

Fall 2011

Airline Employees Are Not Reporting Violations Because They Lack Adequate Whistleblower Protection: Are You Ready for Takeoff?

Katie Lynn Patrick

Recommended Citation

Katie Lynn Patrick, *Airline Employees Are Not Reporting Violations Because They Lack Adequate Whistleblower Protection: Are You Ready for Takeoff?*, 46 Val. U. L. Rev. 211 (2011).

Available at: <http://scholar.valpo.edu/vulr/vol46/iss1/7>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



AIRLINE EMPLOYEES ARE NOT REPORTING VIOLATIONS BECAUSE THEY LACK ADEQUATE WHISTLEBLOWER PROTECTION: ARE YOU READY FOR TAKEOFF?

I. INTRODUCTION

Dave was a mechanic for Fly High Airlines at an International Airport for over twenty years.¹ On his last shift working for the airlines, a Boeing 737 landed safely and taxied up to the gate.² The pilot who flew the plane informed the mechanics that he heard loud barrel canning noises at his feet throughout the flight. Dave investigated the problem before signing the plane off to fly its next route. He detected a problem with the struts in the fuselage and noticed that the mechanical defect was written up in the maintenance logs five times in the last week without being repaired.³ The struts in the fuselage were manufactured in 1968, and worn out to the extent that they caused a safety hazard in flight. At this point, the airplane's reliability was essentially the equivalent of a car manufactured in the 1960s.⁴ Unfortunately, a plane is incapable of pulling over if it experiences a mechanical emergency en route. Dave grounded the plane and sent it to the hangar for maintenance. However, the airline manager threatened to fire him if he reported the violations to the Federal Aviation Administration ("FAA") and did not sign the plane off to fly its scheduled route.⁵ Ironically, firing Dave and flying the plane

¹ This hypothetical was created by the author.

² See *About the 737 Family*, BOEING, <http://www.boeing.com/commercial/737family/background.html> (last visited Oct. 22, 2011) (stating that the 737 is "the world's most popular and reliable commercial jet").

³ See *A Glossary of Aviation Terms and Abbreviations*, AEROFILES (June 30, 2008), <http://www.aerofiles.com/glossary.html> (explaining that a fuselage is "[a]n aircraft's main body structure housing the flight crew, passengers, and cargo and to which the wings, tail and, in most single-engined airplanes, engine are attached"); see also Terry Ward, *How Safe is Your Plane?*, AOL TRAVEL NEWS (Apr. 8, 2010, 1:43 PM), <http://news.travel.aol.com/2010/04/08/how-safe-is-your-plane/> (illustrating similar maintenance violations by Southwest Airlines). In March 2008, Southwest Airlines was charged with a \$10.2 million fine for operating 46 planes on 59,791 flights without performing mandatory inspections for cracking in the plane's fuselage. *Id.*

⁴ See John W. Lincoln, *Managing the Aging Aircraft Problem* KN-1 (Oct. 2011), available at [http://ftp.rta.nato.int/public//PubFullText/RTO/MP/RTO-MP-079\(II\)//MP-079\(II\)-\(SM\)-\\$KN.pdf](http://ftp.rta.nato.int/public//PubFullText/RTO/MP/RTO-MP-079(II)//MP-079(II)-(SM)-$KN.pdf) (discussing the safety and economic implications of aging aircraft). Aging aircrafts have the potential of deteriorating flight safety if they are not properly maintained. *Id.* at KN-3. Fatigue cracking is one of the major challenges for aging aircrafts. *Id.* at KN-1. In 1988, fatigue cracking in the fuselage of a Boeing 737 resulted in the loss of the upper fuselage in flight. *Id.* at KN-7.

⁵ See Federal Aviation Act of 1958, Pub. L. No. 85-726, § 301(a), 72 Stat. 731, 744 (establishing the Federal Aviation Agency, which later became the FAA); 63 Fed. Reg.

212 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

in its unairworthy condition would have resulted in more violations for the airline.

Dave refused to sign the plane off to fly. He sent the plane to the hangar for maintenance and reported the violations to the FAA. Dave was terminated. After evaluating his options, Dave decided to bring a state whistleblower claim against Fly High Airlines instead of a federal claim.⁶ Dave knew his claim had merit and did not want to go through the hassle involved with the Federal Whistleblower Protection Program (“WPP”), which would have required a complaint and investigation procedure with the Department of Labor (“DOL”).⁷ Fly High Airlines removed the claim to federal court and argued that the state whistleblower claim was preempted by the Airline Deregulation Act (“ADA”), as amended by the WPP.⁸

Unfortunately, the outcome of Dave’s case will depend on which circuit is deciding the issue. Currently, there is a circuit split as to whether the ADA, as amended by the WPP, preempts state whistleblower claims.⁹ The Eighth Circuit held that state whistleblower

61206, 61316 (Nov. 9, 1998) (“The stated FAA mission is to provide a safe, secure, and efficient global aviation system.”); *see also* JOHN W. FISCHER, BART ELIAS AND ROBERT S. KIRK, CONG. RESEARCH SERV., RL 34467, U.S. AIRLINE INDUSTRY: ISSUES AND ROLE OF CONGRESS 11 (2008) (stating that “the FAA has been given broad authority to regulate and promote safety within the airline industry”).

⁶ *See* BLACK’S LAW DICTIONARY 1734 (9th ed. 2009) (defining whistleblower act and whistleblower). A whistleblower act is “[a] federal or state law protecting employees from retaliation for properly disclosing employer wrongdoing such as violating a law or regulation, mismanaging public funds, abusing authority, or endangering public health or safety.” *Id.* A whistleblower is “[a]n employee who reports employer wrongdoing to a governmental or law enforcement agency.” *Id.*; *see also* Jacqueline P. Taylor, *The World of Whistleblowers: Are They Sinners or Saints?*, WOMENOF.COM, http://www.womenof.com/THE_WORLD_OF_WHISTLEBLOWERS_ARE_THEY_SINNERS_OR_SAINTS-Article.aspx (last visited Oct. 22, 2011) (explaining whistleblowers, their goals behind blowing the whistle, and the risks they face). The common characteristics among whistleblowers are “their ethics-driven reasons for whistleblowing, their whistleblowing experiences, and the resulting retaliation directed at them by their adversaries.” *Id.* “[T]he primary goal whistleblowers usually seek is accountability for misbehavior and correction of the problems they see in the work place.” *Id.*

⁷ *See* Whistleblower Protection Program, 49 U.S.C. § 42121(b) (2006) (explaining the DOL process); *infra* notes 83–88 and accompanying text (explaining the complaint and investigation procedure with the DOL).

⁸ *See* Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (2006) (stating the express preemption provision of the ADA); 49 U.S.C. § 42121 (providing federal whistleblower protection to airline employees).

⁹ *Compare* Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1263–64 (11th Cir. 2003) (holding that the WPP does not preempt state whistleblower claims), *with* Botz v. Omni Air Int’l, 286 F.3d 488, 498 (8th Cir. 2002) (holding that the flight attendant’s claim under the Minnesota whistleblower statute was preempted by the ADA as amended by the WPP).

claims are preempted by the WPP while the Third, Ninth, and Eleventh Circuits adopted an opposing view.¹⁰ A resolution is necessary to ensure airline employees are treated equally throughout the country. Adopting the majority position, state whistleblower claims should not be held within the scope of the ADA's preemption provision, and the WPP does not alter or expand this scope. Airline employees should be allowed to bring state claims against their employers because it will encourage violation reporting in the future, which will ensure the highest level of aviation safety.

First, Part II of this Note will discuss the relevant statutes, the federal preemption doctrine, and case law leading up to the circuit split concerning whether the WPP preempts state whistleblower claims.¹¹ Second, Part III will analyze the opposing views taken by the circuits and explore the problems with the Eighth Circuit's approach of interpreting the WPP to expand the scope of the ADA's preemption provision.¹² Lastly, Part IV will propose two alternative solutions – an amendment to the WPP and adoption of the majority position – to ameliorate the circuit split, encourage violation reporting, and ensure safety remains the top priority in the aviation industry.¹³

II. BACKGROUND

Congress amended the ADA to include the WPP, which provides federal whistleblower protection for airline employees.¹⁴ The WPP's statutory language is silent as to preemption; however, the circuits disagree on whether the WPP expands the scope of the ADA's preemption provision to include all state whistleblower claims.¹⁵

See generally 49 U.S.C. § 41713(b)(1) (stating the ADA's preemption clause); 49 U.S.C. § 42121 (adding the WPP to the ADA).

¹⁰ *See Ventress v. Japan Airlines*, 603 F.3d 676, 681 (9th Cir. 2010) (holding that state whistleblower claims are not preempted by the ADA, as amended by the WPP); *Gary v. Air Grp., Inc.*, 397 F.3d 183, 190 (3d Cir. 2005) (holding that the addition of the WPP did not expand the scope of the ADA's preemption provision); *Branche*, 342 F.3d at 1263–64 (holding that state whistleblower claims are not preempted by the WPP); *Botz*, 286 F.3d at 498 (holding that the WPP preempts state whistleblower claims).

¹¹ *See infra* Part II (explaining the history and purpose behind the ADA and its preemption provision, the Supreme Court's interpretation of the preemption provision, the WPP, and the opposing views in the circuits regarding the WPP and whether it expands the scope of the ADA's preemption provision).

¹² *See infra* Part III (analyzing the split in the circuits regarding the WPP and whether it expands the scope of the ADA's preemption clause).

¹³ *See infra* Part IV (explaining possible solutions to the circuit split).

¹⁴ *See infra* Part II.D (discussing the federal remedy for airline whistleblowers).

¹⁵ *See infra* Part II.E (discussing the circuit split).

214 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

Part II.A will begin with a brief history of the ADA, providing the foundation necessary to understand the purpose behind its preemption clause.¹⁶ After introducing the ADA, Part II.B will discuss the ADA's preemption clause and the federal preemption doctrine.¹⁷ Next, Part II.C will examine two Supreme Court cases that interpreted the language and scope of the preemption clause.¹⁸ Then, Part II.D will explore the relevant portions of the WPP.¹⁹ Lastly, Part II.E will journey through the two different positions the circuit courts have taken as to whether the ADA, as amended by the WPP, preempts state whistleblower claims.²⁰

A. History of the ADA

The airline industry was heavily regulated long before the passage of the ADA in 1978.²¹ Since 1938, the Civil Aeronautics Board ("CAB") regulated all domestic interstate air travel.²² The Federal Aviation Act of 1958 ("1958 Act") gave the CAB authority to regulate fares, routes, and services of the interstate airline industry along with the power to

¹⁶ See *infra* Part II.A (explaining the history and purpose of the ADA).

¹⁷ See *infra* Part II.B (explaining federal preemption of state law and the ADA's preemption provision).

¹⁸ See *infra* Part II.C (explaining the Supreme Court's interpretation of the language in the ADA's preemption provision).

¹⁹ See *infra* Part II.D (discussing the enactment of the WPP).

²⁰ See *infra* Part II.E (discussing the two opposing views in the circuit courts regarding the WPP and whether it alters the scope of the ADA's preemption clause).

²¹ See AVIATION IN THE UNITED STATES: AIRLINE DEREGULATION ACT, UNITED STATES DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD 29-30 (2010) [hereinafter AVIATION IN THE UNITED STATES] (explaining how "the federal Civil Aeronautics Board (CAB) had regulated all domestic interstate air transport routes as a public utility, setting fares, routes, and schedules").

²² Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973, amended by Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731; see AVIATION IN THE UNITED STATES, *supra* note 21, at 29 (explaining how the CAB started regulating the airline industry in 1937); ELIZABETH E. BAILEY ET AL., DEREGULATING THE AIRLINES 11 (Richard Schmalensee ed., 1989) (explaining that the Civil Aeronautics Act of 1938 created the CAB and gave it the authority to regulate the airline industry). The CAB consisted of a five-member independent regulatory agency. *Id.* The CAB had the authority to control who entered the industry, what routes an air carrier could enter, and who could leave the industry along with the authority to "regulate fares . . . , award direct subsidies to air carriers, control mergers and intercarrier agreements, . . . investigate deceptive trade practices and unfair methods of competition, exempt carriers from certain provisions of the act," and regulate safety. *Id.*; JEFFREY R. MILLER, THE AIRLINE DEREGULATION HANDBOOK 3 (1981) (explaining that "[o]ne of the main reasons for the Civil Aeronautics [A]ct of 1938 was to protect existing air carriers from competition and enable the infant industry to grow"). Since 1938, the CAB regulated the nation's airlines, which resulted in the airlines' remarkable growth. *Id.* at 1.

take administrative action against the airlines.²³ Consequently, an interstate airline had to apply to the CAB when it wanted a new route or an airfare change.²⁴ Significantly, the 1958 Act included a “saving clause” that stated federal regulations would not interfere with state law or common law already in existence pertaining to remedies, and it did not include a clause preempting state law.²⁵ In fact, the states regulated intrastate airlines, which sold tickets at lower prices than CAB regulated airlines and aided in prompting deregulation.²⁶ The heavy regulation by the CAB was inefficient and imposed high costs on consumers.²⁷ Thus,

²³ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731. The 1958 Act empowered the CAB to regulate the interstate airline industry. § 102(b), 72 Stat. at 740; see BAILEY ET AL., *supra* note 22, at 11 (discussing how the Federal Aviation Act of 1958 separated safety regulation from economic regulation). Originally, the CAB had the authority to regulate safety. *Id.* After the 1958 Act, the role of the CAB was to promote “adequate, economical, and efficient service by air carriers at reasonable rates [and] foster competition to the extent necessary to ensure ‘sound development.’” *Id.*; see also MILLER, *supra* note 22, at 3 (stating that the 1958 Act created the FAA and transferred the authority to regulate airline safety to the FAA).

