference report referred to that
9 language as preemption of anything regulating rates,
10 routes, or services. It is necessary to look at what
11 Congress --

12 QUESTION: Well, it would have been easy enough
13 for Congress to have used the language of preempting state
14 law determining rates or setting rates or something of
15 that kind, but it didn't. It said relating to. And in
16 the ERISA context this Court has interpreted that
17 identical phrase in a fairly expansive manner, I guess.

18 MR. GARDNER: Yes, Your Honor, we urge the Court
19 not to apply the same interpretation precepts to the
20 Federal Aviation Act as this Court has indeed applied in
21 the ERISA context, for the very simple reason that ERISA
22 was a very broadly preemptive law because its prime scope
23 was in essence for the Federal Government to occupy the
24 field of regulation of employee benefit plans. That was
25 not the case here. We have to look at what, coming into

1 1978 when this relating to language was adopted, what was
2 Congress setting about to change.

3 Prior to '78 the states and the Federal
4 Government, as this Court recognized in the Nader decision
5 in 1976, had enjoyed a dual enforcement relationship with
6 respect to consumer protection type laws. Nothing prior
7 to '78 preempted the states or prevented the states from
8 enforcing their own laws. In 1978 what was Congress
9 trying to do? Was Congress trying to keep the states out
10 of the area of consumer protection? I think our answer is
11 affirm nothing of the kind.

12 What Congress was doing in 1978 was deregulating
13 the Federal Government's control that had existed since
14 the thirties, I believe, of the rates, routes, and
15 services, the direct --

16 QUESTION: Well, can you say that advertisement
17 of airline rates and fares does not relate to airline
18 rates and fares? Can you really say that?

19 MR. GARDNER: That's not really the question. I
20 think the answer is no, I may not be able to say that, but
21 that's not what Congress was preempting. Congress was
22 preempting only state laws that relate to rates, routes,
23 and services, not state laws that relate to advertising
24 which then relate to rates, routes, and services.

25 QUESTION: Well, suppose in this case that the

1 State of Texas or some other state had passed a statute
2 containing all of the prohibitions and guidelines set
3 forth in the guidelines that you issued here. Would that
4 statute be valid?

5 MR. GARDNER: As long as those guidelines did
6 not regulate the rates, routes, and services, and I would
7 say they would not, I would think that statute would be
8 valid. If the Court --

9 QUESTION: Well, you have to take that position,
10 don't you?

11 MR. GARDNER: It is convenient. But if the
12 Court -- rather, if the Court applied the broad scope of
13 ERISA reading and brought all of the concepts that
14 underlie the broad ERISA preemption and use that in
15 interpreting what Congress intended, not when it said
16 relating to, but when it enacted the 1978 act, then under
17 that kind of interpretation perhaps you could say that
18 regulation such as the NAAG guidelines would relate to it.

19 QUESTION: But I'm troubled about what, the same
20 thing Justice O'Connor asked you. It's really quite
21 difficult to say, it seems to me, that the guidelines
22 issued here do not relate to airline rates.

23 MR. GARDNER: But the guidelines, Your Honor, I
24 mean, it's essentially a false issue. I'm happy to
25 address it, but we're not here on that. We're here on a

1 very narrow effort by the states to address specific
2 violations. The guidelines and the --

3 QUESTION: Well, in order to test that
4 proposition I think we're entitled to inquire as to how
5 far your principle leads, and it seems to me that you
6 simply must take the position that a state could enact a
7 statute which incorporated all of the guidelines that the
8 Attorney Generals' Association issued here.

9 MR. GARDNER: Oh, yes, Your Honor. I'm not
10 taking the position that it could not. I'm taking the
11 position that even if it did so, under the preemption of
12 the Federal Aviation Act it would not be preempted.

13 QUESTION: Your position goes even further than
14 that, as I understand it. You would also say, I assume,
15 that the state could forbid the advertising of airline
16 tickets.

17 MR. GARDNER: I would not assert --

18 QUESTION: It relates to advertising. It
19 doesn't relate to rates.

20 MR. GARDNER: I do not believe that the state
21 under the current law could do so. I would have serious
22 questions --

23 QUESTION: Why is that, even though it only
24 relates to advertising and does not relate to rates?

25 MR. GARDNER: The state consumer protection law,

1 Your Honor, prohibits any industry, not the airlines, and
2 that's one important point. It's a general applicable,
3 generally applicable law. It prohibits any person selling
4 or leasing goods or services from engaging in false,
5 misleading, or deceptive acts or practices.

6 QUESTION: So you abandon your argument that the
7 mere fact that it does not relate to rates is dispositive
8 of this case?

9 MR. GARDNER: I beg your pardon, Your Honor?

10 QUESTION: It seems to me if you're going to
11 take that position you must abandon the argument that the
12 mere fact that it relates to advertising demonstrates that
13 it does not relate to rates.

14 MR. GARDNER: Well, as I said earlier --

15 QUESTION: It can relate to advertising and
16 relate to rates by reason of the fact that it relates to
17 advertising.

18 MR. GARDNER: It would require a two step
19 bootstrapping argument, and --

20 QUESTION: But you acknowledge that that two
21 step bootstrapping argument is valid with respect to a law
22 that prohibits the advertising of airfares.

23 MR. GARDNER: No, Your Honor, I am --

24 QUESTION: No you don't? So they can pass such
25 a law? I mean, either they can or they can't. If they

1 can't, then you have to abandon your relates to rates
2 argument.

3 MR. GARDNER: My argument is focused on what the
4 State did do here, Your Honor. State legislatures do a
5 myriad of things, not all of which I would want to stand
6 before this Court and support. All I am saying is that
7 current law does not permit that sort of action, nor, in
8 my belief, would the First Amendment permit the Court to
9 take, the state to take that sort of action.

10 QUESTION: Aside from the First Amendment, what
11 is your position on a state law that says no airline rates
12 shall be advertised?

