OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: AMERICAN AIRLINES, INC. Petitioner v. MYRON WOLENS, ET AL.

CASE NO: No. 93-1286

PLACE: Washington, D.C.

DATE: Tuesday, November 1, 1994

PAGES: 1-50

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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN AIRLINES, INC. :

Petitioner :

v. : No. 93-1286

MYRON WOLENS, ET AL. :

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Washington, D.C.

Tuesday, November 1, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

BRUCE J. ENNIS, JR., ESQ., Washington, D.C.; on behalf of the Petitioner.

CORNELIA T. L. PILLARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae.

GILBERT W. GORDON, ESQ., Chicago, Illinois; on behalf of the Respondents.

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PROCEEDINGS

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 93-1286, American Airlines v. Myron Wolens.

Mr. Ennis.

ORAL ARGUMENT OF BRUCE J. ENNIS, JR.

ON BEHALF OF THE PETITIONER

MR. ENNIS: Mr. Chief Justice and may it please the Court:

The Airline Deregulation Act categorically preempts any State law relating to airline rates, routes, and services. In 1988, American Airlines decided to change the rate for purchasing tickets through its frequent flyer program. Respondents challenged that decision on State law grounds. They claim State law overrides American's express reservation of the right to change frequent flyer rules and awards at any time, and gives respondents a right to purchase tickets at the rate in effect before the change.

In Morales, this Court ruled that the ADA broadly preempts State laws whose enforcement would have a connection with rates, routes, or services. That test requires preemption of respondent's statutory and common law claims. Enforcement of either claim would have a

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direct impact on American's rates because it would require American to rescind its system-wide rate decision or pay substantial damages.

QUESTION: What about a negligence claim arising out of a plane crash, Mr. Ennis? That certainly -- I mean, if American, for example, wasn't held liable for negligence in plane crashes it certainly would affect its rates, probably affect its way of flying, too.

MR. ENNIS: Your Honor, in Morales this Court ruled that not every claim that literally relates to rates, routes, and services is preempted. Some claims will have too tenuous an effect. We believe that those kinds of safety claims would generally not be preempted. There are also indications in the text of the ADA and in the structure of the ADA that --

QUESTION: -- accidents can have a very powerful effect on service, can they not?

MR. ENNIS: Well, Justice Ginsburg, the Morales test stands for two propositions. First, claims are preempted if the claims assert a direct right to a particular rate, route, or service, and those kinds of safety claims would not. The claims in this case would.

Second, under the tenuousness exception of Morales, claims that would have an indirect effect on rates, routes, and services are preempted, but not if

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they're too tenuous.

In our view, the way to understand that is to say that claims will generally be preempted if their indirect effect will have a significant impact on competitive decision-making regarding rates, routes, or services.

If they are not likely to have a significant effect on competitive decision-making, then they are probably going to be too tenuous to warrant preemption. That test, impact on competitive decision-making, is consistent with both the text of the ADA and the legislative purpose, which was to place maximum reliance on competitive decision-making on market forces.

QUESTION: It certainly wasn't mentioned in -- that test certainly wasn't mentioned in Morales, was it?

MR. ENNIS: Your Honor, the actual formulation of the test in Morales was not mentioned. Morales simply said that claims will not be preempted if their effect on rates, routes, and services is too tenuous or peripheral. We have attempted to formulate, to flesh out a test that gives meaning to the tenuousness exception in Morales that is consistent with the text and with the legislative history, and in our view, that test, impact on competitive decision-making, would not generally preempt most safety claims.

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QUESTION: What if a potential passenger has a ticket and a reservation that says, that guarantees him -- I know airlines don't do it, but supposing we have an oddball airline that does, guarantees him passage on the 4:00 p.m. flight from Chicago to Washington, and he gets there, and he's just told, well, we've sold the place to somebody else. He gets there in plenty of time. So he simply wants to sue the airline for damages. He was going to an important meeting. He might have made some money. Is that preempted?

MR. ENNIS: Generally, Your Honor, those kinds of denied boarding claims will be preempted, because most of those claims will assert a direct right to a particular rate, route, or service. They can't be considered tenuous in any way.

However, preemption of those claims will not leave passengers without a remedy, and will not create a major administrative burden for the DOT, because the DOT has already issued regulations governing denied boarding claims.

QUESTION: What does a person do, go over and stand in line at the Department of Transportation?

MR. ENNIS: What the person does is, that person would have the same remedies that this Court found sufficient in Morales for the claims that were preempted

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there.

QUESTION: What does he do, though?

MR. ENNIS: Well, he can file a -- first attempt to negotiate informally with the airlines, which works in the vast majority of cases, and second can file a complaint with the Department of Transportation. The Department has ample authority to redress any of those -- those --

QUESTION: Has it redressed any so far?

MR. ENNIS: Yes, they have, Your Honor. They have addressed many. In fact, the very claims that are in issue in this case have actually been considered by the Department of Transportation, which entertained those claims but denied them on the merits.

Section 1381 gives the Department of Transportation --

QUESTION: Mr. Ennis, can you tell us what else would be left out? You said overbooking is preempted. How about lost baggage?

MR. ENNIS: Well, Justice Ginsburg, I have to answer that in two ways. I think that most claims involving luggage would not be preempted under our test, but some would. Let me explain.

If the claim challenges the liability limit that the airline has set for lost luggage claims, that claim

would be preempted, because enforcement of that claim would have a significant impact on the airline's competitive decision regarding what the appropriate maximum limit should be, and that's consistent with DOT regulations which permit airlines to set maximum limits for luggage liability, so enforcement of that claim would impede Federal objectives and have a direct impact.