²⁴ See AVIATION IN THE UNITED STATES, *supra* note 21, at 30 (“The CAB earned a reputation for bureaucratic complacency; airlines were subject to lengthy delays when applying for new routes or fare changes, which were not often approved.”). World Airways applied to the CAB to begin a low-fare route from New York City to Los Angeles and it took over six years for the CAB to study the request, which they dismissed because the record was “stale.” *Id.* (internal quotation marks omitted).

²⁵ Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1106, 72 Stat. 731, 798. “Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.” *Id.*; see *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995) (explaining that the federal statute did not include a preemption provision when it was first enacted). The “saving clause stat[es] [that] [n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” *Id.* (citations omitted) (internal quotation marks omitted); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (stating that the “‘saving clause’” enabled states “to regulate intrastate airfares (including those offered by interstate air carriers),” and state regulation was not expressly preempted by the 1958 Act).

²⁶ See AVIATION IN THE UNITED STATES, *supra* note 21, at 29 (explaining how intrastate airlines were regulated by the state governments in which they operated, and not the CAB); see also John W. Barnum, *What Prompted Airline Deregulation 20 Years Ago? What Were the Objectives of That Deregulation and How Were They Achieved?*, Presentation to the Aeronautical Law Committee of the Business Law Section of the International Bar Association (Sept. 15, 2008), available at <http://library.findlaw.com/1988/Sep/1/129304.html> (discussing the success of intrastate carriers and its effect on deregulation). Intrastate carriers that were not regulated by the CAB were selling airline tickets at much lower prices than the CAB regulated airlines. *Id.*

²⁷ See AVIATION IN THE UNITED STATES, *supra* note 21, at 30 (“Most of the major airlines, whose profits were virtually guaranteed, favored the rigid system.”). The airlines did not mind such heavy regulation because the passengers were the ones paying the escalating fares. *Id.*; BAILEY ET AL., *supra* note 22, at 1 (discussing the effect of regulation and the trend of deregulation in the mid 1970s). In the mid 1970s, it was “argued that regulation raised

Congress was concerned that the airline industry would eventually crash.²⁸

In 1975, Congress held hearings related to airline deregulation.²⁹ Congress determined that “maximum reliance on competitive market

prices and limited the variety of goods and services available to consumers in many industries.” *Id.* Thus, “deregulation became the rallying cry of observers of the federal government’s regulatory agencies.” *Id.*; DEREGULATION OF NETWORK INDUSTRIES vii (Sam Peltzman & Clifford Winston eds., 2000) (discussing the purpose behind deregulation in the network industries). In the 1970s, the United States started to deregulate a variety of network industries, such as the energy, transportation, and communication industries. *Id.* The overall purpose of deregulation was to promote competition and benefit consumers. *Id.* The goal behind deregulating network industries was to allow markets to determine the allocation of resources, rather than regulators, and stimulate competition. *Id.* at vii–viii.

²⁸ See AVIATION IN THE UNITED STATES, *supra* note 21, at 30 (“Congress became concerned that air transport in the long run might follow the nation’s railroads into trouble; in 1970 the Penn Central Railroad had collapsed in what was then the largest bankruptcy in history”); DEREGULATION OF NETWORK INDUSTRIES, *supra* note 27, at 41 (discussing deregulation in the railroad industry). The railroad industry was deregulated because its performance under regulation was financially unsuccessful. *Id.* Penn Central, the nation’s largest railroad, and a half a dozen other railroads declared bankruptcy in 1970. *Id.* It was argued “that regulation was inhibiting rail profitability and that the industry needed much greater pricing and operating freedom to avoid more bankruptcies.” *Id.* at 41–42. Therefore, Congress began its attempt to deregulate the railroad industry. *Id.* at 42. Deregulation increased the railroads’ freedom to operate, stimulated competition, and benefited both consumers and the railroad industry. *Id.* at 43–45. As of 1998, operating costs per ton-mile “were 60 percent lower than when deregulation began.” *Id.* at 43; *see also* Barnum, *supra* note 26 (discussing how too much economic regulation can lead to bankruptcy). “[O]ne of the main reasons that the Penn Central and the Erie and the others had gone bankrupt was because there had been too much railroad too little utilized, and that there had been too much railroad because there had been too much public-utility-type economic regulation of the railroads.” *Id.* The bankruptcies that resulted from regulating the railroad industry aided in the decision to deregulate the airlines before they followed the trend of the railroads. *Id.*

²⁹ AVIATION IN THE UNITED STATES, *supra* note 21, at 30; *see Airline Deregulation Act of 1978: Hearing Before the Subcommittee on Aviation of the S. Comm. on Commerce, Science, and Transportation, 98th Cong. (1983) [hereinafter 1983 Hearings]* (statement of Frank Willis, Deputy Assistant Secretary for Policy and International Affairs, Department of Transportation) (explaining the concept of deregulation). “[D]eregulation is all about businessmen exploring the marketplace finding out what works and having the flexibility to create or modify operations as the marketplace dictates.” *Id.* *See generally* Barnum, *supra* note 26 (discussing seven factors that prompted airline deregulation). The first factor was airline pricing. *Id.* The cost of airline tickets was increasing, and the airlines lacked the ability to change fares because they were regulated similar to that of public utilities. *Id.* The second and third factors were the CAB’s regulation of who entered the airline business and what routes an airline could fly. *Id.* The fourth factor was the issue of significant delays imposed by the CAB. *Id.* The CAB frequently sat on applications from airlines who applied for entry or a new route. *Id.* The fifth factor was that the CAB approved capacity limitation agreements and immunized airlines from antitrust attacks. *Id.* The sixth factor was the fact that planes were flying only half full even though “most travelers would prefer to fly on fuller planes in order to pay less.” *Id.* Furthermore, intrastate carriers that were not regulated by the CAB showed the public that it was possible to achieve

forces” would best benefit the airline industry by advancing efficiency, innovation, low prices, and the quality of services.³⁰ Consequently, the ADA was signed into law on October 24, 1978; its main purpose was “to remove government control over fares, routes and market entry (of new airlines) from commercial aviation.”³¹ The regulatory powers of the CAB were to be gradually diminished, allowing airline passengers to experience market forces in the airline industry.³² The ADA would

satisfactory service while flying fuller planes. *Id.* The last factor that provoked deregulation was “the well publicized success of a few intrastate carriers like PSA and Southwest that were not regulated by the CAB and that were selling seats for much less than their CAB-regulated competition.” *Id.*

³⁰ 124 CONG. REC. 30662 (1978); *see Morales*, 504 U.S. at 378 (discussing the congressional intent behind the ADA).

³¹ AVIATION IN THE UNITED STATES, *supra* note 21, at 29. The goals of the ADA included:

[T]he maintenance of safety as the highest priority in air commerce; placing maximum reliance on competition in providing air transportation services; the encouragement of air service at major urban areas through secondary or satellite airports; the avoidance of unreasonable industry concentration which would tend to allow one or more air carriers to unreasonably increase prices, reduce services, or exclude competition; and the encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional markets by existing air carriers, and the continued strengthening of small air carriers.

Id. at 31; *see 1983 Hearings*, *supra* note 29 (statement of Frank Willis, Deputy Assistant Secretary for Policy and International Affairs, Department of Transportation) (discussing the elimination of government control in the industry and the desire to remain deregulated). He stated:

[W]e believe that airline deregulation has given the public a broader range of choices and services and prices, and it has expanded business opportunities, promoted employment opportunities and stimulated efficiency in the industry as a whole. We think there is a compelling case for deregulation being made in the marketplace, and the best evidence we can present for that is that there is no cry in the commercial airline industry nor among its users for a return to extensive Government control.

Id.

³² *See* AVIATION IN THE UNITED STATES, *supra* note 21, at 29 (discussing the diminishing powers of the CAB); BAILEY ET AL., *supra* note 22, at 34 (explaining how the regulatory authority of the CAB gradually diminished). The author explained:

The Airline Deregulation Act (ADA) proposed a gradual relaxation of the CAB’s regulation of the industry, with full rate and route authority to phase out over a four-year period. The Board’s authority over routes was to end on December 31, 1981, and its authority over fares on January 1, 1983. Its authority over domestic mergers, intercarrier agreements, and interlocking directorates would transfer to the Department of Justice on January 1, 1983. The Board would cease operations entirely on January 1, 1985. The remaining tasks of international negotiation and small community air service would shift to the Department of Transportation on that date.

218 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

stimulate open competition in the airline industry, encourage new airlines to enter the market, allow service in small communities to continue, and encourage the use of secondary airports in large cities.³³

Ultimately, the ADA eliminated heavy government-imposed regulation and gave airlines the freedom to compete in the market.³⁴ Furthermore, the ADA enabled airlines to control their own ticket prices, routes, and entry into the market, which allowed consumers to benefit from lower prices.³⁵

B. ADA's Preemption Provision and Federal Preemption of State Law

In addition to deregulating the airlines, it was important to ensure that state regulation did not interfere with the ADA's objectives.³⁶ Therefore, Congress included an express preemption provision in the ADA to prevent state regulation from adversely affecting the federal deregulation process.³⁷ However, Congress did not alter or repeal the "saving clause" of the 1958 Act when it enacted this provision.³⁸

Id.; see also 1983 Hearings, *supra* note 29 (statement of Frank Willis, Deputy Assistant Secretary for Policy and International Affairs, Department of Transportation) (discussing the impact the ADA of 1978 had on the airline industry). The result of airline deregulation "has been an increased competitive environment with positive effects on service, efficiency, and fares." *Id.*

³³ MILLER, *supra* note 22, at 11; see DEREGULATION OF NETWORK INDUSTRIES, *supra* note 27, at 1 (discussing the benefits of deregulation in the airline industry). According to economists, a public policy is successful when its benefits outweigh its costs. *Id.* The benefits of deregulating the airlines far exceed the costs. *Id.* Deregulating the airlines "allow[ed] airlines to set their own fares and decide which markets to serve." *Id.* On average, the fares in the deregulated airline market "were immediately lower . . . than they would have been had they continued to be regulated." *Id.* Customers also benefited from deregulation because it allowed the airlines to serve all markets. *Id.* at 2. Thus, travelers did not have to make as many connections. *Id.* As a result, customers were not required to change airlines as frequently. *Id.*

³⁴ See *supra* notes 29-33 and accompanying text (explaining the effects of deregulation in the airline industry).

³⁵ See *supra* note 33 and accompanying text (explaining how deregulation benefitted the airline industry).

³⁶ See *supra* Part II.A (explaining the purpose of the ADA and its objectives).

³⁷ Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (2006); see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any carrier.").

³⁸ *Morales*, 504 U.S. at 378-79 (1992). The "'saving clause' [states] that '[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.'" *Id.* at 378 (quoting 49 U.S.C. § 1506); see Deborah F. Buckman, Annotation, *Preemption by Airline Deregulation Act*, 49 U.S.C.A. § 41713(b)(1), of *State Law Labor-Related Claims*, 41 A.L.R. FED.

The ADA's preemption provision prohibits states from "enact[ing] or enforc[ing] . . . law[s], regulation[s], or other provision[s] having the force and effect of law related to a price, route, or service of an air carrier."³⁹ Unfortunately, the term "service" in the preemption clause is vague and undefined, which has caused courts to adopt different definitions of the term over the years.⁴⁰ Some courts apply a broad definition of service, extending the scope of the preemption clause to include claims dealing with issues such as baggage handling and boarding procedures.⁴¹ Other courts adopt a more narrow definition of

2D 215, § 3 (2009) (discussing the express savings clause that was retained in the ADA despite the ADA's preemption provision). The author discussed how:

Congress intended to occupy the field of regulation of airline services, prices, and routes, but it did not intend to alter those remedies existing under the common law in other fields pertaining to airlines. . . . The existence of a savings clause does not alone, however, allow the creation of federal common law in the absence of congressional intent to fashion such a remedy. Further, this general remedies savings clause may not undermine the effect of the ADA's express preemption provision and therefore does not shelter state actions from preemption.

Id. (footnotes omitted).