13 MR. GARDNER: I would say that the state could
14 do that, and Congress could then act to prohibit that
15 action. The --

16 QUESTION: Mr. Gardner, did the district court
17 in its injunction refer in terms to the NAAG guidelines?

18 MR. GARDNER: No, Your Honor, although the
19 airlines advise the Court that they did. I read the Court
20 the precise language there. We are enjoined from
21 initiating any enforcement action or actions pursuant to
22 any provision of state law which --

23 QUESTION: Which would be general fraud statutes
24 and that sort of thing.

25 MR. GARDNER: The way we read it, Your Honor,

1 it's any statute, whether it's a criminal statute, a
2 licensing statute. We believe that the language that is
3 before this Court, the injunction of the district court,
4 is broad enough that we cannot, in the State of Texas,
5 take any type of enforcement action because the way this
6 injunction is worded, the injunction that the airlines
7 sought, we are broadly preempted from any form of
8 regulation of airlines.

9 QUESTION: Where is the injunction? Where do we
10 turn to it, do you know?

11 MR. GARDNER: I apologize for not having it
12 handy.

13 QUESTION: Is that 8(a) of the appendix to the
14 petition for certiorari?

15 MR. GARDNER: I believe so, Your Honor. Thank
16 you. Looking at what Congress set out to do in '78, it is
17 clear that Congress did not intend to take the states out
18 of the business, it did not intend to take the Federal
19 Government out of the business of regulating deceptive
20 practices. Section 411 of the Federal Aviation Act had
21 existed for some time. Congress not only did not touch
22 that aspect of Federal regulation, it in fact enjoined the
23 Civil Aeronautics Board, now the Department of
24 Transportation, even more broadly to prohibit
25 anticompetitive and deceptive practices in the airline

1 industry.

2 This indicates that Congress indeed intended and
3 in fact achieved a split type of deregulation. Congress
4 did deregulate the utility-type rate making setting of the
5 airlines rates, routes, and services. It did not intend,
6 nor did it achieve, anything that took the Federal
7 Government out of the business of regulating and
8 prohibiting deceptive practices by airlines.

9 We believe that this shows Congress' intent to
10 deregulate only that one area, the utility-like setting of
11 rates, routes, and services that the Federal agencies had
12 engaged in broadly and that in fact a number of states had
13 engaged in on a piecemeal basis in the past.

14 QUESTION: Could states, after the act was
15 passed, regulate intrastate carriage by airlines?

16 MR. GARDNER: No, Your Honor.

17 QUESTION: But then the act goes beyond merely
18 undoing what the CAB had been doing, because when the CAB
19 was in effect the CAB regulated interstate fares and the
20 states were entitled to regulate intrastate fares, right?

21 MR. GARDNER: Absolutely.

22 QUESTION: And the new act says no regulation of
23 intrastate fares.

24 MR. GARDNER: Because Congress intended no
25 regulation of fares, period, regardless of

1 QUESTION: They want a competitive regime, which
2 is consonant with the notion that they wanted competitive
3 advertising too.

4 MR. GARDNER: Competitive advertising can only
5 exist if the advertising is truthful and is not deceptive.
6 If a competitor loses business to another airline because
7 that other airline has advertised in a way that makes it
8 appear as though they are cheaper when in fact they are
9 not, they are going to lose business. They are not a
10 better competitor, they are just more creative, and from
11 their standpoint, or from our standpoint, unfortunately
12 deceptive advertising.

13 QUESTION: So true is, as the Government points
14 out, that if you're practically disempowered from
15 advertising because you are compelled to include within
16 your notice all of the exceptions that may exist on
17 various routes, you as a practical matter can't have any
18 advertising.

19 MR. GARDNER: Your Honor --

20 QUESTION: And state law could do that, I
21 suppose. Is there any objection to state law saying you
22 must put in any of your advertising all of the exceptions
23 to the fares that you announce, you can't say some
24 exceptions apply?

25 MR. GARDNER: There is no prohibition there,

1 Your Honor. We do recognize that the states have rights
2 to regulate the advertising that is directed at their
3 citizens and that appears within their borders. We may
4 argue with the Department of Transportation as to whether
5 or not that's the best way of doing things, but the simple
6 fact is right now what we're before the Court to argue
7 about is not that. It is actions that are in fact illegal
8 under currently adopted Federal regulation.

9 Federal regulation as it now exists, not as the
10 Department has proposed to amend it but as it now exists,
11 prohibits the very actions that the State of Texas would
12 seek to prohibit. We're trying to have the right to take
13 these what are to the State fairly minor type cases, these
14 are just another run of false advertising cases. They're
15 the types of cases that we would bring against a myriad of
16 companies for false price advertising and have brought
17 against department stores or groceries stores or car
18 dealers or electronics retailers.

19 We merely want the right to take a fixed
20 question, not a speculation as to what the NAAG guidelines
21 might do, but rather a fixed question as to whether this
22 advertisement that has letters 3 inches high saying \$298,
23 while there is an additional \$23 or even more in
24 surcharges, whether that's deceptive under Texas law. We
25 want to take that to a Texas court and present that to a

1 Texas jury. If it isn't deceptive, then we lose. Even if
2 it is deceptive --

3 QUESTION: That's up to the state. If it's
4 state law, the state can determine what's deceptive. If
5 the state wants to say you're always deceptive in an ad
6 unless you list all of the exceptions to the price that
7 you state, if the state wants to say that's deceptive it
8 can, I presume.

9 MR. GARDNER: Yes, Your Honor --

10 QUESTION: I'm just trying to see where your
11 principle leads. It may well be that in the particular
12 instance it's a very reasonable thing you're saying, and
13 something that the Department of Transportation will agree
14 to, but doesn't it lead you all the way to the point where
15 you can, if you wish and if we accept your argument here,
16 you can say effectively there will be no airline
17 advertising, by simply saying you must list every
18 exception to any fare that you advertise?