But if all we're talking about is the value of a particular piece of luggage within that limit, those kinds of claims generally would not be preempted, because they would not assert a right to a particular rate, route, or service directly, and their indirect connection would be tenuous. Airlines are not going to change their competitive decisions regarding the appropriate liability limit just because a State court decides a bag is worth $300 instead of $200.

QUESTION: Mr. Ennis, is it your position that any subject or question or issue that's within the competehce and the jurisdiction of the DOT is preempted?

MR. ENNIS: Your Honor, let me try to answer the question this way. That's not exactly our position. Our position is that the -- section 1305, the express preemption provision, is an express preemption provision, and the purpose of an express preemption provision is to preempt all laws within the sphere of laws whose

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enforcement might interfere with Federal objectives.

This is not actual conflict preemption, this is an express preemption clause, so generally speaking, the answer is yes, that if it would be within the competence of the DOT to regulate, it could be preempted, but our test is not exactly the same.

QUESTION: But the DOT's jurisdiction is not phrased in terms of rates, routes, and services, is it, or is it?

MR. ENNIS: No. In fact, the whole point of the Airline Deregulation Act was to deregulate the authority that the CAB, now the DOT, had over the economic aspects of air transportation, rates, routes, and services.

QUESTION: Yes, I understand, but you have been saying that certain matters can be heard by the DOT, and I'm just asking myself whether or not there is room for some concurrent jurisdiction.

MR. ENNIS: Your Honor, I think there might be room for concurrent jurisdiction for all those types of claims, such as the value of lost luggage claims, that would not impact competitive decision-making. The DOT could certainly come in and, by rule, prescribe a uniform rule for even those kinds of evaluation claims which would not, in our view, be preempted by section 1305 itself.

The point of the deregulation act was simply to

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take away regulation of the economic aspects of air carriage which had historically been supervised by the COB -- CAB, now DOT. It was not intended to affect in any way safety regulation which had historically been supervised by the FAA. In fact --

QUESTION: Well, isn't deregulation more about freeing airlines from intrusive Government oversight than it was concerned about requiring airlines to keep their promises and let them be enforced?

MR. ENNIS: Well, Justice O'Connor, the deregulation act really had, and the Government acknowledges this, three distinct purposes. The first was simply deregulation, get State governments off the airlines' backs with respect to rates, routes, and services. But it also had, as a goal in itself, as an independent purpose, as this Court said in Morales, to place maximum reliance on competitive market forces.

The statute says, directs the DOT, even in exercising the considerable regulatory authority which it still retains, to exercise that authority always with a thumb on the scales in favor of competitive decision-making.

QUESTION: Well, could the DOT promulgate a regulation saying that claims of this type should proceed in State court?

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MR. ENNIS: Your Honor, that would be a very difficult question about whether that kind of regulation would be so inconsistent with the statute that it would be beyond the DOT's power. I think for claims such as valuation claims, I don't see any problem with that, because I don't think those would be preempted.

For claims that would assert direct right to a rate, route, or service, I think it would be inconsistent with the statutory test for the DOT to say, those claims which are clearly preempted by the text of the statute can nevertheless proceed in State court.

QUESTION: What about a -- if the airline sells a passenger, a prospective passenger a ticket at a certain rate and the passenger goes to the gate on the day of the flight and is told, well, we just upped the rates, and it will be $100 more? I guess under your theory the passenger would have no State court lawsuit for that.

MR. ENNIS: That's correct, Justice O'Connor. That's very similar to the question Justice -- Chief Justice Rehnquist asked, and our answer would be the same.

For all of those denied boarding kinds of claims, the passenger is asserting a direct right to a particular rate, route, or service. Those clearly are not tenuously connected with rates, routes, and services.

QUESTION: But that direct right is in fact, I

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would have thought, central to your claim to be able to compete, because you cannot compete effectively unless the offers that you make are offers that your customers or prospective customers can depend on, so that if the customer cannot enforce the contract which he thinks he makes with you, which is the essence of your competitive activity, then that is, in fact, a direct threat to the very competition which the act is supposed to foster.

MR. ENNIS: Justice Souter, we are not taking the position that those kinds of contract claims cannot be enforced. We are simply taking the position --

QUESTION: They can only be enforced in the administrative Federal forum, you said.

MR. ENNIS: They can only be enforced by DOT.

QUESTION: And is DOT enforcing contracts of that sort?

MR. ENNIS: They have on several occasions enforced contracts like that, Your Honor. Yes, they have.

QUESTION: Why does it -- and given the fact that the enforcement of those contracts is, I would suppose, central to your capacity to compete, why, nonetheless, is that, and even the existence of the Federal forum, an argument for preemption? It seems to me that the Feds may indeed want to enforce them if there were an insufficient State mechanism to do it, but why

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does preemption follow from a threat to your competitive position?

MR. ENNIS: Let me try to answer the question this way, Justice Souter. The United States agrees with American that respondent's statutory claim for damages is preempted because of its impact.

QUESTION: The consumer, consumer claim --

MR. ENNIS: The consumer protection claim under the Illinois statute --

QUESTION: Yes.

MR. ENNIS: -- is preempted because of its impact on American's rates, routes, and services.

QUESTION: And -- but the reasoning there, as I understand it, is that there is room under that statute for something more than a straightforward enforcement of the bargain. There is room for policy choices in the State forum, whereas under a straight contract claim there is not. Is that roughly correct?

MR. ENNIS: That's essentially the Government's position, Your Honor, but there are two things to be said about that. First, if the statutory claim is preempted, if Congress wanted to preempt the statutory claim because of its impact on American's rates, why would Congress not want to preempt the contract claim which challenges the same decision for the same reason, seeks the same relief,

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and would have the same impact?

QUESTION: Because in one case the parties are the regulators, in the other case the Government is. One thing is Government imposition of requirements which could be inconsistent with Federal requirements. The other is, as the Government puts it, giving effect to private ordering, to the parties' own bargain.