³⁹ 49 U.S.C. § 41713(b)(1); *cf.* *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995) (explaining how this title of the United States Code was reenacted in 1994). Congress revised this clause and changed the wording, but Congress intended no substantive change to be made. *Id.*

⁴⁰ See Eric E. Murphy, *Federal Preemption of State Law Relating to an Air Carrier's Services*, 71 U. CHI. L. REV. 1202-17 (2004) [hereinafter *Air Carrier's Services*] (presenting the different definitions of "services" that have been adopted by courts). The Supreme Court has never interpreted the term "services" in the preemption provision. *Id.* at 1202. Courts have adopted very different definitions of the term "service" that range between a broad definition, which is the most preemptive, and a narrow definition, which is the least preemptive. *Id.* at 1202-03. The broad definition of "services" interprets the term as including all matters in "the contractual arrangement between the airline and the user of the service." *Id.* at 1203 (quoting *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995)). Examples of items that would be included would be "ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." *Id.* (quoting *Hodges*, 44 F.3d at 336). This definition has "broad preemptive effect." *Id.* Some courts use this definition in a more limited manner by giving it exceptions, such as "distinguishing between a service and the operation of the plane and between economic and safety services." *Id.* at 1205. Other courts apply the narrow definition of "services," which interprets the term as meaning air services. *Id.* at 1206. The narrow definition includes things related to actual air transportation and scheduling, limiting the scope of preemption. *Id.*

⁴¹ See *Arapahoe Cnty. Pub. Airport Auth. v. Fed. Aviation Admin.*, 242 F.3d 1213, 1222 (10th Cir. 2001) (accepting the broad definition of "services" adopted by *Hodges*); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (adopting the broad definition established in *Hodges*); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (accepting the Fifth Circuit's broad definition of "services"); *Hodges*, 44 F.3d at 336 (defining services as having a broad definition). *Hodges* determined that:

“service,” limiting the scope of preemption to claims actually related to air transportation and scheduling.⁴²

It is well established that Congress retains power to implement preemption provisions pursuant to the Supremacy Clause, which provides that states are bound by the laws of the United States.⁴³ Accordingly, federal law trumps state law when the two are in conflict because the laws of the United States are “the [S]upreme Law of the Land.”⁴⁴ Preemption is important because it “allocat[es] governing

“Services” generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as “services” and broadly to protect from state regulation.

Id. (quoting *Hodges*, 44 F.3d at 354).

⁴² See *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000) (accepting the narrow definition of “services”). Services pertain to “the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided.” *Id.* (alteration in original) (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265–66 (9th Cir. 1998)); *Charas*, 160 F.3d at 1265–66 (rejecting the broad definition of services and replacing it with a narrow definition). *Charas* stated that:

Airlines’ “rates” and “routes” generally refer to the point-to-point transport of passengers. “Rates” indicates price; “routes” refers to courses of travel. It therefore follows that “service,” when juxtaposed to “rates” and “routes,” refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, “This airline provides service from Tucson to New York twice a day.”) To interpret “service” more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended.

Id.

⁴³ U.S. CONST. art. VI, § 1, cl. 2. The Supremacy Clause states that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *Id.*; see BLACK’S LAW DICTIONARY, *supra* note 6, at 1297 (defining preemption as “[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation”).

⁴⁴ U.S. CONST. art. VI, § 1, cl. 2; see *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass.*, 507 U.S. 218, 224 (1993) (“Consideration under the Supremacy Cause starts with the basic assumption that Congress did not intend to displace state law.” (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981))); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (discussing when state law must yield to federal law). “[A]ny State law, however clearly within a State’s acknowledged

authority between the federal and state governments.”⁴⁵ Federal preemption of state law can occur one of two ways: (1) where federal law expressly preempts state law; and (2) where preemption is implied by a clear congressional intent to preempt state law.⁴⁶ Express preemption occurs when Congress explicitly states its command in the statute’s language, such as with a preemption provision.⁴⁷ Implied preemption occurs when the Congressional command is implicitly

power, which interferes with or is contrary to federal law, must yield.” *Id.* (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)) (internal quotation marks omitted); *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (explaining that state law must give way to federal law even when it encompasses important state interests). “[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.” *Id.*

⁴⁵ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 395 (3rd ed. 2006); see *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (discussing the importance of respecting the States, even in areas that are heavily regulated such as the FDA).

⁴⁶ CHERMERINSKY, *supra* note 45, at 393; see *Gade*, 505 U.S. at 98 (explaining principles of preemption). The Court explained:

Pre-emption may be either express or implied, and “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Absent explicit preemptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” and conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Id. (citations omitted); see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (explaining that state law is preempted when it “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress”); Gabriel F. Siegle, *Switching Tracks: Complete Preemption Removal and the Railway Labor Act*, 2007 U. ILL. L. REV. 1107, 1121 (2007) (discussing complete preemption). The complete preemption doctrine “permits the removal of claims from state court, pleaded in terms of state law, under a limited set of circumstances.” *Id.* When the preemptive force of a statute is “so powerful as to displace entirely any state cause of action,” then the “claim arises under federal law, [and] falls within the removal jurisdiction of a federal court.” *Id.* There are only three statutes that have been identified as having complete preemption: the Labor Management Relations Act, Employment Retirement Income Security Act, and the National Bank Act. *Id.*

⁴⁷ *Gade*, 505 U.S. at 98; see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (“The question, at bottom, is one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” (internal quotation marks omitted)); CHERMERINSKY, *supra* note 45, at 396–401 (discussing express preemption). “[E]ven if there is statutory language expressly preempting state law, Congress rarely is clear about the scope of what is preempted . . . and this inevitably is an inquiry into congressional intent.” *Id.* at 393.

222 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

contained in its structure and purpose.⁴⁸ Determining congressional intent is necessary in both express and implied preemption.⁴⁹ Generally, police powers of the states are not to be preempted unless there is a “clear and manifest purpose of Congress.”⁵⁰ There is a presumption against preemption when historic police powers of the states are at issue because states are respected by the Federal Government as “independent sovereigns in our federal system, [which] leads us to assume that

⁴⁸ *Gade*, 505 U.S. at 98. The Court looks at congressional intent to determine preemption. *Id.*; see *Wyeth*, 129 S. Ct. 1187, 1194–95 (2009) (discussing the foundation of preemption jurisprudence). There are two main principles in our preemption jurisprudence. *Id.* at 1194–95. “First, ‘the purpose of Congress is the ultimate touchstone in every preemption case.’” *Id.* at 1194 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The second principle is “the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.* at 1194–95 (quoting *Medtronic*, 518 U.S. at 485) (internal quotation marks omitted); CHEMERINSKY, *supra* note 45, at 393 (“[I]mplied preemption is often a function of both perceived congressional intent and the language used in the statute or regulation.”).

⁴⁹ See CHEMERINSKY, *supra* note 45, at 393 (discussing congressional intent in express and implied preemption). The Court must determine congressional intent in both express and implied preemption. *Id.* The problem is that Congress almost never clearly or expressly states its intent regarding the scope of preemption. *Id.* at 394. The Court is often left to discern congressional intent by using “fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation.” *Id.*

⁵⁰ *Rice v. Santa Fe Elevator Corp*, 331 U.S. 218, 230 (1947). Historic police powers of the states are not to be preempted without a “clear and manifest purpose of Congress.” *Id.* The Court explained:

Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Id. at 230–31 (citations omitted); see *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (observing that Congress should clearly state its intention regarding the preemption of state laws). “The exercise of federal supremacy is not lightly to be presumed.” *Id.* (quoting *Schwartz v. Texas*, 344 U.S. 199, 202–03 (1952)); BLACK’S LAW DICTIONARY, *supra* note 6, at 1276 (defining police power). A police power is “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.” *Id.* States have a “Tenth Amendment right . . . to establish and enforce laws protecting the public’s health, safety, and general welfare, or to delegate this right to local governments.” *Id.*

Congress does not cavalierly pre-empt state law causes of action.”⁵¹ Congress expressly exercised its Supremacy Clause power to implement the ADA’s preemption provision and preempt state law from interfering with the newly deregulated airline industry, but it was unclear regarding its meaning of “service.”⁵²

C. *Supreme Court’s Interpretation of the ADA’s Preemption Provision*

Two Supreme Court cases have interpreted the language of the ADA’s express preemption provision.⁵³ The first case was *Morales v. Trans World Airlines, Inc.*, decided in 1992.⁵⁴ The issue in *Morales* was whether the states were preempted from enforcing their general consumer protection statutes to prohibit allegedly deceptive airline fare advertisements.⁵⁵ The Court began its analysis by looking to the language of the statute itself.⁵⁶ As noted, the statute “expressly preempt[ed] the states from ‘enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier’”⁵⁷ The

⁵¹ See *Wyeth*, 129 S. Ct. at 1195 n.3 (quoting *Medtronic, Inc.*, 518 U.S. at 485) (internal quotation marks omitted) (discussing the presumption against preemption). Furthermore, the Court stated that the presumption “accounts for the historic presence of state law,” and it may apply in areas that are heavily regulated by the federal government. *Id.* Therefore, the absence of federal regulation is not required for the presumption to apply. *Id.*

⁵² See *supra* notes 43–51 and accompanying text (discussing Congress’s power under the Supremacy Clause); *supra* notes 40–42 and accompanying text (explaining how courts have adopted different definitions of “service”).

⁵³ See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (interpreting the preemption provision under the ADA and elaborating on the standards set forth in *Morales*); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (interpreting the ADA’s preemption provision for the first time).

⁵⁴ 504 U.S. 374 (1992).

⁵⁵ *Id.* at 378. In 1987, the National Association of Attorneys General adopted Air Travel Industry Enforcement Guidelines. *Id.* at 379. These guidelines contained specific standards that governed “the content and format of airline advertising, the awarding of premiums to regular customers (so-called ‘frequent flyers’), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights.” *Id.* These guidelines did not attempt to create new laws or regulations in the airline industry. *Id.* Rather, they explained “how existing state laws appl[ied] to air fare advertising and frequent flyer programs.” *Id.* (internal quotation marks omitted). The attorneys general of seven states notified major airlines that they were in violation of the guidelines. *Id.* Airlines filed suit in federal district court claiming that the state regulation of fare advertisements is preempted by the ADA. *Id.* at 380.

⁵⁶ *Morales*, 504 U.S. at 383. The Court “[began] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Id.* (internal quotation marks omitted).

⁵⁷ *Morales*, 504 U.S. at 383 (alteration in original) (quoting 49 U.S.C. app. § 1305(a)(1)). The preemption provision was reenacted and reworded in 1994. Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (2006). The current wording of the ADA preemption provision is

224 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

Supreme Court focused on the phrase “relating to.”⁵⁸ The Court determined that the ordinary meaning of “relating to” is broad; therefore, the provision serves a broad preemptive purpose.⁵⁹

The Court analogized the Employee Retirement Income Security Act (“ERISA”) cases, where it had interpreted the “relates to” an employee benefit plan language as “if it has a connection with, or reference to, such a plan.”⁶⁰ The *Morales* Court adopted this standard.⁶¹ As a result, state laws, regulations, or other provisions are preempted if they have a connection with or reference to airline “rates, routes, or services.”⁶² The Court further explained that certain state laws may not be preempted if they affect the scope of the statute in “too tenuous, remote, or peripheral a manner.”⁶³

The Supreme Court also applied ERISA precedent to reach its holding that the ADA preemption provision preempts both state laws

the following: a state “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.” § 41713(b)(1); see *Wolens*, 513 U.S. at 223 n.1 (explaining that no substantive changes were intended by Congress when it revised the preemption provision).

⁵⁸ See *Morales*, 504 U.S. at 383 (“[T]he key phrase, obviously, is ‘relating to.’”).

⁵⁹ *Id.* at 383–84. The Court explained that “[t]he ordinary meaning of these words is a broad one . . . and the words thus express a broad pre-emptive purpose.” *Id.* at 383. “[R]elating to’ [means] . . . ‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.’” *Id.* (quoting BLACK’S LAW DICTIONARY 1158 (5th ed. 1979)).

⁶⁰ *Morales*, 504 U.S. at 384. The ERISA preemption clause stated that all state laws are superseded “insofar as they may now or hereafter relate to any employee benefit plan.” ERISA, 29 U.S.C. § 1144(a) (2006); see *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983) (“The breadth of [the provision’s] pre-emptive reach is apparent from [its] language.”). The Court defined “relates to” in ERISA’s preemption provision as “ha[ving] a connection with or reference to such a plan.” *Id.* at 96–97; see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (stating that ERISA’s preemption provision is “deliberately expansive, and designed to ‘establish pension plan regulation as exclusively a federal concern’”).

⁶¹ *Morales*, 504 U.S. at 384. The language in the ADA’s preemption provision was identical to the language in ERISA’s preemption provision. *Id.*; see 29 U.S.C. § 1144(a) (showing the similarly worded preemption provision of ERISA).