19 MR. GARDNER: Your Honor, all we are seeking
20 here today is a declaration that the Texas Deceptive Trade
21 Practices Act as written and as enforced, or attempted to
22 be enforced in this case, is not preempted because as
23 written and as enforced it does not regulate and therefore
24 does not relate to the rates, routes, and services. I
25 will absolutely grant that if a state statute does

1 regulate, whether directly or indirectly, and has a direct
2 and substantial effect on the decisions as to setting
3 rates, routes, or services by the airline people who are
4 setting those rates, routes, and services, there is going
5 to be preemption under the law as written.

6 QUESTION: That's a point that the airline could
7 raise in the state case that was brought against it, I
8 suppose?

9 MR. GARDNER: Yes, Your Honor. There is nothing
10 to stop the states, the airlines from litigating every
11 aspect of preemption in the state courts. As I was about
12 to say to, in response to Justice Scalia, if the airlines
13 lose to a jury and cannot convince a jury that they acted
14 non-deceptively, or if we actually bear our burden, as any
15 other litigant, of convincing the jury that they have in
16 fact acted deceptively, they can still convince the judge
17 that it doesn't matter if Texas law has been violated
18 because Texas law goes too far.

19 QUESTION: Well, you don't get to the jury until
20 you have a valid state enforcement proceeding, and it
21 seems to me that your position must be that California can
22 require one size of type on airline advertisings, that
23 Texas can require another size of type, and that Arizona
24 can require a third type of type with an added disclosure,
25 and that every one of those state statutes would be valid

1 as a state enforcement of its laws against deceptive
2 practices.

3 MR. GARDNER: Yes, Your Honor.

4 QUESTION: That has to be your position.

5 MR. GARDNER: Absolutely. I'm not saying that's
6 the way it ought to be, and I am saying that is not the
7 way it is. The states are not in fact regulating in a
8 different manner.

9 QUESTION: If the state laws contain the
10 provisions that I have hypothesized were enacted, would
11 they or would they not be preempted under the existing
12 Federal statutes?

13 MR. GARDNER: I would say, Your Honor, that they
14 would not, but I would also say in that instance in my own
15 opinion that that is when it's appropriate for the
16 Department of Transportation to step in and preempt us.
17 The Department has its authority to preempt the states if
18 what the states are doing --

19 QUESTION: All right. And if they, they would
20 not be preempted then you would have to say that that is
21 not a law affecting airline rate and routes.

22 MR. GARDNER: Your Honor, the airlines -- this
23 case came to the Court on virtually no factual evidence at
24 all. This, we had a -- the lawsuit was filed, 3 days
25 later we had a temporary restraining order hearing, there

1 was no testimony, and that's all we have for a record.
2 But there is nothing in the record to indicate that,
3 exactly that, much less merely telling an airline that it
4 should put in the big print what the actual cost of flying
5 is has any effect whatsoever on rates, routes, or
6 services. The airlines speculate that. They raise a
7 number of fears that this might have, and therefore the
8 Federal court should get involved and stop the State from
9 a conjectured enforcement of its law.

10 But that is simply not what has happened and
11 there is no evidence in the record to show that. In fact
12 the very limited evidence in the record is that some
13 airlines were in fact including this previous surcharge in
14 their full fare during 1988 and there is no evidence that
15 there was any damage to those airlines, that they stopped
16 advertising or that they raised rates, or that anything
17 happened that had any effect, direct, indirect, or
18 insubstantial.

19 QUESTION: May I ask you a question that was
20 raised by your response to Justice Kennedy? You said if
21 you had these conflicting regulations in different states
22 that created a problem of uniformity that the Department
23 of Transportation could step in and preempt that?

24 MR. GARDNER: Yes, Your Honor.

25 QUESTION: Pursuant to what authority?

1 MR. GARDNER: We believe that the Department has
2 intrinsic authority under, as the interpreter of the
3 Federal Aviation Act, to say that this --

4 QUESTION: To go out and preempt a lot of state
5 laws? That's a novel concept. They have the authority to
6 issue cease and desist orders at the airlines, but I don't
7 know if they have any, I'm not aware -- I was just
8 interested in the source of that suggestion. You're
9 saying it's some sort of inherent authority?

10 MR. GARDNER: I am speculating that they could
11 do that. I would also speculate the states would probably
12 fight them and we'd be back here on that. But there is,
13 there are instances --

14 QUESTION: What if you had, say, not an airline
15 industry, say in the automobile industry that all the
16 automobile companies wanted, were subjected to a lot of
17 conflicting regulations on advertising, the same kind of
18 thing Justice Kennedy suggested. Is there some Federal
19 agency that can go out and say you can't, everything would
20 be preempted?

21 MR. GARDNER: I believe the Federal Trade
22 Commission would assert to this Court that it did have
23 that intrinsic authority.

24 QUESTION: To preempt?

25 MR. GARDNER: Yes, Your Honor.

1 QUESTION: By a rule making process?

2 MR. GARDNER: Yes, Your Honor. By full flow
3 rule making. By rule making that is published,
4 opportunity for comment, and fully considered. There are
5 instances that we could conjecture where the Department of
6 Transportation could properly preempt the state, but
7 again, that is just not the situation that we have here
8 today.

9 All we have here today is this limited action of
10 the State. It's a minor attempt to -- you know, all of
11 our cases are not minor. I shouldn't say that. These are
12 significant cases, but they are not different than an
13 attempt to stop a department store or a grocery store or
14 any other retailer of services or goods from
15 misrepresenting what it costs to buy those services or
16 goods.

17 What the airlines want and are asking this Court
18 to say Congress meant to do was to give them carte blanche
19 to violate the laws of the State of Texas with impunity,
20 and they alone would be able to do that. I can think of
21 no other industry that enjoys the right to engage in
22 deceptive practices without any fear of state regulation.

23 The airlines are arguing that they engage in
24 interstate commerce. In these days, Your Honor, virtually
25 every industry or company of any size engages in

1 interstate commerce. They may find themselves having to
2 comply with the laws of different states. To them that is
3 an inconvenience. To the State of Texas and to the other
4 states that is a matter of our sovereign authority within
5 our federalist system, our right to set rules for
6 companies that choose to do business within our borders
7 that may be different from the rules set by other states.