MR. ENNIS: Justice Ginsburg, this case doesn't raise that hard question about express promises that the airline simply refuses to perform, because in this case it is undisputed that American expressly reserved the right to change frequent flyer rules and awards at any time.

QUESTION: But that simply means that, if you're correct, you may win the case if it is litigated in State court, but it doesn't have anything to do with preemption.

MR. ENNIS: It has a great deal to do with preemption, Justice Souter, for the following reason. In our view, it is certain that the plaintiffs cannot prevail unless, under State law norms and policies, that express reservation clause is limited or invalidated, either on the ground that it gave inadequate notice --

QUESTION: Why? Why isn't it simply a question of interpreting what the clause means? One might argue that all that that clause means is that any time from that day forward the airline can change, but it can't do it

with retroactive effect. You characterize that as invalidating the clause in advance. It seems to me it could very well be characterized as simply construing the clause that the parties agreed to.

MR. ENNIS: Justice Ginsburg, in our view the only fair way to read that reservation of rights is that it applies across the board.

But to answer your question, even if it could conceivably be interpreted differently, there is at least a palpable risk that State law norms and policies will come into play in construing and applying that express reservation clause, and when you're dealing with a case of express preemption, we don't have to show an actual conflict. We only have to show that there's a risk of interference with Federal objectives. Here the risk is --

QUESTION: But aren't you in effect simply saying that the risk of interference comes from the fact that, in construing the parties' bargain, the State court might get it wrong in your viewpoint. It's kind of the mirror image of your argument that there should be no preemption because you are destined to win.

MR. ENNIS: Your Honor, unfortunately we are not destined to win, because if you'll look at the opinion of the Illinois supreme court below, all it had before it was a preemption question. It went out of its way to say that

American Airlines had breached a contract. That was not a mistake, because the dissent --

QUESTION: Well, let's say I think your argument is that you are destined to win before any right-thinking court.

(Laughter.)

MR. ENNIS: Your Honor, I wouldn't use the phrase right-thinking court --

QUESTION: Well, I --

MR. ENNIS: -- but the Illinois supreme court has had two opportunities to decide whether these claims are preempted. It ruled on one ground, and this Court set that aside because it was plainly wrong. It's now ruled on another ground, which is indistinguishable from the ground this Court rejected in Morales.

Basically, the second time around, the Illinois supreme court said the claims are not preempted because they will not actually prescribe or dictate particular rates, routes, or services, but in Morales this Court squarely held, based on ERISA precedents, that section 1305 is not limited to laws that will directly prescribe rates, routes, or services.

QUESTION: Well, maybe, indeed in your view, and perhaps in the ultimate view, the court went off on a tangent of reasoning, but I don't see why it follows from

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that that if a court applies basically straight, common law principles of contract interpretation to enforce a bargain which the parties themselves made, or for the purpose of enforcing and doing nothing more than enforcing a bargain which the parties themselves have made, that that is somehow a threat in effect to the competitive capacity, which it was one of the objects of the Airlines Deregulation Act to foster.

MR. ENNIS: It is a tremendous threat to the competitive capacity, because if the case --

QUESTION: Why is it any more a threat to competitive capacity than it is when a Federal forum is used?

MR. ENNIS: Because, Your Honor, what that would essentially say is, unless the airline uses the particular magic words in its reservation of rights clause that a particular State will give effect to, that reservation will have no effect, and that will deter airlines from engaging in the very innovative types of competition, such as frequent flyer programs, that the Airline Deregulation Act was precisely intended to encourage.

QUESTION: So it is in fact the lack of absolutely uniform State law in every State forum, then, which is the essence of your argument.

MR. ENNIS: That's -- to answer Justice

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O'Connor's question, that is the third objective of the Airline Deregulation Act, is nationwide uniformity. Precisely because those kinds of questions on the merits could be decided differently in different States is why you need to have DOT deciding those questions on a national, uniform basis.

QUESTION: Is there any appeal from the rulings of the DOT? Could a person take the DOT ruling to court?

MR. ENNIS: Your Honor, I believe that -- I'm not certain of the answer to that question, but I believe the answer to that question is probably yes, but I'm not certain.

QUESTION: Well, but then you run the same sort of risk -- you could get one kind of ruling from the Fourth Circuit on appeal from DOT and another ruling from the Seventh Circuit.

MR. ENNIS: As I said, Your Honor, I'm not certain of the answer to that question, but even if that were so, at least you would have the Federal courts deciding such rules, which are more likely to be decided on a national, uniform basis.

I would like to reserve the rest of my time for rebuttal.

QUESTION: Well, can I -- I wanted to know what -- you can't have competition, can you, without

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contracts that are enforceable, so how could this act be aiming at competition and services unless it has a -- unless it foresees enforceable contracts --

MR. ENNIS: We believe these contracts are enforceable. They're simply enforceable under law.

QUESTION: But the DOT isn't given authority to enforce contracts. The DOT is given authority to deal with deceptive practices.

MR. ENNIS: Justice Breyer --

QUESTION: That doesn't say enforce contracts.

MR. ENNIS: Justice Breyer, these very claims were brought before DOT challenging the very same --

QUESTION: It's true that something could be a breach of contract and also be a deceptive service. I mean, it could be deceptive and a breach of contract, but you could have breach of contracts that are not consumer deception, and so how do those things relate? Does primary jurisdiction help?

MR. ENNIS: They relate in two ways, Justice Breyer. First, section 1381 gives DOT the jurisdiction to consider this precise claim. It has considered it, decide -- rejected it on the merits.

If DOT had agreed that what American had done in 1988 was deceptive or unfair, it could have issued a cease and desist order so that the rates in effect before the

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change would continue to be in effect.