⁶² *Morales*, 504 U.S. at 384 (internal quotation marks omitted). “Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline ‘rates, routes, or services’ are pre-empted under 49 U.S.C.App [sic] § 1305(a)(1).” *Id.*

⁶³ *Id.* at 390. Examples of laws that would be “far more tenuous” than the law addressed in *Morales* are state laws concerning “nonprice aspects of fare advertising.” *Id.* The Court stated that the “saving clause” does not adversely affect the preemption provision because it is merely a relic of the pre-ADA era that lacked a preemption provision. *Id.* at 384–85. In statutory construction, the specific governs the general; therefore, a general saving clause protecting state remedies cannot be allowed to trump a specific substantive preemption provision. *Id.* “[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause.” *Id.* at 385 (internal quotation marks omitted).

specifically addressed to the airline industry and laws of general applicability that may have an indirect effect.⁶⁴ Additionally, the Court held that the ADA's preemption provision preempted all state laws that fall within its scope, including state laws that are consistent with the provision.⁶⁵ Thus, the Supreme Court held that the fare advertising provisions in *Morales* were preempted by the ADA.⁶⁶

In the second case, *American Airlines v. Wolens*, the Supreme Court interpreted "relating to rates, routes, or services" as meaning states cannot impose their own public policies, regulation, or competition theories on airline operations.⁶⁷ In *Wolens*, the airline modified the terms and conditions of its frequent flyer program and applied it retroactively.⁶⁸ Customers who earned credits prior to the modification of the frequent flyer program were disadvantaged because their credits

⁶⁴ See *id.* at 386 (explaining the petitioner's argument against preemption). The petitioner argued that laws of general applicability were not preempted by the ADA. *Id.* The only laws preempted were state laws specifically tailored to the airline industry. *Id.* The Court disagreed with this notion; it completely ignored the broad "relating to" language. *Id.* Furthermore, the Court reasoned that they "have consistently rejected this precise argument in [their] ERISA cases: '[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.'" *Id.*

⁶⁵ See *id.* at 387 (addressing the argument that state laws should not be preempted when they are consistent with federal law). The statute's language does not suggest that its preemption is limited to inconsistent state regulation. *Id.*

⁶⁶ *Id.* at 391. The Court explained that state restrictions on fare advertising have a direct effect on airline fares. *Id.* at 388. Advertising informs the public of prices and services, thereby performing a role in the allocation of resources. *Id.* State restrictions on advertising increases the difficulty of finding the lowest cost seller and thus reduces the incentive to price competitively. *Id.*; see *Ill. Corporate Travel v. Am. Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989) (stating that "[p]rice advertising surely 'relates to' price," as stated by Judge Easterbrook).

⁶⁷ 513 U.S. 219, 229 n.5 (1995) (internal quotation marks omitted). The *Wolens* Court also interpreted other terms and phrases from the preemption provision such as "'enforce,'" "'enact,'" and "'having the force and effect of law.'" *Id.* The Court stated that the words "'enforce'" and "'enact'" "'could [] be read to preempt even state-court enforcement of private contracts.'" *Id.* However, the phrase "'law, rule, regulation, standard, or other provision'" indicates "'official, government-imposed policies, not the terms of a private contract.'" *Id.* The Court further explained that the phrase "'having the force and effect of law'" is most naturally read to "'refe[r] to binding standards of conduct that operate irrespective of any private agreement.'" *Id.*

⁶⁸ *Id.* at 225. Plaintiffs participated in American Airlines' frequent flyer program called AAdvantage, which gave participants an opportunity to earn mileage credits when they flew American. *Id.* at 224. The mileage credits could be exchanged for airline tickets or class upgrades. *Id.* American made modifications to the AAdvantage program and applied them retroactively. *Id.* at 225.

226 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

were devalued.⁶⁹ The Court held that the state consumer fraud act claim was preempted, but the state law breach of contract claim was not.⁷⁰ The Court determined that the purpose of the ADA was to leave the selection and design of marketing mechanisms to the airline industry and not to the states.⁷¹ Therefore, the consumer fraud claim, which related to “rates” and affected the airlines’ marketing scheme, was preempted by the ADA’s preemption clause.⁷² In regards to the state law breach of contract claim, the Court explained that the ADA’s preemption clause, when read with the “savings clause,” allowed states to afford relief to a party who claimed and proved that an airline dishonored a term that it stipulated.⁷³

Ultimately, *Morales* and *Wolens* established the test for determining preemption under the ADA.⁷⁴ A state law is preempted by the ADA’s preemption provision if it “relates to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them.”⁷⁵

⁶⁹ *Id.* at 224–25. Plaintiffs brought suit against the airline claiming that the cutbacks violated the Illinois Consumer Fraud and Deceptive Business Practices Act and constituted a breach of contract. *Id.* at 225.

⁷⁰ *Id.* at 222. The remedy sought for the breach of contract claim merely holds the parties to their agreement. *Id.* at 229. Furthermore, holding that the ADA permits state law breach of contract claims “makes sense of Congress’ retention of the FAA’s saving clause.” *Id.* at 232.

⁷¹ *Id.* at 228.

⁷² *Id.* States are stopped from “imposing their own substantive standards with respect to rates, routes, or services.” *Id.* at 232.

⁷³ *Id.* at 232–33. The Court did “not read the ADA’s preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings.” *Id.* at 228. The terms and conditions offered by airlines, and accepted by passengers, are “privately ordered obligations ‘and thus do not amount to a State’s enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of [the ADA’s preemption provision].’” *Id.* at 228–29 (alteration in original).

⁷⁴ See *supra* notes 54–66 and accompanying text (explaining how *Morales* established the test to determine preemption under the ADA); *supra* notes 67–73 and accompanying text (illustrating how *Wolens* applied the *Morales* test); see also *Wolens*, 513 U.S. at 234–35 (explaining that the scope of the ADA’s preemption provision is too complicated to be settled by two Supreme Court cases). “[W]hile we adhere to our holding in *Morales*, we do not overlook that in our system of adjudication, principles seldom can be settled ‘on the basis of one or two cases . . .’” *Id.*

⁷⁵ *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996) (internal quotation marks omitted) (clearly stating the test established by the Supreme Court in *Morales* and *Wolens*).

D. *The WPP*

After the Supreme Court interpreted the ADA's preemption provision, the enactment of the WPP complicated the analysis.⁷⁶ For many years, the aviation industry lacked a federal whistleblower statute to protect airline employees.⁷⁷ In 2000, Congress enacted the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") to improve airline safety.⁷⁸ AIR 21 included a federal whistleblower protection program providing uniform whistleblower protection to airline employees for the first time.⁷⁹ Thus, the ADA was amended to

⁷⁶ See *supra* Part II.A-C (explaining the purpose behind the ADA and its preemption provision and discussing the Supreme Court's interpretation of the ADA's preemption provision).

⁷⁷ See Peter R. Marksteiner, *The Flying Whistleblower: It's Time for Federal Statutory Protection for Aviation Industry Workers*, 25 J. LEGIS. 39, 39 (1999) (discussing the need for a federal whistleblower statute). Employees in the aviation industry were not completely unprotected from whistleblower retaliation; however, they did not enjoy a federal whistleblower statute. *Id.* A federal whistleblower statute was necessary to encourage airline employees to report violations without fear of retaliation. *Id.* The FAA is in charge of monitoring and enforcing safety standards in the aviation industry. *Id.* at 40. Since the demand for regional and commuter airlines has catapulted, "[t]he FAA has turned to the carriers themselves to monitor their own compliance with FAA standards under what is referred to as the 'Safety Partnership' program." *Id.* at 39. Like other agencies, the FAA has limited resources and a fixed budget. *Id.* at 40. Airline employees are in the best situation to discover and report safety violations. *Id.* at 39. However, without federal statutory protection for aviation whistleblowers, employees in the airline industry will not come forward with violations due to fear of reprisal. *Id.* at 73; Rita Murphy, *OSHA, AIR21 and Whistleblower Protection for Aviation Workers*, 56 ADMIN. L. REV. 901, 910 (2004) [hereinafter *OHSAs, AIR 21 and Whistleblower Protection*] ("Congress began seriously contemplating a whistleblower protection program in the late 1990s after a string of commercial passenger plane crashes pushed safety concerns to the forefront.").

⁷⁸ Whistleblower Protection Program, 49 U.S.C. § 42121 (2006); see AVIATION IN THE UNITED STATES, *supra* note 21, at 203 (discussing the enactment of AIR21); Marksteiner, *supra* note 77, at 50 (discussing the relationship between airline safety and statutory whistleblower protection). The author explained that if people felt free to report violations without fear of reprisal, the violations would be corrected and the safety risks would be eliminated. *Id.*

⁷⁹ 49 U.S.C. § 42121; see 146 CONG. REC. 2814 (2000) (explaining that the objective of the WPP was to provide whistleblower protection to airline employees to encourage violation reporting and ensure safety); AVIATION IN THE UNITED STATES, *supra* note 21, at 206; Marksteiner, *supra* note 77, at 52 (discussing how "[t]he FAA relies on voluntary reporting by airline employees to compile and track much of the data it needs in order to perform its safety function"). The author stated:

[R]eliance on front-line employees to report violations of laws or rules is an indispensable asset to regulatory agencies whose ability to regulate effectively is limited by finite resources. The benefits from those front-line employees are potentially lost if they must choose between reporting essential information to the FAA and the possibility of losing their jobs. . . . Workers need the protections offered by this

228 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

include the WPP.⁸⁰ The WPP provided a federal cause of action for employees that protected them from retaliatory termination or discrimination for reporting violations or alleged violations to the FAA or the company itself.⁸¹ The WPP did not include an express preemption provision, did not reference preemption in any way, and did not indicate that it was an expansion of the preemption clause in the ADA.⁸²

Under the WPP, an employee may not directly file a civil action in federal court against his employer.⁸³ Pursuant to the statute, an employee is required to go through an administrative complaint and investigation process with the DOL.⁸⁴ First, he must file a complaint with the Secretary of Labor ("Secretary").⁸⁵ Then, the Secretary assesses

law if they are expected to act as an extension of the FAA's safety inspection component.

Id. at 53–54.

⁸⁰ 49 U.S.C. § 42121; *see* Buckman, *supra* note 38, § 2 (discussing the history of the ADA and the WPP).

⁸¹ 49 U.S.C. § 42121; *see* Marksteiner, *supra* note 77, at 51 (explaining the important role airline employees play in reporting safety violations to the FAA and the need to protect these employees from retaliation). The author explained:

[I]n the aviation industry, the FAA recognizes that employee participation is essential to implement the FAA policy of insuring that air travel is as safe as possible for the traveling public. . . . [T]he FAA will not be adequately able to enforce its safety policy unless the workers upon whom the FAA relies are confident they can report violations without fear of reprisal.

Id.

⁸² 49 U.S.C. § 42121; *see* Buckman, *supra* note 38, § 2 (stating that the WPP "contains no reference to preemption and no indication that it altered or added anything to the ADA's preemption provisions").

⁸³ 49 U.S.C. § 42121(b)(1). The complaint procedure under the WPP states that "[a] person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of [49 § 42121(a)] may . . . file (or have any person file on his or her behalf) a complaint with the Secretary . . ." *Id.*

⁸⁴ *Id.* § 42121(b). A person who believes that he has been retaliated against in violation of the WPP may file a complaint with the Secretary "not later than 90 days after the date on which such violation occur[ed]." *Id.* § 42121(b)(1); *see* Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1261 n.8 (11th Cir. 2003) (explaining the process of going through the DOL under the WPP); AVIATION IN THE UNITED STATES, *supra* note 21, at 206 ("The time limit for employees to make such complaints in writing to the Occupational Safety and Health Administration is 90 days from the date of each adverse employment action.").

⁸⁵ 49 U.S.C. § 42121(b)(1). Upon receiving the complaint, the Secretary will "notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person." *Id.* The Secretary shall afford the person named in the complaint an opportunity to submit a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses. *Id.* § 42121(b)(2)(A); *see supra* notes 83–85 and *infra* notes 86–88 (discussing the procedures under the WPP).

the merits of the employee's complaint and either denies it or finds it meritorious.⁸⁶ If the Secretary finds that the employee was terminated or discharged for reporting a violation or an alleged violation, an abatement of the violation can be ordered, and the employee may be reinstated and awarded back pay and compensatory damages.⁸⁷ Either party may obtain review of the Secretary's order in the circuit court of appeals if he is unsatisfied with the outcome.⁸⁸

AIR 21's WPP is one of seventeen whistleblower statutes that the DOL is responsible for.⁸⁹ The limited number of resources, increasing caseload, and the statute's complexity has resulted in lengthy delays in

⁸⁶ 49 U.S.C. § 42121(b)(2)(A). Within 60 days of receiving the complaint and allowing the employer to answer, "the [Secretary] shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit." *Id.* The Secretary shall "notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. *Id.* "If the [Secretary] concludes that there is a reasonable cause to believe that a violation of [49 § 42121(a)] has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief." *Id.* "The [Secretary] shall dismiss a complaint . . . and shall not conduct an investigation . . . unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id.* § 42121(b)(2)(B)(i). The Secretary may not order relief "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* § 42121(b)(2)(B)(ii).

⁸⁷ 49 U.S.C. § 42121(b)(3)(B). The statute states:

If, in response to a complaint filed under paragraph (1), the [Secretary] determines that a violation of subsection (a) has occurred, the [Secretary] shall order the person who committed such violation to—
 (i) take affirmative action to abate the violation;
 (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
 (iii) provide compensatory damages to the complainant.

Id.

⁸⁸ *Id.* § 42121(b)(4)(A). The statute further states:

Any person adversely affected or aggrieved by an order issued under [the WPP] may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the [Secretary].

Id.

⁸⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-106, WHISTLEBLOWER PROTECTION PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND CONSISTENCY 1, 7 (2009) (explaining the several whistleblower statutes that the DOL is responsible for).