8 We're not seeking to create chaos, and I affirm
9 again that the states have not taken action that has in
10 any way created the type of conflicts that the Court has
11 posited, and I will affirm to the Court that I think it is
12 extremely unlikely that that is going to happen, and just
13 urge the Court --

14 QUESTION: Well, you've just waved a stick. I
15 mean, even if you're correct that these rules adopted by
16 the Association of State Attorneys General, or whatever
17 the organization is that adopted them, haven't been
18 applied in this case, they were certainly brandished
19 against the airlines. I mean, I think it's one thing to
20 say they're not involved in this case and it's another
21 thing to say that the airlines haven't been affected by
22 any such activity.

23 MR. GARDNER: The NAAG guidelines, Your Honor,
24 were not intended to do anything except let the airlines
25 know what was expected of them under our respective state

1 laws in an attempt to achieve uniformity. The idea was to
2 prevent multiple minor state litigation. That may have
3 been achieved. On the other hand what we also achieved,
4 what NAAG achieved through doing the guidelines, they're
5 not rules, they're just guidelines, the guidelines process
6 was to make a Federal case out of what we believe are the
7 day-to-day enforcement type actions that the states always
8 engage in. I should also --

9 QUESTION: So the state attorney generals felt
10 there was a need for uniformity?

11 MR. GARDNER: The state attorneys general
12 acknowledged the very fear that this Court has expressed,
13 that we did not want to set one standard in Texas and
14 another standard in California. It is possible that we
15 could have interpreted our different laws in different
16 ways. We felt that the fairest way to the airlines was to
17 come about, bring about an announcement of the safe
18 harbors, what we would expect, what we would tolerate, so
19 that airlines could have the knowledge that they could do
20 business, if they complied within that guidelines, without
21 having to fear prosecution by the states.

22 We also made the point that they could also, as
23 it were, violate the NAAG guidelines, they could ignore
24 the NAAG guidelines, as long as they were not otherwise
25 deceptive. This was not a standard. It was not a be all

1 and end all. All those guidelines were were minima to
2 help the airlines along.

3 But what we look at, and if you see the November
4 '88 notice, what we relied on was not the NAAG guidelines
5 but state law was violated. We mention state law six
6 times in those, in that letter. We didn't refer to the
7 guidelines because we weren't going to be suing under the
8 guidelines. You can look at the lawsuit that Texas in
9 fact filed in state court against Pan Am, no mention of
10 the NAAG guidelines because our judges and our juries
11 don't really care what NAAG had to say. And I guess what
12 we're urging the Court is to say the same thing, to not
13 care what NAAG had to say, to look at what the State set
14 out to do.

15 You know, I think that, in closing, all
16 arguments in this case reduce to one point, whether or not
17 sound public policy as announced by Congress favors
18 preemption of state authority to enforce their own laws.
19 The arguments can go either way, and you will hear
20 arguments the other way. Texas urges that, and asks this
21 Court that the best action to take in this instance is to
22 take the action that does the least damage to federalism
23 and permit Texas to enforce this law that does not
24 regulate rates, routes, or services.

25 If there are no other questions I would ask to

1 reserve the remainder of my time.

2 QUESTION: I'd like to ask you one question,
3 counsel. You say you're not enforcing the NAAG
4 guidelines?

5 MR. GARDNER: No, Your Honor.

6 QUESTION: If you take the Joint Appendix to
7 page 137a, the second paragraph of the letter to the
8 General Counsel of the Department of Transportation, it
9 says in short we continue to support and intend to enforce
10 the NAAG guidelines which we adopted last December. That
11 seems to undermine what you just said.

12 MR. GARDNER: I would merely say that we
13 misspoke, Your Honor. If you look to what we did do, what
14 we wrote the airlines -- the letter that serves as their
15 case in controversy to bring this lawsuit, we didn't
16 mention the NAAG guidelines, we didn't say we were setting
17 out to enforce them.

18 QUESTION: I understand that, but that's also
19 part of the record in the motion for a temporary
20 restraining order.

21 MR. GARDNER: Yes, Your Honor. In all honesty I
22 had not noticed it. If we were to write it over we would
23 never have said that. We weren't out to do that.

24 QUESTION: Very well, Mr. Gardner. Mr. Jones,
25 we'll hear from you.

1 ORAL ARGUMENT OF KEITH A. JONES

2 ON BEHALF OF THE RESPONDENTS

3 MR. JONES: Mr. Chief Justice, and may it please
4 the Court:

5 I hope to develop three points. First, to show
6 that this case involves state implementation of the
7 substantive requirements of the NAAG guidelines and not,
8 as the states argue, their enforcement of consumer
9 protection laws generally. Second, to establish that
10 section 105 of the Deregulation Act should be given the
11 same broad, common sense meaning as the similarly worded
12 ERISA preemption statute. And third, to demonstrate that
13 the rules articulated by the NAAG guidelines fall well
14 within the preemptive scope of section 105 as so
15 construed.

16 QUESTION: Mr. Jones, do I gather from your
17 first point that you feel it's necessary to your case to
18 show that the State here was intending to implement the
19 NAAG guidelines and not just general fraud statutes or
20 deceptive advertising statutes?

21 MR. JONES: I don't think that's integral to our
22 argument, but I think that it's important to inform the
23 Court what the case is really about, because the State
24 takes the position that it has been enjoined from
25 enforcing its consumer protection laws generally, and we

1 brought this case specifically targeted at those eight
2 postscripts that are articulated in the NAAG
3 guidelines.