Second, section 1371(2), the Congress gave a specific remedy, authorized DOT to provide a compensation remedy to passengers for breach of "agreements." That's a remedy that DOT has for breach of agreements. It has failed to exercise that remedy, but the fact --

QUESTION: What's the general relationship? That is to say, does primary jurisdiction help?

MR. ENNIS: I think this is not a case of primary jurisdiction, though the Government takes the position in its brief that Nader is no longer good law on that point after enactment of the deregulation act, but essentially speaking, our argument would be that because these claims directly assert a right to a particular rate, route, or service, they clearly come within Morales. They would have the same impact as the statutory claims, and they should be preempted.

QUESTION: Very well, Mr. Ennis.

Ms. Pillard.

ORAL ARGUMENT OF CORNELIA T. L. PILLARD

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MS. PILLARD: Thank you, Mr. Chief Justice, and may it please the Court:

We agree with petitioner that the Consumer Fraud Act claim is preempted, but we do disagree on the proper

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preemption analysis for the contract claim.

Petitioner's suggestion that a remedy for breach of contract lies with the Department of Transportation turns the act on its head. The Department has never been in the business of adjudicating private contract disputes, and the deregulation act --

QUESTION: Could it do so under the statute?

MS. PILLARD: In our view, it is not empowered to adjudicate private rights. As this Court referred to in the Nader decision, the Department of Transportation's authority is to effectuate public rights, and it has the authority to protect its own regulations in compliance with its statute, but it does not have the authority to adjudicate private contract disputes between private parties.

And that's consistent with the deregulation act insofar as what the act aimed to do was to encourage a free market where prices and production were determined precisely by private contract, as opposed to by tariffs or Government decision, and in our view the private market depends on the effectiveness of contract.

One of the examples that Mr. Ennis gave was the limits on baggage liability. That limit is a contract limit, and the ability of the airlines to enforce it against their passengers is, in fact, a matter of State

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contract law.

The act's repeated references to contracts or agreements between private parties we think reflects Congress' assumption that contracts in a usual sense would remain effective.

The preemption clause, by its terms, preempts enforcement of law, not enforcement of contracts. That was the position of the Civil Aeronautics Board, which it took contemporaneously with the passage of the Airline Deregulation Act, and that's the position we take today.

Our view is supported first by the text and structure of the act, including the text of the preemption clause, references elsewhere in the active contracts, the clause saving remedies, and the actions of any provision for an alternative Federal remedy for breach of contract rights.

QUESTION: May I ask what you do with the Norfolk and Western case in which they rely on the fact that enforcement of a contract is enforcement of a law?

MS. PILLARD: The -- in Norfolk & Western, the entire function of the statute was quite different from the Airline Deregulation Act. There, you had a situation in which the Interstate Commerce Commission was empowered on a case-by-case basis to preempt State law as necessary to allow carriers to consolidate.

It was almost like a bankruptcy type of situation, where Congress gave the ICC authority to shear away obligations, and in that act the Commission has the obligation to see to the rights of employees, so -- and the Court found that important in construing the language of the statute to allow preemption of a collective bargaining agreement, because clearly that was contemplated in the act in giving the Commission the authority to provide for the rights of employees.

Here, you have a situation where the Department does not have a mechanism for providing for the rights of passengers or others dealing with the airlines. In fact, the Department's regulations contemplate as an important contract enforcement mechanism that individuals can go to State court, and that's expressed in the regulations.

QUESTION: But Mr. Ennis told us that you had entertained a similar claim and denied it on the merits. Is that incorrect?

MS. PILLARD: I'm not sure what he's referring to, unless he's referring to the petition for a proposed rulemaking which was filed by the Association of Discount Travel Brokers, and there the Department decided that the practices were not unfair and deceptive within the meaning of the Department's statute, but it expressly, in the order denying rulemaking, specified that we thought the

types of claims, if any, were contract claims, and so we have not decided the contract question at issue in this case, and I'm not sure if there's another order that he's referring to.

QUESTION: Well, on the Norfolk case, do you accept the conclusion of the Norfolk case that common law doctrine can be in some cases displaced under the Airline Deregulation Act?

MS. PILLARD: I do think that common law doctrine can be, in some instances, displaced, but I --

QUESTION: In other words, standard law, rule, regulation, et cetera can include State common law in an appropriate case.

MS. PILLARD: It can, but we don't believe that it includes contracts, because the provisions that that refers to are provisions with the force and effect of law, such as, for example, the tariffs, as opposed to private parties' agreements which, standing on their own, are really the voluntary undertakings of the parties and --

QUESTION: Well --

MS. PILLARD: -- are fully consistent with deregulation.

QUESTION: -- respondents are trying to hold the airline to what they say was promised, and it's hard to understand why it matters whether you call it a contract

action or a consumer fraud action. The result is absolutely the same with relation to the rates and services.

MS. PILLARD: The result is only the same, Justice O'Connor, if you look at the claim without reference to the act of the carrier which gives rise to the contract obligation. However, that's not the inquiry under State contract law.

Under State contract law, the inquiry is very much whether this was a voluntary undertaking of the carrier, and only if the carrier in fact contracted to be bound is that obligation -- are they held to that obligation, and that's very much in contrast to a situation where the State proscribes, independent of what the airline thinks is best for it.

QUESTION: So --

QUESTION: But it's identical to the consumer fraud claim, where it depends on what it is the airline promised.

You're saying the consumer fraud action at the State level is preempted but not the contract action, and the consumer fraud action under State law would proceed in much the same way as the contract action: What is it the airline promised, and it was fraudulent to promise such-and-such and not deliver it.

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I mean, that's -- it seems to me, it is the same in its effect.