230 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

the investigation process.⁹⁰ Generally, investigations exceed the statutory time frame allowed for the investigation.⁹¹ In addition to lengthy investigations, the employees are only successful in a minority of the cases.⁹² For example, employees had successful outcomes in about nineteen percent of the 1,800 cases in 2007.⁹³ Appeals are also delayed and relatively unsuccessful; about one-third or fewer of the appeals result in outcomes that favor the employee.⁹⁴

Thus, AIR 21 established the WPP, which provided airline employees with the option of bringing a federal whistleblower claim against their employer for retaliatory discharge.⁹⁵ Subsequently, airline employees had uniform federal whistleblower protection; however, the process was delayed and employees were successful in a minority of the cases.⁹⁶

E. *The Circuit Split*

Prior to enactment of the WPP, airline employees could only bring state whistleblower claims.⁹⁷ Several airline employees brought state

⁹⁰ See *id.* at 2, 4. OSHA has about sixty-nine investigators, eight supervisory investigators, and one program manager assigned to enforcing seventeen whistleblower statutes, and there are roughly 1,800 whistleblower complaints that they must investigate. *Id.* at 2. In addition, “caseloads are increasing at all levels.” *Id.* at 3. “[D]ue to the addition of several new statutes, investigators are carrying larger, more complex caseloads.” *Id.* at 6. The Government Accountability Office (“GAO”) “found that completion of any one phase of an investigation—opening, information gathering, or closing—sometimes took longer than the overall statutory or regulatory time frame for the entire investigation.” *Id.* at 4. Complexity of the cases affects the length of the investigation process. *Id.* Many investigators reported that “they lack some of the resources they need to do their jobs, including equipment, training, and legal assistance.” *Id.* at 5. For instance, almost half of the investigators in the government’s survey stated that AIR21’s WPP was one of the most complex statutes to enforce, and they did not receive any specific training for this statute. *Id.* at 6.

⁹¹ See *id.* at 17. The GAO found that investigations for whistleblower statutes that have a sixty-day time frame could take up to 320 days to complete. *Id.* The WPP has a statutory time frame of sixty days. 49 U.S.C. § 42121(b)(2)(A).

⁹² See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 89, at 26 (explaining the small percentage of outcomes that favor the employee).

⁹³ See *id.* (following necessary adjustments, GAO found that sixty-five percent of the whistleblower complaints were dismissed, seventeen percent withdrawn, and nineteen percent found to have merit).

⁹⁴ See *id.* at 5.

⁹⁵ See *supra* Part II.D (introducing the federal remedy enacted for airline employees who blow the whistle).

⁹⁶ See *supra* notes 89–94 and accompanying text (discussing the delays with the investigation process and low success rates).

⁹⁷ See Marksteiner, *supra* note 77, at 39 (discussing the need for a federal whistleblower statute). At the time of this article, most employees enjoyed some form of federal whistleblower protection, but not airline employees. *Id.*; see also OSHA, AIR 21 and

retaliatory discharge claims against their employers after the ADA's preemption provision was in place, but before enactment of the WPP.⁹⁸ Notably, a majority of the courts found that these claims were not preempted by the ADA.⁹⁹ The courts applied the *Morales* test, which questioned whether the law related to "rates, routes, or services of an air carrier."¹⁰⁰ Most courts have held that state whistleblower claims were

Whistleblower Protection, *supra* note 77, at 910 (discussing how the airline industry was opposed to federal statutory protection). Many people in the airline industry believed that airline employees had adequate recourse and federal statutory protection was not necessary. *Id.* Furthermore, most airlines believed the FAA was successfully monitoring safety and a whistleblower protection program for airline employees was "intrusive and unnecessary." *Id.*

⁹⁸ See *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 598 (5th Cir. 1993) (finding that Congress did not clearly intend the ADA's preemption provision to preempt state law claims for retaliation); *Espinosa v. Cont'l Airlines*, 80 F. Supp. 2d 297, 302 (D.N.J. 2000) ("It cannot be stated that Congress clearly intended for a plaintiff's state law claim for retaliatory discharge to be preempted by the [ADA]."); *Ruggiero v. AMR, Corp.*, No. C94-20160JW, 1995 WL 549010, at *9 (N.D. Cal. Sept. 12, 1995) ("It is not reasonable to believe that retaliatory discharge claims have a 'connection with or reference to' air carrier services."). Any effect they may have on services "is far 'too tenuous, remote or peripheral' to have pre-emptive effect." *Id.*; see also *Anderson v. Evergreen Int'l Airlines, Inc.*, 886 P.2d 1068, 1071 (Or. Ct. App. 1994) (stating that the relationship between the aircraft mechanic's wrongful discharge claim and "services" was "'too tenuous, remote, or peripheral'" to be preempted by the ADA).

⁹⁹ See *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1259-60 (11th Cir. 2003) (citing various cases that held the preemption clause of the ADA did not include retaliatory discharge claims); *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 597 (5th Cir. 1993) (holding that any effect the retaliatory discharge claim may have on American Airline's services was "far too remote to trigger pre-emption" and thus was not preempted by the ADA); *Espinosa*, 80 F. Supp. 2d at 301 (holding that the state whistleblower claim was "'too tenuous, remote, or peripheral'" to be preempted by the ADA). "Although the Court's holding in *Morales* appeared to suggest a broad interpretation of the 'related to' phrase, the Court also cautioned that the ADA's preemptive sweep was not unlimited and did not preempt state actions that were 'too tenuous, remote, or peripheral.'" *Id.*; see also *Ruggiero*, 1995 WL 549010, at *9 (holding that the ADA does not preempt a claim for retaliatory discharge), *Anderson v. Evergreen Int'l Airlines, Inc.*, 886 P.2d 1068, 1071 (Or. Ct. App. 1994) (holding that the aircraft mechanic's wrongful discharge claim was not preempted by the ADA). *But see* *Marlow v. AMR Servs. Corp.*, 870 F. Supp. 295, 299 (D. Haw. 1994) (holding that the aircraft mechanic's state whistleblower claim was preempted by the ADA).

¹⁰⁰ See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (establishing the test for determining whether a state claim is preempted by the ADA); *Air Carrier's Services*, *supra* note 40, at 1197-98 (explaining the different interpretations courts have adopted regarding the term "service" in the ADA preemption provision). Courts have not been able to derive a uniform definition of the term "service" under the ADA. *Id.* at 1198. For example:

One interpretation is that 'service' means air services, involving only actual transportation and its frequency and scheduling. If the term is given this narrow definition, express preemption can *never* occur with regard to the other various services the airlines provide. In contrast,

“too tenuous, remote, or peripheral” and thus fell outside the scope of preemption.¹⁰¹

Subsequent to enactment of the WPP, airline employees continued to pursue state remedies.¹⁰² The circuits took opposing views as to whether the WPP preempted state whistleblower claims: (1) the Eighth Circuit held that the WPP expressly preempted state whistleblower claims by expanding the scope of the ADA’s preemption provision; and (2) the Third, Ninth, and Eleventh Circuits held that the WPP did not expand the preemption provision’s scope, thus the only analysis was whether the claim fell within the scope of the ADA’s preemption clause.¹⁰³

“service” can also include airline services beyond transportation, such as flight attendant services, overhead compartment storage, and boarding procedures. If the term is given this broad definition, the statute can preempt *all* of these other areas if the state regulations have the requisite connection to them.

Id. at 1197–98 (footnotes omitted).

¹⁰¹ See *supra* notes 98–99 (illustrating the numerous cases that have held retaliatory discharge claims do not fall within the scope of the ADA’s preemption provision); see also Katrina Maher, Note, *Preemption – The Preemptive Scope of the Airline Deregulation Act as Amended by the Whistleblower Protection Program: Wright v. Nordam Group, Inc.*, 74 J. AIR L. & COM. 113, 118–19 (2009) (explaining that Congress must have been aware that the majority of courts held that state law whistleblower claims were not preempted by the ADA before the enactment of the WPP).

¹⁰² See Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 621 (1999) (explaining why employees prefer to bring state whistleblower claims, even after a federal remedy is available). Most state whistleblower statutes rely on judicial redress as opposed to an administrative process; thus, employees who wish to have their day in court bring state remedies. *Id.*

¹⁰³ See *Ventress v. Japan Airlines*, 603 F.3d 676, 681, 683 (9th Cir. 2010) (following the *Branche* view); *Gary v. Air Grp., Inc.*, 397 F.3d 183, 189–90 (3d Cir. 2005) (following the *Branche* court’s reasoning); *Branche*, 342 F.3d at 1263–64 (holding that the WPP’s preemption clause is not altered or expanded by the WPP); see also Maher, *supra* note 101, at 114 (discussing the new issue of whether the WPP expands the scope of the ADA’s preemption provision). The author discussed:

[F]or the first twenty-two years following passage of the ADA, if a state law whistleblower claim was not related to the services of an airline, the claim was not expressly preempted by [the ADA]. However, when Congress enacted the WPP and created a federal whistleblower cause of action, the courts were forced to address the issue of whether Congress intended to *expand* the preemptive scope of [the ADA] such that *all* state law whistleblower claims falling within the WPP’s scope are preempted.

Id. (footnotes omitted); cf. *Botz v. Omni Air Int’l*, 286 F.3d 488, 498 (8th Cir. 2002) (holding that the WPP expands the scope of the WPP’s preemption provision).

1. Eighth Circuit's Position: The WPP Expanded the Scope of the ADA's Preemption Provision

In *Botz v. Omni Air International* in 2002, the Eighth Circuit, in a case of first impression, held that the ADA, as amended by the federal WPP, expressly preempted the flight attendant's claim under the state whistleblower statute.¹⁰⁴ The court began its analysis by assessing the purpose of Congress and the ordinary meaning of the statutory language.¹⁰⁵

First, the court determined whether the scope of the preemption clause encompassed the flight attendant's claim.¹⁰⁶ The court applied the test from *Morales*; thus, Botz's state whistleblower claim was preempted by the ADA if it had "a connection with or reference to airline 'rates, routes, or services.'"¹⁰⁷ The court held that the Minnesota whistleblower statute fell within the scope of the preemption provision because it indirectly affected "services."¹⁰⁸

¹⁰⁴ *Botz*, 286 F.3d at 498. "While the plain language of the ADA's pre-emption provision encompasses Botz's claims, the WPP makes it unmistakable that such claims are preempted and dispels whatever doubt might possibly linger after a plain-language analysis of the ADA's pre-emption provision." *Id.* In *Botz*, a flight attendant refused a flight assignment that was round-trip from Alaska to Japan because she believed it violated the Federal Aviation Regulations ("FARs"). *Id.* at 490. Omni allegedly terminated her in retaliation of her refusal. *Id.* Botz brought a claim under the Minnesota whistleblower statute, and the case was removed to the federal court. *Id.* at 490-91. The Botz court had to determine whether the flight attendant's state whistleblower claim was preempted by the ADA and whether the WPP expanded the preemption clause of the ADA. *Id.* at 491.

¹⁰⁵ *Id.* at 491-92. Preemption is not taken lightly in the employment law area because it "falls within the traditional police power of the State." *Id.* at 493. However, where Congress has given a clear intent for preemption, the state's police powers may be superseded. *Id.*

¹⁰⁶ *Id.* at 491-92. Theories of implied preemption are usually not considered when Congress has placed an express preemption clause in the enacted legislation. *Id.* at 493.

¹⁰⁷ See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (establishing the test for determining what is preempted by the ADA's preemption clause). State enforcement actions having "a connection with, or reference to airline 'rates, routes, or services'" are expressly preempted by the ADA. *Id.*; see also *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 n.5 (1995) (discussing the *Morales* test). The *Wolens* court stated that this "is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" *Id.*

¹⁰⁸ *Botz*, 286 F.3d at 492, 496-97. Botz argued that her claims are protected from preemption by the saving clause in the ADA; however, the court disagreed and found the saving clause to be merely a general remedies clause that "is a relic of the pre-ADA/no pre-emption regime." *Id.* at 491 (quoting *Morales*, 504 U.S. at 385). Furthermore, the *Morales* Court already held that the general saving clause cannot undermine the effect of the express, specific preemption clause. *Morales*, 504 U.S. at 385.

Botz relied on cases decided prior to the WPP, when there was no equivalent federal cause of action available.¹⁰⁹ The Eighth Circuit reasoned that the WPP provided protection to airline employees who were discriminated against or discharged for reporting safety-related violations, which evidenced that Congress had a “clear and manifest intent to [preempt state law] whistleblower claims related to air safety.”¹¹⁰ Thus, the enactment of the WPP and the protections it provides airline employees encompasses “the types of claims [that] Congress intended the ADA to [preempt].”¹¹¹ Congress created a single, uniform standard to deal with air-safety violation complaints and furthered its goal of market force reliance by not allowing such complaints to be determined by fragmented, inconsistent state regulation.¹¹²

The Eighth Circuit reasoned that Congress was aware of the ADA, its express preemption provision, and its broad application.¹¹³ Further,

¹⁰⁹ *Botz*, 286 F.3d at 496, 496 n.8. Botz further argued that her claims were too tenuously and remotely connected to “prices, routes, or services” to be preempted. *Id.* at 496. Botz relied on a number of cases that “held certain [state law] employment discrimination claims to be too remote or tenuously related to air-carrier prices, routes, and services to be pre-empted.” *Id.* (footnote omitted). The court found the cases it relied on to be distinguishable because they did not involve a state law that gave an airline employee the right to refuse an assignment essential to an airline’s “services,” and none of them involved an application of state law that regulates the same principles as the WPP. *Id.*

¹¹⁰ *Id.*; see *Gade v. Nat’l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 111 (1992) (explaining “the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress” (alteration in original) (internal quotation marks omitted)); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (explaining that there must be a “clear and manifest purpose of Congress” for a Federal Act to supersede traditional police powers of the states).