4 QUESTION: Do you support the breadth of the
5 injunction issued by the district court here?

6 MR. JONES: The states are concerned about the
7 breadth of the ordering paragraph in the injunction --

8 QUESTION: Yes. Do you support that?

9 MR. JONES: I don't think that the ordering
10 paragraph as such was correctly written, but I think that
11 if you read that paragraph, not in isolation but in the
12 context of what the district court said earlier in the
13 text of the same order and also read it in light of the
14 complaint which narrowly focuses on the NAAG guidelines,
15 you will agree with us that the proper construction of the
16 injunction is that it just bars the State --

17 QUESTION: Rule 65 is quite precise that the
18 injunction was set out not in the light of something else,
19 but very precisely, exactly what is enjoined. I don't
20 know that Rule 65 leaves any latitude to go back to the
21 complaint and say well, let's see if we can't get another
22 reading out of the actual order.

23 MR. JONES: This order was very broadly phrased.
24 I think that it's fair to say that the subsequent history
25 of the litigation in the district court confirmed that all

1 of the parties understood that the injunction only ran
2 against the NAAG guidelines and not against consumer
3 protection law generally.

4 QUESTION: Even though the order did not mention
5 the NAAG guidelines?

6 MR. JONES: Well, actually the order does
7 mention the NAAG guidelines twice in its first paragraphs,
8 but what counsel for the State has focused your attention
9 on is the particular ordering language of the injunction.
10 But the order itself begins with the discussion of the
11 NAAG guidelines and that is the context within which the
12 ordering paragraph should be read.

13 QUESTION: Yes, but Mr. Jones, isn't it your
14 position that the consumer protection laws are generally
15 preempted insofar as they apply to airline advertising of
16 rates?

17 MR. JONES: It may be that in a future case this
18 Court will so hold.

19 QUESTION: But isn't that your position in this
20 case? Isn't that what you argue the scope of the
21 preemption is?

22 MR. JONES: Our argument is that the particular
23 restrictions placed upon airfare advertising by these
24 guidelines themselves are plainly barred, whatever
25 application state consumer protection law may have in

1 other contexts.

2 QUESTION: I don't understand why you just don't
3 argue that insofar as the consumer protection laws are
4 enforced against, are attempted to be enforced against
5 airline advertising it's just preempted. What's wrong
6 with that argument? Is there something -- if that isn't
7 the argument, then I would suppose you would have answered
8 the Chief Justice that the guidelines argument is, is
9 integral to your argument.

10 MR. JONES: We think the consumer protection
11 laws as they apply to airfare advertising are preempted,
12 but the analysis that we set forth is an attempt to show
13 why these guidelines in particular interfere with the pro-
14 competitive policy of the statute.

15 QUESTION: What about consumer protection laws
16 as they apply to the sale of tickets, never mind
17 advertising? I mean, that's as closely connected to
18 rates, I suppose, as the advertising of them. Fraud in
19 the sale of tickets can't be prosecuted under state law?

20 MR. JONES: On the face of it you would think
21 that they were as closely related. What Congress intended
22 to do in the Deregulation Act was to establish a freely
23 competitive marketplace with a strong bias in favor of
24 free competition. And after, with the advent of
25 deregulation the airlines, under, continuing to be under

1 the regulation, regulatory authority of the Department of
2 Transportation, developed a new pricing policy, a pro-
3 competitive pricing policy called yield management.

4 And yield management is designed to maximize
5 revenues while at the same time filling as many seats as
6 possible. And it has two salient features. This is a
7 long-winded answer, but I think I will get there
8 ultimately. One of the features of yield management is a
9 multi-tiered pricing structure under which different
10 prices are charged for different tickets that have
11 different restrictions relating to refundability, advance
12 purchase, length of stay, time of day or day of week, and
13 so forth. And the other salient feature is that the mix
14 of fares on every flight is under continuous review and
15 revision as the flight date approaches.

16 The NAAG guidelines are contrary, actually they
17 make it virtually impossible to conduct yield management
18 programs. DOT has recognized this. It has pointed out
19 that yield management is an essential feature of
20 competition in a deregulated air transport market. The
21 guidelines require every restriction, each and every
22 restriction, to be stated in each and every ad with
23 respect to every advertised fare, and they also require
24 that these restrictions be etched in stone for a fixed
25 period of time. These requirements simply cannot be

1 squared with the pro-competitive yield management program
2 that Congress, I mean that DOT approves and the airlines
3 have developed under deregulation.

4 QUESTION: Mr. Jones, I think we've had a little
5 difficulty this afternoon in getting either you or Mr.
6 Gardner to articulate for us the guiding principle to be
7 used by us in resolving this case. Each of you wants to
8 focus only on the specific regulation at issue here
9 without regard for the many other issues that are going to
10 arise in the future. Preemption is serious business, and
11 if this statute is to be given a broad reading then I
12 assume this Court would be faced with a whole range of
13 cases in the future in which it is alleged that certain
14 state and local laws and regulations are preempted.

15 For example, I suppose it can be argued that the
16 Texas income tax law might affect the airfares charged by
17 an airline. Are Texas income taxes preempted? Maybe
18 Texas liquor laws affect what alcohol can be served in one
19 of these airline clubs. Are those preempted? What about
20 the zoning laws that tell us where and how airline
21 terminals can be built? Where does, where do we draw the
22 line?

23 MR. JONES: I was trying to get to where you
24 draw the line with respect to the NAAG guidelines, and
25 then let me discuss the broader question that you have

1 raised, Justice O'Connor. Just one last note with respect
2 to advertising and the guidelines. The problem therefore
3 with the guidelines that may or may not pertain to other
4 consumer protection laws is that they directly interfere
5 with the efficiency innovation and low prices that
6 Congress explicitly asked DOT to help further in its
7 administration of the statute.

8 Now, more generally, Justice O'Connor, as you
9 pointed out in the preceding argument given by Mr.
10 Gardner, section 105 does employ the same preemptive
11 formula as the ERISA statute. Just as ERISA preempts all
12 state laws that relate to employee benefit plans, so
13 section 105 preempts all state laws relating to rates,
14 routes, and services of any air carrier. And in
15 construing ERISA this Court has said that the phrase
16 relating to means having a connection with or reference to
17 the statutory subject.