MS. PILLARD: I think this relates to what Justice Breyer was saying about, there is a difference between these two causes of action. In our view, it's a very significant difference when it comes to whether airlines remain free to offer rates, routes, and services on their own terms.

The difference is that in proving a contract claim you have to prove the agreement. In proving a Consumer Fraud Act claim, all you have to prove is the intent to deceive, and they're two different inquiries, and --

QUESTION: But in making this argument, you don't rely on the word "law" under the statute. In other words, you accept the Norfolk rule that decisional mandates are law in certain cases.

MS. PILLARD: In certain cases, but we think that taken together --

QUESTION: So your argument is not really tied to the words of the statute in a very close way, I take it.

MS. PILLARD: Well, I would disagree, Justice Kennedy, insofar as what is being enforced is not law in our example, it's contract, and so the enforcement of

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contract we think is not what Congress contemplated in this act, and we think that's reinforced by the reference to provisions having the force and effect of law, which is --

QUESTION: Suppose there's a civil code section in the State of California, which there is, which says that contracts are enforceable if there's consideration. It's a statutory law.

MS. PILLARD: I think you're right in pointing out that our theory does not depend on the difference between common law and statutory law. What it depends on is where does the prescription come from? Where does the substantive standard controlling rates, routes, and services come from? Does it come from the airlines, or does it come from the Government?

QUESTION: I think you gave as one example an unconscionability doctrine that could be common law, but that that would not be written into the parties' bargain. Can you be concrete in other respects? What would be common law doctrine that would be preempted?

MS. PILLARD: The standard that we propose to elaborate on our concept is that doctrines which, on their face or as applied, interfere with the airlines' ability to set their own rates, routes, and services, and the reason that we point to unconscionability or public policy

doctrines is because those are doctrines which involve the court in admitting there was a bargain and then judging the fairness of that bargain --

QUESTION: What about --

MS. PILLARD: -- as a policy matter. For example, two passengers sitting in adjacent seats, and a court could find that if one paid $400 for the ticket and the other had a bargain ticket for $100, that's just unfair, but we think that's precisely the kind of pricing policies that the deregulation act protects, and therefore it's that kind of opportunity within the rubric of contract law to second-guess the bargain --

QUESTION: What about the --

MS. PILLARD: -- that we think is preempted.

QUESTION: What about the statute of frauds or the parole evidence rule, something like that?

MS. PILLARD: Those kind of rules, the ordinary rules of offer, acceptance, consideration, interpretation, we think are not preempted precisely --

QUESTION: Promissory estoppel under section 90 of the Restatement.

MS. PILLARD: Precisely because they go to determining as an objective matter what was it the parties agreed to in coming up with the meaning of that agreement, as opposed to second-guessing the nature of that

agreement.

Thank you, Your Honor.

QUESTION: Thank you, Ms. Pillard.

Mr. Gordon.

ORAL ARGUMENT OF GILBERT W. GORDON

ON BEHALF OF THE RESPONDENTS

MR. GORDON: Mr. Chief Justice and may it please the Court:

Contrary to Mr. Ennis' argument this morning, these claims were never considered by the DOT. That case, which is part of the record, that DOT decision was a coupon broker rulemaking petition where the reasonableness or unreasonableness of those capacity control restrictions and those black-out date restrictions were at issue, and it is important to note that in that proceeding, American opposed the rulemaking. American opposed having the Department of Transportation regulate frequent flyer programs.

The plaintiffs in this case are not asserting a direct right to a particular rate, or a service. Even under the test proposed by Mr. Ennis, whether it has a significant impact on competitive decisions, the claims in this case would still not be preempted.

The fundamental question that must be answered by the Court in this case is whether Illinois courts are

precluded from enforcing contracts which airlines voluntarily enter into with other parties. This case comes before the Court at the pleading stage. It's based on a complaint alleging such a contract. Our contract happens to involve a frequent flyer program. It could involve food service, the purchase of gasoline, passenger terms -- it doesn't matter. Congress did not intend to preempt these voluntary agreements.

No matter what American argues in this case, they believe they have the right to enter into enforceable contracts. They enter into these contracts all the time, and they file lawsuits all over the United States trying to enforce them.

It is curious that in all of the litigation filed by American which is noted in our brief, and there are literally tens of other cases they've filed, that American did not find themselves barred by the doctrine of preemption. If American's position is correct, they cannot sue, either, to enforce their contracts.

The enforceability of contracts was not addressed by this Court in Morales, a case where a group of State attorney generals sought to regulate fair advertising. This case is clearly not Morales, and it requires a different analysis.

As this Court stated in Cipollone less than a

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month after Morales was decided, liability for breach of contract is measured by the terms of the contract. Voluntary agreements involve duties undertaken by the contracting parties rather than those imposed by State law. Such contracts can be enforced without undoing or undermining the Federal deregulatory scheme.

QUESTION: Without limit? How about on remedies? How about injunctive relief, punitive damages --

MR. GORDON: Well, injunctive relief in certain cases could be regulatory if it were to undo or undermine the Federal deregulatory scheme, but as a general rule, if the type of injunctive relief we are talking about would be specific performance, that should be a means of enforcing a contract, unless it undermines the Federal deregulatory scheme.

QUESTION: Would you remind me where you stand on injunctive relief in this very case? I think you're no longer pressing a claim for injunctive relief, is that correct?

MR. GORDON: That is correct. We are no longer pressing such a claim, Your Honor.

QUESTION: Would you agree that punitive damages would be subject to preemption?

MR. GORDON: Well, Justice Souter, as the Court

noted in both Silkwood and Cipollone, punitive damages are not necessarily regulatory. There could be certain cases --

QUESTION: Well, neither are they the enforcement of the bargain, and I thought the essence of your bargain is that what you're asking for is the enforcement of a bargain, and that is precisely what the act was supposed to foster, but if you go to punitive damages you've passed that point.