¹¹¹ *Botz*, 286 F.3d at 497. By establishing a uniform remedy for aviation employees who are retaliated against for reporting safety violations, Congress has “furthered its goal of ensuring that the price, availability, and efficiency of air transportation rely primarily upon market forces and competition.” *Id.*

¹¹² *Id.* Furthermore, Congress provided a review system where an unsatisfied party can appeal to the federal courts of appeals for review, making the process uniform across the nation. *Id.*; cf. *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 373 (3d Cir. 1999) (discussing how safety is a necessity for airlines and not a factor when competing with other airlines). “Safe operations . . . are a necessity for all airlines. Whether or not to conform to safety standards is not an option for airlines in choosing a mode of competition.” *Id.*

¹¹³ *Botz*, 286 F.3d at 497. Botz argued that the WPP was not intended to preempt state whistleblower statutes, because Congress did not include an express preemption provision when it easily could have. *Id.* The *Botz* court thinks this argument “turns the proper logic on its head.” *Id.* The court reasoned:

When it fashioned the WPP, Congress was surely aware of the ADA’s express pre-emption provision. It was presumably aware, as well, that the Supreme Court had determined that the provision had a broad application and should be given an expansive interpretation. Given this, we would expect Congress to have directed language in the WPP

Congress was not mandated to include an express preemption provision unless its intent was that the WPP did not preempt state whistleblower claims.¹¹⁴ The court held that while Botz's claim fell within the scope of the "plain language" of the preemption provision—the WPP made it "unmistakable that such claims are pre-empted and dispel[led] whatever doubt might possibly linger after a plain-language analysis of the ADA's pre-emption provision."¹¹⁵

2. The Majority Position: The WPP Does Not Alter or Expand the ADA's Preemption Provision

Other circuits have refused to follow the Eighth Circuit's approach.¹¹⁶ In 2003, the Eleventh Circuit, in *Branche v. Airtran Airways, Inc.*, addressed the issue, declined to follow the *Botz* analysis, and provided the opposing view for circuits to apply in the future.¹¹⁷

to the issue of federal pre-emption only if it had been Congress's intent that the WPP *not* exert any pre-emptive effect upon state whistleblower provisions.

Id.

¹¹⁴ *Id.* But see *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1263 (11th Cir. 2003) (explaining that the silence as to preemption is "susceptible to more than one interpretation"). In regards to the ADA's preemption provision, the Supreme Court has only interpreted "related to." *Id.* "[A]ir carrier services" has yet to be interpreted by the Supreme Court. *Id.* Congress was aware of the judicial interpretations among the circuits regarding "services," and that most of the state retaliatory discharge claims were found not to be preempted by the ADA. *Id.* Thus, "it becomes significantly less clear that in saying nothing about pre-emption in the WPP Congress was somehow indicating that it assumed state whistleblower claims to be pre-empted." *Id.*

¹¹⁵ *Botz*, 286 F.3d at 498.

¹¹⁶ See *Ventress v. Japan Airlines*, 603 F.3d 676, 693 (9th Cir. 2010) (following the Eleventh Circuit's approach); *Gary v. Air Grp., Inc.*, 397 F.3d 183, 190 (3d Cir. 2005) (finding that the Eleventh Circuit provided the better approach); *Branche*, 342 F.3d at 1264 (holding that the scope of the ADA is not expanded or altered by the WPP).

¹¹⁷ See *Branche*, 342 F.3d at 1261–64 (concluding that the ADA's WPP does not expand the scope of the ADA's preemption provision). In *Branche*, an Airtran DC-9 airplane landed at Tampa International Airport with one of its two engines running at a temperature exceeding FAA guidelines; a dangerous situation that can result in engine failure. *Id.* at 1251. Airtran maintenance workers performed a test on the engine that they were unqualified and unauthorized to do, violating the FARs. *Id.* at 1251–52. Branche, an Airtran aircraft inspector, reported the violations to the FAA and was subsequently terminated. *Id.* at 1252. Branche says that:

[A]fter the plane departed from [Tampa International Airport] on June 30, 2001, the engine overheated during its flight to Atlanta and the plane subsequently was taken out of service. . . . [H]e alleges that the following day he investigated this particular engine and learned that it had overheated on two separate occasions during the preceding two weeks.

Id.; see also *Ventress*, 603 F.3d at 693 (following the view set forth by the Eleventh Circuit); *Gary*, 397 F.3d at 190 (applying the Eleventh Circuit's analysis); *AirTran Whistleblower Gets*

236 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

In *Branche*, the court divided its analysis into two steps.¹¹⁸ First, it questioned whether Branche's state claim related to "prices, routes or services" of an air carrier resulting in preemption by the ADA.¹¹⁹ Second, the court asked if the WPP expanded the scope of the ADA's preemption provision, thus preempting Branche's state whistleblower claim.¹²⁰

In addressing the first issue, the Eleventh Circuit held that Branche's state whistleblower claim was unrelated to the "services" of an air carrier and therefore not preempted.¹²¹ The court reasoned that his state whistleblower claim was fundamentally an employment discrimination claim that did not affect any area of airline competition.¹²²

As for the second issue, the court carefully analyzed the reasoning set forth in *Botz* and held that the WPP does not require preemption of Branche's state whistleblower claim.¹²³ The court reasoned that the WPP's silence as to preemption is ambiguous and could be read one of two ways.¹²⁴ One can follow the reasoning set forth in *Botz*, and argue that Congress knew the preemption provision in the ADA was viewed broadly and intended the WPP to expand its preemptive scope to

Day in Florida Court, AIRLINE FIN. NEWS, Sept. 22, 2003 (stating that Branche wanted to bring a state claim "under Florida law so that a jury could hear his case").

¹¹⁸ See *Branche*, 342 F.3d at 1253-54, 1261 (applying the test set forth by the Supreme Court in *Morales*, and then determining whether the WPP expands the scope of the ADA's preemption clause).

¹¹⁹ *Id.* at 1253-61. A state law is preempted by the ADA when it explicitly refers to airline rates, routes, or services, or has a significant economic effect upon them. *Id.* at 1259; see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (establishing the test to apply when determining whether state law is preempted by the ADA).

¹²⁰ *Branche*, 342 F.3d at 1261. The *Branche* court stated that preemption under the ADA is mandatory when the state law has a connection with airline prices, routes, or services. *Id.* at 1254. The court concluded that Branche's state whistleblower claim did not expressly refer to airline services; therefore, the only way it can be preempted is if it has a significant economic effect on such services. *Id.* at 1255. The court did not share the broad view of the term "services." *Id.* at 1258. Furthermore, the *Branche* court explained that "to pre-empt state law claims concerning other elements of airline operations that are not bargained for plainly would not further the goal of promoting competition in the airline industry." *Id.* at 1256. The *Branche* court concluded that "the phrase 'related to the . . . services of an air carrier' means having a connection with or reference to the elements of air travel that are bargained for." *Id.* at 1258 (alteration in original).

¹²¹ *Id.* at 1261.

¹²² *Id.*; cf. Marksteiner, *supra* note 77, at 40 (addressing the argument made by the airline industry that reporting safety violations relates to competition). "[T]he aviation industry pleads its case by arguing that unnecessary or redundant safety measures will hurt profitability and therefore *not* promote domestic air commerce. In its rule-making function, the FAA ends up balancing the competing interests of safety and airline profitability." *Id.* (footnote omitted).

¹²³ *Branche*, 342 F.3d at 1261-64.

¹²⁴ *Id.* at 1263. The WPP does not state anything about preemption. *Id.*

preempt state whistleblower claims.¹²⁵ Conversely, one can argue that Congress' knowledge of the scope of the ADA's preemption provision "implies nothing about the legislature's view of its scope."¹²⁶ Congress must have been aware that before enactment of the WPP, the majority of courts found state whistleblower claims were not preempted by the ADA.¹²⁷ Therefore, by omitting a preemption clause in the WPP, it appeared that Congress viewed state whistleblower claims as not preempted.¹²⁸

Furthermore, inferring that Congress intended to preempt all equivalent state law claims with the enactment of the WPP would be implying preemption, and implied preemption is inapplicable when the statute includes an express preemption provision.¹²⁹ The Eleventh Circuit held that the mere enactment of the WPP cannot justify expanding the scope of the express preemption provision to include and preempt all equivalent state whistleblower claims.¹³⁰ The court further held that the *Morales* test should be applied when determining whether state whistleblower laws are preempted by the ADA, as amended by the WPP.¹³¹ Consequently, the only issue to determine is whether the state whistleblower claim is related to airline "'rates, routes, or services.'"¹³²

Subsequently, the Third and Ninth Circuits declined to follow the *Botz* analysis and applied the *Branche* view.¹³³ As a result, courts are split—some follow the *Botz* analysis while others tend to follow the

¹²⁵ *Id.*

¹²⁶ *Id.* "Simply stated, it is possible to point to a multitude of substantive contexts in which parallel state and federal remedies exist." *Id.* at 1264; see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496–97 (1996) (explaining that state remedies can exist beside federal remedies).

¹²⁷ *Branche*, 342 F.3d at 1263.

¹²⁸ *Id.* at 1263–64; see *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 111–12 (1992) (explaining that the Court "will not infer pre-emption of the states' historic police powers absent a clear statement of intent by Congress").

¹²⁹ *Branche*, 342 F.3d at 1263–64; see *Gade*, 505 U.S. at 112 (stating "in express pre-emption cases, that Congress' intent must be divined from the language, structure, and purposes of the statute as a whole").

¹³⁰ *Branche*, 342 F.3d at 1263–64; see *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass.*, 507 U.S. 218, 224 (1993) (explaining that state law should not be preempted unless it frustrates the federal scheme); *Medtronic*, 518 U.S. at 496–97 (discussing how federal and state remedies can coexist); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (discussing the principle that preemption should be judged on whether or not the state standard frustrates the objectives of the federal law).

¹³¹ *Branche*, 342 F.3d at 1264; see *supra* Part II.C (discussing the Supreme Court's interpretation of the ADA's preemption clause and establishing the test to apply to determine preemption under the ADA).

¹³² *Branche*, 342 F.3d at 1264.

¹³³ See *Ventress v. Japan Airlines*, 603 F.3d 676, 681 (9th Cir. 2010) (holding that the WPP does not preempt state whistleblower claims); *Gary v. Air Grp., Inc.*, 397 F.3d 183, 189–90 (3d Cir. 2005) (holding that the WPP does not expand the ADA's preemption provision).

238 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

Branche analysis.¹³⁴ The inconsistency in the application of the ADA's preemption provision regarding the WPP has resulted in inequality in the relief sought by airline whistleblower employees.¹³⁵ Some airline employees have their state whistleblower claims heard, while others are preempted.¹³⁶ In addition, the federal remedy requires a delayed investigation process with the DOL that results in a minority of successful outcomes for employees.¹³⁷ This can have an adverse effect on the overall safety of the airline industry by suppressing future whistleblower claims by airline employees.¹³⁸ If employees are

¹³⁴ See *Torikawa v. United Airlines, Inc.*, No. 08-00322, 2009 WL 2151821, at *4 (D. Haw. July 17, 2009) (holding that the employee's state whistleblower claim is not preempted by the ADA or the WPP); *Meyer v. United Airlines, Inc.*, No. 08 C 0599, 2009 WL 367762, at *5 (N.D. Ill. Feb 15, 2009) (holding that the WPP does not preempt "all state law retaliatory discharge claims that relate to air safety"); *Gervasio v. Cont'l Airlines, Inc.*, No. 07-5530, 2008 WL 2938047, at *3 (D.N.J. July 29, 2008) (holding that the WPP does not preempt state law whistleblower claims). The question remains the same: Is the state law related to rates, routes, or services? *Id.*; *James v. Evergreen Int'l Airlines, Inc.*, No. 07-CV-1640-HU, 2008 WL 2564804, at *5 (D. Or. June 23, 2008) (concluding that the wrongful discharge claim is not preempted by the ADA, as amended by the WPP); *Wright v. Nordam Grp., Inc.*, No. 07-CV-0699-CVE-PJC, 2008 WL 802986, at *3 (N.D. Okla. March 20, 2008) (holding that the ADA, as amended by the WPP, preempts state whistleblower claims); *Fadaie v. Alaska Airlines, Inc.*, 293 F. Supp. 2d 1210, 1217 (W.D. Wash. 2003) ("The Court's conclusion that plaintiffs' retaliatory discharge claim is not 'related to' price, routes, or service is unaffected by the existence of the WPP."); *Tucker v. Hamilton Sundstrand Corp.*, 268 F. Supp. 2d 1360, 1363-64 (S.D. Fla. 2003) (stating that state whistleblower claims are preempted if they fall under the ADA's preemption clause); *Simonds v. Pan Am. Airlines, Inc.*, No. Civ. 03-11-M, 2003 WL 22251155, at *4-5 (D.N.H. Sept. 30, 2003) (stating that preemption of state whistleblower claims should be determined on a case by case basis, and in this case the claim was preempted by the ADA, as amended by the WPP).