18 I understand that that's not, that's just the
19 beginning of analysis. That's not by any means the end of
20 analysis. But we submit that that first step is one that
21 needs to be taken, that section 105, like the similarly
22 worded ERISA statute, should be construed as preempting
23 all state laws that have a connection with or reference to
24 airfares.

25 QUESTION: Well, does that include state income

1 tax laws?

2 MR. JONES: I don't think that it does.

3 QUESTION: Does Texas have an income tax law?

4 MR. JONES: Texas does not have an income tax
5 law, to my knowledge.

6 QUESTION: But other states do, of course.

7 MR. JONES: That's right. The phrase relating
8 to could encompass a very broad spectrum, and --

9 QUESTION: Zoning laws? Liquor laws?

10 MR. JONES: I think that our position is that
11 the formulation relating to naturally encompasses all
12 state laws whose enforcement would be likely, likely to
13 affect the actual level of rates or the routes or services
14 in a manner that was contrary to the underlying pro-
15 competitive policy of the Deregulation Act. Therefore I
16 don't think we can give any clear cut answer to broad
17 hypotheticals of this kind, although they do seem to be
18 far removed from the immediate rate setting process with
19 which we are concerned here.

20 QUESTION: That's the problem that I see in your
21 argument, Mr. Jones, that your theory does not accord with
22 the statutory text that you're using to implement it.
23 What you're objecting to is interference, or any state law
24 that interferes effectively with competition, which was
25 the goal of the statute, competition in rates and the

1 other matters. But the text does not suit that kind of a
2 reasoning. The text seems to carve out categories of
3 state law without looking at their particularized effect.
4 It's any relating to this matter, not that has a
5 significant enough effect upon this matter.

6 MR. JONES: We're suggesting that the statute
7 has to be applied in the same way as the ERISA statute,
8 and in those ERISA cases the Court has looked at the
9 operation of state law, has analyzed the operation of
10 state law in relation to the objectives of the Federal
11 statute. And that is a process that does require case-
12 by-case adjudication, but it is a process that gives
13 effect to the relational concept underlying the statute
14 and also effectuates the underlying statutory purposes
15 that can be constructed from not only the preemption
16 statute but the other provisions of the statute as well.

17 QUESTION: Your opponent, Mr. Jones, suggests
18 that Congress, in enacting the ERISA statute, intended to,
19 quote, occupy the field, whereas here congressional intent
20 was not the same, and that therefore the phrases, though
21 identical language, should not be read the same in the two
22 acts. What is your response to that?

23 MR. JONES: Our response is that in this context
24 the difference between regulation and deregulation is, the
25 distinction is one without a difference. In ERISA the

1 Court was, the Congress was identifying an area in which
2 it wanted to keep the states out and it was an exclusively
3 Federal regulatory domain. Here Congress has created an
4 area in which the states also are supposed to be kept out
5 because it is left to the marketplace and to the
6 continuing pro-competitive regulation by the Department of
7 Transportation.

8 QUESTION: How about section 1506 of Title 49
9 that says nothing contained in this chapter shall in any
10 way abridge or alter the remedies now existing at common
11 law or by statute, but this provision of this or in
12 addition --

13 MR. JONES: That's something of an anomaly.
14 Section 1106 was enacted in 1938 and when the Deregulation
15 Act was enacted in 1978 section 1106 was continued without
16 any discussion. I don't think that the undiscussed
17 continuation of an ancient savings clause should undermine
18 the --

19 QUESTION: Are you suggesting it was repealed by
20 implication?

21 MR. JONES: Well, to some extent any later
22 enacted preemption clause will be incompatible with the
23 full breadth of an earlier savings clause. I don't know
24 whether you would call it repealed by implication, but
25 there is an obvious incompatibility between a preemption

1 clause and a savings clause.

2 QUESTION: Perhaps only if you read the
3 preemption clause the way you do.

4 MR. JONES: No, I don't think so. I think
5 however you read the preemption clause it will bar some
6 state remedies, it will eliminate some state remedies that
7 could previously have been in existence.

8 QUESTION: Mr. Jones, can I ask you a question
9 to be sure I understand your theory? Justice Scalia asked
10 you about fraud in the sale of tickets, and I understood
11 your answer to be that's probably not preempted because it
12 doesn't have a sufficient direct impact on the rate making
13 process. Maybe I misunderstood.

14 MR. JONES: That's essentially correct, Mr.
15 Justice Stevens.

16 QUESTION: And I take it you would also say
17 that, say regulation, state regulations prohibited obscene
18 advertising or advertising of liquor in conjunction with
19 airline travel in the terminal would not be preempted if
20 it didn't have any significant burden? You're not
21 claiming all regulation by the states of advertising that
22 mentions rates is preempted?

23 MR. JONES: We're not claiming that here, no.

24 QUESTION: It's got to be sufficiently
25 burdensome to affect the rate making process?

1 MR. JONES: I'm not sure if burdensome is the
2 word that I would choose. It has to be sufficiently, it
3 has to sufficiently implicate the pro-competitive concerns
4 of the statute, that is it has to interfere with the rate
5 setting process in the freely competitive market. Let me
6 go back to the fraud --

7 QUESTION: I'm not sure there's a big difference
8 between what you said and what I said.

9 MR. JONES: Perhaps there isn't. Let me go back
10 to the fraud hypothetical. It's conceivable that a fraud
11 claim could rest upon a claim that there was a deceptive
12 ad, and perhaps such a fraud claim would indeed be
13 preempted if the argument about deception was the same
14 kind of argument that the states make here with respect to
15 the guidelines, or that underlie the guidelines. Other
16 fraud claims, however, might have nothing to do with
17 deceptive advertising as such and they would fall well
18 outside the line that we're trying to draw.

19 QUESTION: If you emphasize burden rather than
20 the content of the ads, you seem to admit that a lot of
21 ads could be regulated that mention rates in the airline
22 terminal and the like. And if you emphasize burden, then
23 I don't know how you get around Justice O'Connor's
24 question about suppose they have rent control or they
25 impose some heavy costs on the operation of airline

1 terminals or something like that, the way they handle
2 their dealings with their car rental agencies or something
3 of that kind.