MR. GORDON: We aren't seeking punitive damages.

QUESTION: No, I realize, but doesn't your argument really force you for consistency's sake to say punitive damages would, in fact, be preempted?

MR. GORDON: Well, only to the extent that punitive damages, Justice Souter, would have a direct impact on the deregulatory scheme, which they often would, and in those instances they would be preempted.

But there are circumstances -- for example, in tort cases -- where punitive damages would really not impact on the deregulatory scheme and therefore would not be preempted nor regulatory, so I don't think there can be a hard and fast rule that punitive damages would be preempted, but they're generally not available in contract claims for breach of contract.

QUESTION: Your answer to Justice Souter is that

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it doesn't make any difference that they don't come as a result of the enforcement of the bargain.

MR. GORDON: It does make a difference in how they impact on the Federal deregulatory scheme, Mr. Chief Justice.

QUESTION: Yes, but I didn't think that the fact -- I didn't think your argument was based on the idea that if you're simply enforcing a bargain it has no impact on the deregulatory scheme. Are you saying that if enforcing a bargain is going to have an impact on the deregulatory scheme, then it's gone?

MR. GORDON: Not that if it has an impact, Mr. Chief Justice, but if it undoes or undermines the Federal deregulatory scheme, there could be circumstances where even a voluntary agreement would have to be preempted. If it were so interrelated to the operation of the airline and to how they do price their product, then there could be a circumstance, for example a -- the situation that the Solicitor General raised on the unconscionability defense on a contract claim. There are certain situations, and they're very rare, but as a general rule we do not believe that would exist.

QUESTION: Well, Mr. Gordon, if you trade-in frequent flyer mileage credits it's just another way of buying a ticket on the airline --

MR. GORDON: I don't believe --

QUESTION: -- and it seems to me that an action such as yours concerning the frequent flyer program relates to rates within the meaning of the statute, just as Morales indicated. I don't see how you get it out from under what the Court said in Morales.

MR. GORDON: Justice O'Connor, if you were to look at the program brochure in our lawsuit, the allegations of the pleading, you will note that if you get a certain number of mileage credits, one of the many awards, perhaps 30 or 40 possibilities, is a free airline ticket.

A free ticket is defined, the ordinary meaning of the word "free" in the dictionary is "without charge." It is clearly not a rate. It's an award for your brand loyalty. It doesn't matter if you get that mileage credit by staying in a hotel, renting a car, using a charge card, calling someone on a long distance telephone network, purchasing merchandise out of a catalogue, or putting money in a particular American Airlines money market fund.

There are many ways of obtaining the mileage credits, and they can be used for a number of awards, some of which involve airline travel and some do not. We do not believe that any relationship to rates would be more than tenuous, Justice O'Connor.

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QUESTION: Do you think most people that are in the frequent mileage program say, oh, I now have an award, not, I now have a free ticket?

MR. GORDON: Justice Kennedy, I don't know what most people say, but I believe that the terms which are before the Court indicate that if you get a certain number of mileage credits you get a free ticket, not that you pay with another form of currency not recognizable in the United States.

QUESTION: What is your suggestion as to how you separate the sheeps from the goats? I mean, the sheep are simply the ordinary agreements that you have to have enforceable to have any competition at all. The goats are the use of the State contract law to impose all kinds of impediments to competition by saying, for example -- I mean, there are dozens in the briefs.

MR. GORDON: Justice Breyer, we would suggest that as a general rule voluntary agreements should not be preempted under section 1305 because it's clear that Congress did not intend to preempt them, but that in the rare circumstance where a voluntary agreement undermines the Federal deregulatory scheme, then that should be preempted.

QUESTION: Fine, and then how do you distinguish those two, and do you have primary jurisdiction to do it?

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MR. GORDON: Well, the --

QUESTION: Do you leave it up to the DOT? Do you -- how does -- I was interested in the primary jurisdiction part. It seemed to me that might provide an answer, and I'd like your view.

MR. GORDON: Well, Justice Breyer, the DOT's jurisdiction is, of course, discretionary and nonexclusive, so the DOT can take jurisdiction of the subject matter, and that's an interesting response to why American would not be subjected to unreasonable laws of 50 States.

If there were a circumstance where the laws of all the States were so diverse as to be unduly burdensome on American, they could go to the Department of Transportation, they could ask for a rule on that subject matter, and that rule would take precedence over the State law.

So consequently, I think that the Department of Transportation's jurisdiction coexists, except to the extent that there is no authority in the Department of Transportation to award compensatory damages for breach of contract. It's simply not there.

QUESTION: So here you'd follow the SG's approach? I mean, is -- it would be your argument we'd send this back, and if it turns out that they're using

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something other than simple, straightforward contract principles to decide this case, that then, what, we'd ask DOT? How would it work?

MR. GORDON: Well, I think that the case should just be affirmed, it would go back to the trial court, and if, on appeal again, there were some imposition of State law that the DOT or American Airlines felt related to rates, routes, or services, some State theory, then they would have that ground for appeal at another time.

We're at the pleading stage here. Sending it back now to examine that issue, the Illinois court would only look at the same complaint that this Court looks at, but if it were to go back up through the system, yes, they would have the right to appeal preemption issues if the Court were to set a guideline and say that the imposition of State theory can be preempted.

If that were to occur in our case, and we don't believe it would, that would be a relevant factor.

QUESTION: Mr. Gordon, from what you've just said, you seem to be aligning yourself totally with the Government's position. It wasn't clear to me from your brief that you were buying into the theory that if it's State law being exposed -- imposed, and external restraint on this agreement -- that's the Government's position -- then it's no good. It's only if the parties'

own rules are being enforced.

Your brief was not as clear on exactly what your position was on where you draw the line.