¹³⁵ See *Ventress*, 603 F.3d at 676, 683 (holding that the ADA's preemption provision is unaltered after the enactment of the WPP); *Gary*, 397 F.3d at 189-90 (holding that the WPP does not expand the WPP's preemption provision, therefore it does not preempt state whistleblower claims); *Branche*, 342 F.3d at 1263-64 (holding that the WPP's preemption clause is not altered or expanded by the WPP); *Botz v. Omni Air Intern.*, 286 F.3d 488, 498 (8th Cir. 2002) (holding that the WPP expands the scope of the WPP's preemption provision).

¹³⁶ See *supra* notes 134-35 (discussing the different holdings reached by circuit courts and district courts concerning preemption of state whistleblower claims under the ADA, as amended by the WPP).

¹³⁷ See *supra* notes 89-94 and accompanying text (discussing the lengthy administrative process with the DOL and the small percentage of cases that result in favor of the employee).

¹³⁸ See *Aviation Safety Protection Act of 1996: Hearings on H.R. 3187 Before the Subcomm. on Aviation of the House Transportation and Infrastructure Comm.*, 104th Cong. (1996) [hereinafter *1996 Hearings*] (statement of Patricia A. Friend) (noting that the threat of whistleblower retaliation operates as an "unwritten company gag order"); OFFICE OF SYSTEM SAFETY, FEDERAL AVIATION ADMINISTRATION, A REPORT ON ISSUES RELATED TO PUBLIC INTEREST IN AVIATION SAFETY DATA 16 (1997) (discussing the need for a strong fiduciary relationship between the FAA and airline employees to ensure a high level of safety is maintained in the

permitted to institute state actions against their employers for violating state whistleblower statutes, they will not be as reluctant in reporting safety violations and airline safety will not deteriorate.¹³⁹

III. ANALYSIS

The circuit split concerning whether the WPP preempts state whistleblower claims must be resolved.¹⁴⁰ An airline employee should have the option of bringing federal or state whistleblower claims against his employer.¹⁴¹ Allowing airline employees to bring either claim increases the amount of whistleblower protection, which will encourage violation reporting in the future and ensure the highest level of aviation safety.¹⁴² This Part will examine why the view adopted by the Eighth Circuit is incorrect and hazardous to airline safety, and why the opposing view—adopted by the Eleventh Circuit—is the correct approach.¹⁴³

First, Part III.A will discuss how the Eighth Circuit misinterpreted the WPP by finding that it expands the scope of the ADA's preemption

industry). A “high degree[] of trust between the FAA and its safety partners” is necessary for the agency to carry out its safety mission as “its resources [are] increasingly constrained as the industry becomes more complex.” *Id.* at 16; *see also* Marksteiner, *supra* note 77, at 50 (discussing the need for aviation employees to report safety violations to ensure the FAA's system is effective). “[I]f aviation workers cannot report safety violations without fear of reprisal, they will not report these violations at all. Under these conditions, the self-reporting and self-correcting model will not work.” *Id.*; Mike M. Ahlers, *Southwest settles with FAA for \$7.5 million*, CNN (Mar. 2, 2009, 7:15 P.M.), <http://www.cnn.com/2009/US/03/02/southwest.faa.settlement/index.html?iref=allsearch> [hereinafter Ahlers, *Southwest settles with FAA*] (“Southwest operated 46 of its Boeing 737 jets on nearly 60,000 flights without performing mandatory inspections for fatigue cracks in their fuselages.”); *FAA proposes a \$1.45 million fine against Northwest Airlines*, CNN (Mar. 23, 2010, 1:11 P.M.), <http://www.cnn.com/2010/TRAVEL/03/23/northwest.airlines.fine/index.html?iref=allsearch> (stating that “32 of the carrier's 757s flew more than 90,000 passenger flights” while in an unsafe condition”).

¹³⁹ *See* 1996 Hearings, *supra* note 138 (statement of Patricia A. Friend) (explaining that airline accidents could be prevented if safety violations are reported); OSHA, *AIR21 and Whistleblower Protection*, *supra* note 77, at 914 (explaining the benefits of increasing whistleblower protection); *see also* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000) (discussing how whistleblower statutes have been enacted in each of the fifty states).

¹⁴⁰ *See supra* notes 134–39 and accompanying text (explaining why the circuit split needs to be resolved).

¹⁴¹ *See infra* Part III.A–C (explaining why federal and state remedies should be available to airline whistleblowers).

¹⁴² *See infra* Part III.C (explaining that airline employees should have federal and state remedies available to them because it will provide more protection and increase violation reporting in aviation).

¹⁴³ *See infra* Part III.A–C (analyzing the different approaches taken by the circuits and explaining why the Eleventh Circuit's approach is correct).

240 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

provision and expressly preempts state whistleblower claims.¹⁴⁴ Next, Part III.B will analyze congressional intent, as illustrated in the legislative history of the statute, and how it further supports the Third, Ninth, and Eleventh Circuits' position that Congress did not intend the WPP to expressly preempt similar state remedies.¹⁴⁵ Finally, Part III.C will examine the detrimental effect the Eighth Circuit's approach will have on airline safety by suppressing violation reporting in the aviation industry.¹⁴⁶

A. *The Eighth Circuit Misinterpreted the ADA as Amended by the WPP*

This section will examine the flaws behind the Eighth Circuit's holding that the WPP preempted state law whistleblower claims.¹⁴⁷ The Eighth Circuit's reasoning is flawed in three respects.¹⁴⁸ First, the Eighth Circuit casually inferred preemption even though it fell within traditional police powers of the state and there was no express preemption provision in the WPP.¹⁴⁹ Second, the Eighth Circuit misinterpreted the goal of the ADA and the underlying objective behind enacting the WPP.¹⁵⁰ Third, the Eighth Circuit relied on the fairness and uniformity of the WPP when, in reality, the WPP's silence as to preemption has resulted in unfair inconsistency among the circuits.¹⁵¹

First, the Eighth Circuit casually presumed preemption, even though the statute fell within the traditional police powers of the state.¹⁵² Police

¹⁴⁴ See *infra* Part III.A (discussing how the Eighth Circuit "lightly inferred" preemption, misinterpreted the objectives of the ADA and the WPP, and erroneously relied on fairness and uniformity).

¹⁴⁵ See *infra* Part III.B (examining the WPP's legislative history and how it supports the Eleventh Circuit's approach that the WPP does not preempt state whistleblower remedies).

¹⁴⁶ See *infra* Part III.C (discussing how the Eighth Circuit's approach will suppress future violation reporting in the aviation industry, and the detrimental effect this will have on airline safety).

¹⁴⁷ See *infra* notes 148-96 and accompanying text (discussing the flaws behind the reasoning used by the Eighth Circuit in support of its holding).

¹⁴⁸ See *infra* notes 148-96 and accompanying text (analyzing the three problems with the Eighth Circuit's approach).

¹⁴⁹ See *infra* notes 152-69 and accompanying text (discussing how the Eighth Circuit casually presumed preemption when the statute involved a traditional police power of the state).

¹⁵⁰ See *infra* notes 170-82 and accompanying text (discussing how the Eighth Circuit misinterpreted the objectives of the ADA and the WPP).

¹⁵¹ See *infra* notes 184-96 and accompanying text (explaining why the Eighth Circuit's reliance on fairness and uniformity of the WPP is contradicted).

¹⁵² See CHEMERINSKY, *supra* note 45, at 234 ("[P]olice power allows state and local governments to adopt any law that is not prohibited by the Constitution."); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (stating that states have historically exercised their police powers to protect the safety of their citizens).

powers of the states are not to be preempted unless there is a “clear and manifest purpose of Congress.”¹⁵³ The Eighth Circuit reasoned that state whistleblower claims attempt to regulate the same area of the airline industry as the WPP, which provides protection for airline employees, and found that this was strong evidence of Congress’s “clear and manifest intent” to preempt state whistleblower claims related to air safety.¹⁵⁴ However, merely enacting a federal remedy for airline whistleblowers is not evidence of Congress’s “clear and manifest purpose” to preempt all equivalent state remedies.¹⁵⁵

In support of this view, there is no express preemption provision in the WPP.¹⁵⁶ The express preemption provision of the ADA is in a separate area of the statute, and it provides that state laws related to air carrier “price[s], route[s], or service[s]” are preempted.¹⁵⁷ The Eighth Circuit reasoned that Congress was aware of the ADA’s express preemption provision and its broad interpretation, and that it would have included non-preemption language in the WPP if it intended such a result.¹⁵⁸ However, Congress just as easily could have put an express preemption provision in the statute if that was its intent.¹⁵⁹ The WPP is

¹⁵³ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (explaining that the historic police powers of the states should not be preempted unless there is a “clear and manifest purpose of Congress”); *Gary v. Air Grp., Inc.*, 397 F.3d 183, 190 (3d Cir. 2005) (stating that there is a “well-established principle that ‘courts should not lightly infer preemption’”). The Third Circuit explained that this principle “is particularly apt in the employment law context which falls ‘squarely within the traditional police powers of the states, and as such should not be disturbed lightly.’” *Id.*

¹⁵⁴ See *Botz v. Omni Air Int’l*, 286 F.3d 488, 496 (8th Cir. 2002) (arguing that the comprehensive scheme provided by the WPP is “powerful evidence of Congress’s clear and manifest intent to pre-empt state-law whistleblower claims related to air safety”).

¹⁵⁵ See *Medtronic*, 518 U.S. at 496-97 (holding that a federal statutory remedy did not preempt equivalent state law remedies); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1264 (11th Cir. 2003) (“[T]he very enactment of a federal remedy, without more, cannot cause us to expand the scope of an express pre-emption provision to encompass and pre-empt all equivalent state remedies.”).

¹⁵⁶ Whistleblower Protection Program, 49 U.S.C. § 42121 (2006); see *Maher*, *supra* note 101, at 118 (“[S]uch silence should not serve as a basis for expanding the scope of § 41713 to cover all state law whistleblower claims.”).

¹⁵⁷ Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (2006). “[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier” *Id.*

¹⁵⁸ See *Botz*, 286 F.3d at 496-97 (“[W]e would expect Congress to have directed language in the WPP to the issue of federal pre-emption only if it had been Congress’s intent that the WPP not exert any pre-emptive effect upon state whistleblower provisions.”).

¹⁵⁹ See *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (explaining that Congress would have enacted an express preemption provision if it believed state laws would interfere with the statute’s objectives). *Levine* is a recent Supreme Court case addressing preemption of state laws in an area heavily regulated by the Food and Drug Administration (“FDA”). *Id.* The Court held that it was not impossible for drug manufacturers to comply with state and

242 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

silent in regards to preemption.¹⁶⁰ Furthermore, whistleblower claims involve employment discrimination, which is a traditional police power of the states.¹⁶¹ The silence, in addition to involving a traditional police power, supports the position that state whistleblower claims are not preempted.¹⁶²

The Eighth Circuit's inference that enacting a federal remedy means Congress intended all equivalent state laws to be preempted also falters because, as the Eleventh Circuit acknowledges, this would be implied preemption.¹⁶³ Furthermore, the federal remedy cannot expand the scope of the express preemption provision to include all equivalent state remedies because complete preemption is inapplicable without clear congressional intent.¹⁶⁴ Under the complete preemption doctrine, a statute preempts all equivalent state laws only when it satisfies two requirements: it has an exclusive federal cause of action for the plaintiff and it unambiguously preempts state law.¹⁶⁵ The argument that the

federal law obligations, and state law claims do not interfere with Congress's objectives in the FDCA. *Id.* The Court reasoned that Congress would have included an express preemption clause if that was its intent. *Id.* Congress's silence regarding preemption and the fact that Congress was aware of the "prevalence of state tort litigation" is strong evidence that Congress did not intend federal oversight to be the "exclusive means of ensuring drug safety and effectiveness." *Id.*; see also *Branche*, 342 F.3d at 1263 (explaining that the absence of a preemption provision is susceptible to more than one interpretation).

¹⁶⁰ See *Branche*, 342 F.3d at 1263 (stating that the WPP is silent about preemption). "Because the WPP says nothing about pre-emption and this silences is ambiguous, we find its enactment less probative of Congressional intent regarding the pre-emption of state whistleblower claims than did the Eighth Circuit." *Id.*

¹⁶¹ See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (discussing how employment standards fall within the traditional police power of the states); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (explaining that preemption should not be "lightly inferred" when dealing with labor standards); *Meyer v. United Airlines, Inc.*, No. 08 C 0599, 2009 WL 367762, at *4 (N.D. Ill. Feb. 15, 2009) (discussing how the area of employment law falls within the traditional police powers of the states).

¹⁶² See *Branche*, 342 F.3d at 1263 (discussing how Congress's silence on the preemption issue in the area of employment discrimination, which is typically controlled by the states, does not show an intent to preempt state whistleblower statutes).

¹⁶³ See *id.* at 1263-64 (stating that implied preemption is not applicable when the statute contains an express preemption provision); *supra* notes 48-49 and accompanying text (discussing implied preemption).