4 MR. JONES: Well, Congress did specifically
5 provide that the states could continue to impose certain
6 kinds of taxes and it also provided that their proprietary
7 control over airports and their regulations issued in
8 connection with that were not preempted. Congress foresaw
9 that the preemption statute might other wise sweep in
10 these provisions and for that reason it explicitly
11 exempted them from the preemption statute.

12 QUESTION: What exemption are you talking about
13 now? What statutory provision?

14 MR. JONES: With respect to the proprietary
15 operations, that's in the preemption statute itself. I
16 think it's subsection B. With respect to the taxes, I
17 cannot now remember the name, the number of the section,
18 but it was the subject of this Court's opinion in the
19 Wardair Canada case.

20 QUESTION: Thank you.

21 MR. JONES: Let me address if I might the
22 State's argument that the statute should be construed only
23 to bar the states from engaging in what they called
24 utility type regulation. That argument is self-defeating.
25 These guidelines are a perfect example of utility type

1 regulation. They represent precisely the kind of
2 controlled supervision over rate advertising in which
3 state public utility commissions commonly engage.

4 Thus if section 105 is to be given the reading
5 that the states themselves say they prefer, this case at
6 least is at an end. And I think it would be sufficient
7 for purposes of this case only if the Court were to decide
8 whatever other further preemptive scope section 105 may
9 have. At least it does preempt utility type regulation of
10 the kind involved in this case.

11 QUESTION: Thank you, Mr. Jones.

12 Mr. Nightingale.

13 ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

15 SUPPORTING RESPONDENTS

16 MR. NIGHTINGALE: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 I'd like, if I could, to take the narrow and
19 then the broad that have concerned the Court this
20 afternoon, first of all narrowly. The Deregulation Act
21 prohibits states from enacting or enforcing any law that
22 relates to rates, routes, or services. State laws that
23 restrict the form and content of advertising of airfares
24 relate directly to airfares. Advertising is an important
25 channel of communication between sellers and potential

1 buyers of air transportation.

2 QUESTION: Well now, does that go so far as to
3 say they can't regulate obscene advertising in the
4 airport?

5 MR. NIGHTINGALE: Obscene advertising would not
6 relate to rates in our opinion.

7 QUESTION: I'm talking ads with the rates put on
8 them, or maybe not obscene but the character of the
9 advertising, having people serving liquor, say, at the
10 time some states are concerned about that. Could they
11 prohibit the showing of drinking liquor on an airline in a
12 picture in connection with the rates for the flight?

13 MR. NIGHTINGALE: Your Honor, I think that the
14 liquor example is a special case because it involves, the
15 states have special authority in that situation. I would
16 think that liquor would be subject to state regulation.

17 QUESTION: Could they just ban all advertising
18 in the waiting room of the airport --

19 MR. NIGHTINGALE: No, Your Honor, they could not
20 ban advertising in the waiting room of the airport.

21 QUESTION: -- thinking it's not aesthetically
22 suited to the, you know, to the terminal or something like
23 that? They couldn't do that?

24 MR. NIGHTINGALE: There are, there is an
25 exemption in the act for the rights exercised by

1 proprietors of airports, state proprietors, and on
2 reflection I think that the sorts of regulations that have
3 to do with the maintenance of the environment in the
4 airport, like the anti noise regulation, would be within
5 that exemption.

6 QUESTION: But I'm talking about advertising by,
7 not by the proprietor, by the airline.

8 MR. NIGHTINGALE: Well, the proprietor I believe
9 has proprietary rights to maintain the airport. I
10 understood that your airfare advertising ban in airports
11 was one imposed by the airport owner as a way of
12 maintaining the atmosphere.

13 QUESTION: No, no, no. The state could decide
14 that we don't, we want, just like they don't want people
15 soliciting for, you know -- for one reason or another they
16 just don't want to have the appearance cluttered up with
17 rate advertising in front of the terminals or anything
18 like that.

19 MR. NIGHTINGALE: No, Your Honor. I think if
20 the state tried to do it in the capacity other than as
21 proprietor of the airport it would be preempted. Airfare
22 advertising assures in particular that discount fares, the
23 sorts of fares that the Deregulation Act was designed to
24 encourage, come to the attention of consumers. Unless
25 sellers of air transportation can make the availability of

1 those fares known to potential purchasers in a cost
2 effective way they will have a greatly reduced incentive
3 to offer them.

4 QUESTION: What if one of those ads is seriously
5 misleading, not in one of the ways set forth in the
6 guidelines, but it just lies. It says the fare will be
7 \$300 and it's actually, or \$100 and it's actually \$300?
8 Is there no remedy under state law?

9 MR. NIGHTINGALE: Your Honor, the line that the
10 Department draws with respect to that is if the
11 misrepresentation is a situation in which the airline
12 fails to produce on a contractual promise, in other words
13 if I walk up to the ticket counter and I am told that if I
14 give you \$100 you'll deposit me in San Francisco, and in
15 fact you drop me off in Chicago, that I have an action
16 under state law to enforce my contract to be, to have the
17 terms of the contract enforced. However, if the nature of
18 the deception is one that relates to the description of
19 the service in a way that doesn't give rise to an
20 enforceable promise, it falls within the area in which the
21 Department balances pro-competitive policies and
22 protection of the individual. So the --

23 QUESTION: So the problem with the guidelines is
24 that they use tort law instead of contract law? They
25 should simply have said anyone who does not list all of

1 the exceptions to the fare shall be deemed to have no
2 exception to it, and anyone who accepts such an offer
3 shall be deemed to have a contract with no exception?

4 MR. NIGHTINGALE: Your Honor, no, because
5 Federal law specifies the nature of the contract of
6 carriage between an individual and an air carrier, so that
7 there would not be a way around this for the states simply
8 to recast law regulating deceptive advertising in the form
9 of contract law.