MR. GORDON: Our brief was not as clear, Justice Ginsburg, because that's not our case. Our case is an express contract, a simple contract, and there is no imposition of State theory or State policy.

But in answer to Justice Breyer's question, I was extending the principle to potential future cases, but in our case we don't believe that's any issue at all.

QUESTION: But in your answer to Justice Breyer's question, you hypothesized the exercise of jurisdiction by the DOT, and indicated there would then be preemption. Would that preemption be by operation of the statute that we are here considering?

MR. GORDON: Preemption -- maybe I mis -- wasn't clear in answering that question. I don't believe that that concurrent jurisdiction would have the DOT making decisions as to what's preempted or what's not preempted. I believe that's a function of the courts. The DOT --

QUESTION: But if we had a case where the DOT had issued regulations or rules on a certain subject, would we turn just to the statute before us to determine whether or not there's preemption?

MR. GORDON: We would turn to the statute and

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the DOT regulation would supersede, if it were the same subject, the State law, yes.

QUESTION: Because of the operation of the statute, not because of some other doctrine of field preemption?

MR. GORDON: That's correct, Your Honor.

QUESTION: So then we do have to look at the words of the statute to determine the relative jurisdiction and jurisdictional competence of the State and the agency, and I'm not sure why the nonexercise of that power by the agency has anything to do with the interpretation of the statute.

MR. GORDON: Well, this Court has stated many times, Justice Kennedy, that contemporaneous construction by an administrative agency should be given great deference, and that's all we're suggesting.

The Court gave deference to the DOT's position in Morales and also to that of the FTC. That was a different case. In our case, the DOT believes, and we believe, that the appropriate and only place to litigate matters involving breach of voluntary agreements is the State court.

Make no mistake about it, this is not a case of being in the State court or the Federal court. This is a situation unlike many of the other preemption statutes,

such as ERISA, where it's a question of being in the State court or having your claim extinguished. There is no claim if this case is preempted. There is no claim before the DOT, there is no claim in the Federal court, and there is no claim in the State court. These people are clearly without a remedy.

QUESTION: You're understandably worried about your own case, which I understand, but the thing that's difficult for me is exactly the same line of questioning.

That is, it would make sense if in this borderline area, where there's the risk that the contract law would so be interpreted as to interfere with competition, to consult DOT, and that's why I was intrigued by their notion of primary jurisdiction, but I'm worried about the statute and how this would actually work.

You may not have thought this out, and I don't expect you to, necessarily, but if you can, it might be helpful.

MR. GORDON: Your Honor, we believe that the primary jurisdiction doctrine would not be strictly applicable here because the DOT's jurisdiction in these cases is discretionary and nonexclusive.

We believe the better function of the DOT in these types of cases would be in the circumstance that if

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the airline felt they were being unfairly subjected or burdened by this plethora of State law that they would seek rulemaking.

They are in a position to seek rulemaking by the DOT on some issue where they believe that they are being unduly burdened by these numerous State laws, so I don't agree to that extent that there would be concurrent jurisdiction. I think that would be --

QUESTION: Mr. Gordon, you take the position in your brief that your Consumer Fraud Act claim is not preempted, either, is that correct?

MR. GORDON: Yes, Your Honor, Mr. Chief Justice.

QUESTION: You don't agree with the Government on that point, then.

MR. GORDON: We disagree with the Government on that point because we do not believe our Consumer Fraud Act claim relates to the rates, routes, and services in more than a tenuous manner. Our argument is limited to that on the consumer fraud.

We don't believe that there's some general rule necessary that consumer fraud claims are not preempted because they don't always involve the voluntary agreement of the parties, and they involve unfair and deceptive practices which are, of course, the subject matter of DOT jurisdiction, so to the extent that our consumer fraud

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claim does not relate to the rates, routes, or services in more than a tenuous manner, we do not believe it should be preempted.

The reservation of the right to change the program mentioned by Mr. Ennis is clearly an enforceable provision, although not really important, in my view, before this Court. It's enforceable based on what it says and what it doesn't say, and that would be for the State court to determine. We believe it's an unambiguous provision that they had the right to change the program prospectively only.

American ignores the irrefutable argument that they could always impose capacity control restrictions prospectively, because they had always reserved for themselves the right to do so. It is the retroactive effect of capacity control restrictions after the consumer has performed his end of the bargain that we are claiming in our complaint is a breach of contract.

It is important to note that the DOT does not provide for a remedy for these claimants. The Federal Aviation Act provides for public enforcement of the act, not for remedies for private parties.

No money damages or other restitution are available to a private party, and while the millions of plaintiffs in this class might each have filed a

rulemaking petition before the DOT claiming an unfair or a deceptive practice, they could not even make such an administrative charge for breach of contract, and even if they could, the only remedies provided for in the FAA are for the imposition of penalties or injunctive relief.

For the DOT to have the authority under any scenario to enforce breach of contract claims they would necessarily have to have jurisdiction over all of the parties to a contract. The DOT would have no jurisdiction if American Airlines wanted to sue a consumer, because the DOT has no jurisdiction over the individual, only the airline, so it would really be impossible for the DOT to have authority to adjudicate breach of contract claims.

Contracts are prominently mentioned in the Airline Deregulation Act. It is inconceivable that Congress intended for there to be contracts without providing or envisioning a mechanism to enforce contracts.

QUESTION: Well, I guess it is possible, of course, that under the present regime a dissatisfied customer could go to the DOT with a complaint and say, look, we think you, DOT, ought to order the airlines not to make retroactive changes, and I assume the Department of Transportation would have the authority to issue such a directive to the airlines if it chose to do so.

MR. GORDON: Justice O'Connor --

QUESTION: Do you disagree with that?