10 QUESTION: What if the airline advertises Dallas
11 to Washington, D.C., \$100, and I show up for a ticket and
12 they say well, no, it's \$200, we just didn't mean what we
13 said in that ad. Can the state enforce deceptive
14 advertising law in that case?

15 MR. NIGHTINGALE: Your Honor, no. That law is
16 preempted because what the situation is -- remember that
17 in the air carriage industry what you have is a finite
18 airplane. Everyone understands that when you are booking
19 seats what you are talking about is getting there while
20 there are seats still available.

21 QUESTION: But the answer given isn't that there
22 are no seats. It's simply that although we said we'd
23 charge you \$100, we're going to charge you \$200, and there
24 are lots of seats on this plane.

25 MR. NIGHTINGALE: Again, that would be preempted

1 is our position, preempted because the regulation of what
2 is said about fares, deceptive practices is a, that is an
3 area that is committed to the Department of
4 Transportation. It -- maybe if I could get, in connection
5 with your question, to the general framework here that we
6 think decides these difficult cases, cases incidentally
7 that are far more difficult than the one before the Court
8 today.

9 It is the State's position that the Deregulation
10 Act involved essentially the passive withdrawal of direct
11 controls on rates, routes, and services. In fact the act
12 did more than that. It set forth in addition new
13 regulatory criteria to guide the Department of
14 Transportation in exercising the authority that remained
15 to it. Among the authority that remained to the
16 Department of Transportation was the authority to protect
17 consumers against deceptive practices.

18 In exercising that authority it seeks to balance
19 pro-competitive objectives with protection of the
20 consumer, recognizing first of all that there is not
21 necessarily a cut and dried right answer to that balance,
22 although there certainly would be, Mr. Chief Justice, in
23 the situation that you have put forward. I can't imagine
24 that the Department of Transportation would not conclude
25 that that is deceptive and therefore act --

1 QUESTION: Do you support the affirmance of the
2 injunction as written and issued by the court below?

3 MR. NIGHTINGALE: Your Honor, again, we agree
4 with the airline that it, that read as a whole it can be
5 read more narrowly than the ordering paragraph. If the
6 ordering paragraph alone is the focus of the Court's
7 attention, we think that the only part of it which is
8 problematic is the part that follows fair advertising.
9 There is talk about other operations involving rates,
10 routes, or services. We don't believe that that, that the
11 issue is so broad as the ordering paragraph indicates.
12 But certainly state laws that restrict the content and
13 form of airfare advertising are preempted, and we
14 understand the ordering paragraph to be entirely
15 consistent with that.

16 QUESTION: So you think a remand is necessary?

17 MR. NIGHTINGALE: Again it's our position that
18 read as a whole the order captures the more limited
19 meaning. We would not oppose a remand, but we believe
20 that the order is adequate read as a whole.

21 QUESTION: Mr. Nightingale, before you sit down
22 I would like to just have some description of the
23 principle by which we should decide these case.

24 MR. NIGHTINGALE: Right, Your Honor.

25 QUESTION: And I haven't heard it. I haven't

1 heard it from Mr. Gardner, I didn't hear it from Mr.
2 Jones. I'm curious if I'm going to hear one from you.

3 MR. NIGHTINGALE: Let me suggest that we take
4 ERISA as a starting point. In ERISA the Court has said
5 reference to or connection with equals relates to. Now,
6 the Court has also recognized that every conceivable
7 relationship is not sufficient.

8 In a footnote in the Shaw v. Delta Airlines case
9 the Court said that there may not be preemption when a law
10 affects benefit plans in a way that is, quote, too
11 tenuous, remote, or peripheral to justify preemption. So
12 that the application of a state law that says the bad
13 faith denial of benefits is preempted, even though that is
14 just an application of a general state law that says bad
15 faith breeches of contract are actionable, it is preempted
16 when applied to an ERISA benefit plan.

17 Whereas the application of a garnishment statute
18 is not preempted because that is just too peripheral, too
19 unrelated to the purposes of the act, in this case the
20 fostering of a pro-competitive environment, opening up a
21 market and preserving space for the pro-competitive
22 policies of the Department of Transportation.

23 QUESTION: Thank you, Mr. Nightingale.

24 Mr. Gardner, you have 2 minutes remaining.

25 REBUTTAL ARGUMENT OF STEPHEN GARDNER

1 ON BEHALF OF THE PETITIONER

2 MR. GARDNER: To address Justice O'Connor's
3 request for a principle, I apologize for not laying it out
4 and I will observe that it seems to me strikingly similar
5 to the one the airlines announced. We are asking the
6 Court to determine that the Federal Aviation Act does not
7 preempt a law of general applicability that does not have
8 a direct and substantial effect on the rates, routes, and
9 services of an airline.

10 But the unfortunate result there is that that
11 does require a remand because we have not had a record
12 developed here, as we have pointed out. We do not believe
13 the airlines will succeed in developing such a record
14 because we do not believe that regulation of false
15 advertising does indeed have that direct and substantial
16 effect, nor, to use the ERISA test, does this state law
17 have any connection with rates, routes, or services, or
18 any reference to. Even if you use the ERISA test our
19 enforcement of our state consumer protection law fails.

20 QUESTION: What about just the guidelines? If
21 we assume that only the guidelines are at issue do you say
22 that there's not enough record with respect to that as
23 well?

24 MR. GARDNER: There is no record of any effect
25 of any of the, whether the guidelines or the actual

1 enforcement of the state law. The airlines say oh, mercy,
2 this is what's going to happen to me, but they do not show
3 that this is what will. The record is full of conjecture,
4 speculation. The lawsuit was fundamentally, although
5 there is case in controversy, fundamentally premature.
6 That's why we urge the Court to let us try these cases in
7 state court where the facts can be fully developed.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Gardner.

11 The case is submitted.

12 (Whereupon, at 1:59 p.m., the case in the above-
13 entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-1604 - DAN MORALES, ATTORNEY GENERAL OF TEXAS, Petitioner
V. TRANS WORLD AIRLINES, INC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)