MR. GORDON: I only disagree to the extent the authority in that area that the DOT has is limited to unfair or deceptive practices. A breach of contract may rise to that level.

QUESTION: Well, the Department of Transportation surely has the authority to direct the airlines not to make retroactive changes in these programs.

MR. GORDON: I believe the Department of Transportation has the authority if they found it to be an unfair or deceptive practice. I do not believe they have the authority, and they don't profess to have the authority nor the desire to make these types of determinations in simple breach of contract actions.

QUESTION: Could they have the authority to say all airline frequent flyer programs must be retroactive in order to protect the airline's capacity to adjust?

MR. GORDON: They would have the authority to enter such a rule, yes, Justice Kennedy.

QUESTION: May I just ask one question that I'm kind of puzzling about? You've mainly argued, as the Government did, the contract claim rather than the consumer fraud statute, but as Justice O'Connor suggested in one of her questions, the relief under either would be

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precisely the same, wouldn't it?

MR. GORDON: It isn't the relief that we are distinguishing, it is the relationship to rates, routes, and services.

QUESTION: But they have precisely the same impact on rates, routes, and services. I don't know why one relates to rates, routes, and services more than the other.

MR. GORDON: One relates to the agreement of the parties, the other is an imposition of State law on deceptive practices. That's the only distinguishing feature I would suggest, Justice Stevens.

QUESTION: You have not abandoned your consumer fraud position, have you?

MR. GORDON: We do not abandon it. We believe that it does not more than tenuously relate to the rates, routes, or services of the airline, but we do not believe and do not profess that there should be some general rule that consumer fraud claims are not preempted.

QUESTION: Thank you.

MR. GORDON: The result in a necessary corollary of a finding of preemption in this case would be that the tort claims which will next reach this Court must also be preempted.

The Fifth Circuit is awaiting a rehearing en

banc in Hodges v. Delta Airlines involving a preemption of a negligence claim. The Court should understand that this case cannot be decided in isolation. There must be a ruling that contracts in tort claims were not intended to be preempted by Congress, and it is consistent, that position is consistent with the statutory language of the ADA.

The mechanisms for enforcement of a contract only exist in State law, and section 1506, which saves these common law claims, would have to be written completely out of the statute if the Court were to preempt contract and tort claims, because without contract and tort claims --

QUESTION: Mr. Gordon, what are we to do with Mr. Ennis' concession that tort claims aren't preempted?

MR. GORDON: I think, Justice Ginsburg, you should look very deeply into Mr. Ennis' position that they're tenuously related to the rates, routes, and service's of an airline.

I can't think of anything more closely related to the services of an airline than safety inspections of the aircraft, and for Mr. Ennis to conclude that that has a tenuous relationship to the rates, routes, and services of the airline while a voluntary agreement for a marketing promotion, a gimmick where they have all these partners

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and mileage credits being accumulated, is more closely related is an untenable argument, in my view.

Thank you.

QUESTION: Thank you, Mr. Gordon.

Mr. Ennis, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF BRUCE J. ENNIS, JR.

ON BEHALF OF THE PETITIONER

MR. ENNIS: Mr. Chief Justice:

First, there is no textual basis for the Government's unworkable distinction between normative and nonnormative contract claims, for two reasons. First, limiting preemption to State-imposed norms or policies is very much like limiting preemption to State-imposed requirements or prohibitions, which was the very different statutory language at issue in Cipollone, but section 1305 sweeps much more broadly. It preempts State laws that relate to rates, routes, and services, not just State laws that relate to rates, routes, and services and also impose State norms.

Second, as this Court made clear and held in Morales, section 1305 preempts State laws even if the underlying State policy would be consistent with the Federal objectives. There is, therefore, no reason to have this normative distinction, because State laws that relate to rates, routes, and services are preempted

regardless of what the underlying State policy is.

The express preemption clause is designed to preempt a sphere where there's a risk. Here, the risk is palpable because the impact of the statutory claim and the contract claim would be the same, and also --

QUESTION: Then why doesn't that pick up the tort claim, too?

MR. ENNIS: Your Honor, because the tort claim would not have the same impact. The respondents in this case are claiming a direct right to a particular rate. Tort claims are not claiming a direct right to a particular rate. Those are in the indirect, tenuousness exception of Morales.

Second, the remedy that preempted claimants would have here is exactly the same Federal remedy as the Government agrees would be sufficient for the normative contract claims that the Government agrees should be preempted.

Third, this case necessarily depends on State norms of unconscionability or inadequate notice. The argument that the reservation clause does not apply is an argument that it did not adequately inform consumers that it would have a so-called retroactive effect. That is the same argument they make under their statutory deceptive practices claim.

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QUESTION: Mr. Ennis, does the savings clause save anything in the realm of contract?

MR. ENNIS: Yes. It saves anything that is not preempted by the text of 1305. That's what this Court --

QUESTION: I'm trying to find out what is the business that the State court can handle that would be labeled a contract claim?

MR. ENNIS: I think, Your Honor, the Court answers that question by looking at the text of 1305 to decide on that basis what is or is not preempted, and what is not preempted --

QUESTION: Could you give me an example of something that wouldn't be preempted, a contract claim that would not be preempted under your view?

MR. ENNIS: I think a contract claim for lost luggage in which the claimant says my bag was worth $500 and the airline says it was worth $300 is not going to be preempted, because it doesn't directly assert a right to a particular rate, route, or service, and its indirect effect will be too tenuous or remote. Airlines are not going to change their competitive decisions on that ground.

Let me point out from page 33 of our opening brief that the DOT proceeding to which I referred was not just a rulemaking proceeding, it was a complaint

proceeding, and it challenged the very same American Airlines decision that is at issue here.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ennis.

MR. ENNIS: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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CASE NO.:93-1286

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BY Ann Marie Federico

(REPORTER)