¹⁶⁴ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496-97 (1996) (holding that a federal statutory remedy did not preempt equivalent state law remedies); *Branche*, 342 F.3d at 1264 ("[I]t is possible to point to a multitude of substantive contexts in which parallel state and federal remedies exist . . ."). "[T]he very enactment of a federal remedy, without more, cannot cause us to expand the scope of an express pre-emption provision to encompass and pre-empt all equivalent state remedies." *Id.*; see also *Siegle*, *supra* note 46, at 1121 (explaining that complete preemption occurs "where a statute has a 'preemptive force . . . so powerful as to displace entirely any state cause of action'" (alteration in original)).

¹⁶⁵ *Siegle*, *supra* note 46, at 1107.

WPP is an exclusive federal cause of action is the following: The WPP has an appeal process through the circuit courts ensuring uniformity, and if the WPP did not completely preempt state whistleblower claims they would interfere with this uniformity.¹⁶⁶ However, it is clear that federal remedies can coexist with state remedies.¹⁶⁷ In addition, there is too much ambiguity surrounding the question of whether the WPP preempts state laws.¹⁶⁸ Thus, the WPP fails both requirements and does not fall under the complete preemption doctrine.¹⁶⁹

Second, the Eighth Circuit misinterpreted the statute's objectives when it reasoned that Congress furthered the goals of the ADA by enacting the WPP.¹⁷⁰ The Eighth Circuit held that the creation of a single uniform standard for dealing with employees' whistleblowing will ensure price, availability, and efficiency of airlines by relying on market forces and competition, rather than allowing them to be determined by inconsistent state regulation.¹⁷¹ This is clearly the purpose of the ADA when it comes to state claims that "relate to" prices, routes, or services as

¹⁶⁶ See Whistleblower Protection Program, 49 U.S.C. § 42121 (2006) (explaining the appeal process if one is unsatisfied with the Secretary's findings); *Botz v. Omni Air Int'l*, 286 F.3d 488, 497 (8th Cir. 2002) (explaining the uniformity that results from the WPP's appeal process). "By making the [Secretary's] findings and remedy order in response to an employee's complaint reviewable by the federal courts of appeals, Congress insured a more uniform interpretation of the WPP, and thus a more predictable response to public air-safety complaints . . ." *Id.*

¹⁶⁷ See *Medtronic, Inc.*, 518 U.S. at 496-97 (explaining the possibility for similar federal and state remedies to exist side by side).

¹⁶⁸ See *Branche*, 342 F.3d at 1263-64 (holding that the WPP does not preempt state whistleblower claims); *Botz*, 286 F.3d at 498 (holding that the WPP preempts state whistleblower claims).

¹⁶⁹ See 49 U.S.C. § 42121 (providing a federal cause of action for airline employee whistleblowers with no explicit statement that it is the exclusive remedy for such whistleblowers); 49 U.S.C. § 40120(c) (2006) (illustrating the current saving clause, which states that "[a] remedy under this part is in addition to any other remedies provided by law").

¹⁷⁰ See *Botz*, 286 F.3d at 497 (arguing that Congress "furthered its goal of ensuring that the price, availability, and efficiency of air transportation rely primarily upon market forces and competition" by enacting the WPP); FISCHER ET AL., *supra* note 5, at 1 (stating that "[s]afety has never been deregulated").

¹⁷¹ *Botz*, 286 F.3d at 497.

explained in the ADA's express preemption provision.¹⁷² However, this argument lacks merit when applied to the WPP.¹⁷³

The purpose of the ADA was to deregulate the airline industry and promote "maximum reliance on competitive market forces."¹⁷⁴ Congress enacted the preemption provision to prevent states from interfering with this deregulation.¹⁷⁵ Thus, the ADA and its preemption provision essentially deal with the economic perspective of the airline industry.¹⁷⁶ Whistleblower claims have to do with employment discrimination and the safety of the airlines, not the economic, efficiency, or competitive aspects of the airlines.¹⁷⁷ Therefore, safety has a tenuous, at best, connection to "price, routes or services" of airlines.¹⁷⁸

Contrary to the Eighth Circuit, a uniform remedy for airline employees who report violations will not ensure price, availability or efficiency of airlines by relying on market forces and competition.¹⁷⁹ This is because airlines do not compete for safety.¹⁸⁰ All airlines must

¹⁷² Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (2006); see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (stating that "the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any carrier"). Congress determined that "maximum reliance on competitive market forces" would best benefit the airline industry by advancing efficiency, innovation, low prices, and the quality of services. 124 CONG. REC. 30662 (1978).

¹⁷³ See 146 CONG. REC. 2814 (2000) (explaining that the objective of the WPP was to provide whistleblower protection to airline employees to encourage violation reporting and ensure safety).

¹⁷⁴ 124 CONG. REC. 30662 (1978); see AVIATION IN THE UNITED STATES, *supra* note 21, at 29 (explaining that the ADA's main purpose was "to remove government control over fares, routes and market entry (of new airlines) from commercial aviation"). The ADA also "maint[ains] . . . safety as the highest priority in air commerce." *Id.* at 31.

¹⁷⁵ 49 U.S.C. § 41713(b)(1).

¹⁷⁶ See *supra* notes 27-35 and accompanying text (explaining that heavy regulation prior to the ADA was inefficient, imposed high costs on customers, and needed to be deregulated to ensure reliance on competitive market forces).

¹⁷⁷ See *infra* notes 179-82 and accompanying text (explaining that airlines do not compete for safety because federal aviation regulations are mandatory for airlines); see also *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1261 (11th Cir. 2003) (holding that the employment discrimination claim is not an area in which airlines compete).

¹⁷⁸ See *Branche*, 342 F.3d at 1261 (holding that the state whistleblower claim is not preempted under § 41713 because it "does not relate to the services of an air carrier within the meaning of [the statute]"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (explaining that certain state laws may not be preempted by the ADA if they affect the scope of the statute "in too tenuous, remote, or peripheral a manner" (internal quotation marks omitted)).

¹⁷⁹ See *Branche*, 342 F.3d at 1264 (discussing how preempting state whistleblower claims relating to safety will "not advance the pro-competitive goals of the ADA").

¹⁸⁰ See *id.* at 1260 (explaining why airlines do not compete for passengers on the basis of safety). Passengers do not bargain for safety because "it is implicit in every ticket sold by every carrier. Accordingly, it does not serve the purposes of the ADA to pre-empt state law employment claims related to safety." *Id.*; see also *Abdullah v. Am. Airlines, Inc.*, 181

comply with the same federal aviation regulations and laws; thus, all airlines are required to be safe.¹⁸¹ Safety is not going to further the purpose of the ADA and its preemption provision because it is not going to increase “reliance on competitive market forces.”¹⁸²

Finally, the Eighth Circuit reasoned that the WPP fosters fairness for employees better than fifty inconsistent state whistleblower statutes because it provides uniform protection.¹⁸³ However, the circuit split regarding whether or not these claims are preempted by the WPP contradicts the Eighth Circuit’s fairness argument.¹⁸⁴ The text of the WPP is ambiguous regarding preemption; thus, airline employees continue to bring state claims.¹⁸⁵ While the Eighth Circuit holds that equivalent state remedies are preempted, the majority of the circuits hold that they are not preempted.¹⁸⁶ This has created inconsistency among

F.3d 363, 373 (3d Cir. 1999) (discussing how safety is a necessity for airlines). “Safe operations . . . are a necessity for all airlines.” *Id.* Airlines do not have the option to choose which safety standards to conform to and which ones to disregard. *Id.* Safety is not an option when choosing modes of competition. *Id.* “For this reason, safety of an airline’s operations would not appear to fall within the ambit of the ADA and its procompetition preemption clause.” *Id.*

¹⁸¹ See CNN Wire Staff, *Feds push \$700,000 fine against Puerto Rican airline*, CNN (June 28, 2010, 2:53 P.M.), <http://cnn.com/2010/TRAVEL/06/28/faa.airline.fine/index.html?iref=allsearch> (“All maintenance procedures must be followed at all times. There are no exceptions when it comes to safety,” FAA Administrator Randy Babbitt said.”).

¹⁸² 124 CONG. REC. 30662 (1978); see FISCHER ET AL., *supra* note 5, at 1 (stating that “[s]afety has never been deregulated”).

¹⁸³ *Botz v. Omni Air Int’l*, 286 F.3d 488, 497 (8th Cir. 2002). “The WPP’s single, uniform scheme for responding to air-carrier employees’ reports of air-safety violations fosters fairness far better than a patchwork, hit-or-miss system of whistleblower protections scattered throughout the States.” *Id.* The court stated:

By making the [Secretary’s] findings and remedy order in response to an employee’s complaint reviewable by the federal courts of appeals, Congress insured a more uniform interpretation of the WPP, and thus a more predictable response to public air-safety complaints, than would likely be possible if it had granted review in the courts of the fifty States.

Id.

¹⁸⁴ See *Branche*, 342 F.3d at 1263–64 (holding that the WPP does not preempt equivalent state remedies); *Botz*, 286 F.3d at 498 (holding that equivalent state whistleblower remedies are preempted by the WPP).

¹⁸⁵ *Gary v. Air Grp., Inc.*, 397 F.3d 183, 190 (3d Cir. 2005) (stating that “the plain language of the WPP is wholly silent on the issue of preemption”). The Third Circuit agrees with the Eleventh Circuit’s conclusion that “Congress’ silence renders its intent ‘ambiguous’ at best and thus should not serve as a basis for expanding ADA preemption.” *Id.*

¹⁸⁶ See *Ventress v. Japan Airlines*, 603 F.3d 676, 683 (9th Cir. 2010) (holding that the ADA’s preemption provision is unaltered after the enactment of the WPP); *Gary*, 397 F.3d at 190 (holding that the WPP does not expand the ADA’s preemption provision, therefore it does not preempt state whistleblower claims); *Branche*, 342 F.3d at 1264 (holding that the ADA’s preemption clause is not altered or expanded by the WPP); *Botz*, 286 F.3d at 498 (holding that the WPP expands the scope of the ADA’s preemption provision).

246 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

the courts, resulting in unfairness among the airline employees.¹⁸⁷ It is unfair that some employees may bring state claims, while others may not, especially because of the deficiencies with the WPP.¹⁸⁸

Although the WPP provides a uniform federal remedy, its imperfections have led many airline employees to pursue state claims.¹⁸⁹ The WPP requires complainants to go through a delayed investigation process with the DOL, in which complainants are unsuccessful about eighty percent of the time.¹⁹⁰ Employees are also required to administratively appeal before they can bring their claim in federal court, and administrative appeals are unsuccessful about two-thirds of the time.¹⁹¹ “The [DOL] process [is] described as cumbersome rather than expeditious, biased rather than expert, ineffective rather than efficient, and as limiting access to the court rather than substituting superior procedures.”¹⁹² Thus, airline employees who want to “advocate[] judicial redress” bring state claims because state whistleblower statutes tend to rely more on judicial redress than administrative procedures.¹⁹³ Employees who bring their claims under the WPP are not guaranteed their day in court or relief; however, employees who bring state claims are likely to receive their day in court in addition to a jury and punitive damages.¹⁹⁴ Thus, many employees

¹⁸⁷ See *Gary*, 397 F.3d at 190 (explaining why Gary’s state whistleblower claim was not preempted and could be brought in state court); *Branche*, 342 F.3d at 1262 (allowing the state whistleblower claim brought by Branche to be heard in state court); *Botz*, 286 F.3d at 498 (preempting the state whistleblower claim brought by Botz).

¹⁸⁸ See *AirTran Whistleblower*, *supra* note 117 (explaining the lengthy DOL process and the few employees that succeed). For example:

The complaint is a common one, said Tom Divine, legal director for the Government Accountability Project, a Washington-based non-partisan pro-whistleblower advocacy group. The process is “slower than molasses. It is a black hole.” In the 25 to 40 cases the [DOL] decides each year involving complaints against corporations, similar to Branche’s, Divine said about one-third of the cases are won by the employee.

Id.

¹⁸⁹ See *supra* notes 89–94 and accompanying text (discussing the WPP’s deficiencies).

¹⁹⁰ See *AirTran Whistleblower*, *supra* note 117 (stating that employees may encounter a hostile environment when they bring state whistleblower claims as well); *cf.* notes 89–94 and accompanying text (explaining the deficiencies in the DOL’s process, and stating that only nineteen percent of the claims are found to have merit).

¹⁹¹ See *supra* text accompanying notes 93–94 (describing the unsuccessful outcome of appeals within the DOL regarding whistleblower claims).

¹⁹² Vaughn, *supra* note 102, at 621.

¹⁹³ *Id.*

¹⁹⁴ See *AirTran Whistleblower*, *supra* note 117 (stating that Branche “wanted the issue tried under Florida law so that a jury could hear his case”). Some states will even allow employees to seek punitive damages. *Id.*

prefer state whistleblower remedies to the federal remedy.¹⁹⁵ As a result, state whistleblower claims will proceed, a percentage of them will be preempted, and the unfairness among airline whistleblowers, regarding available remedies, will continue.¹⁹⁶

B. Legislative History and the Text of the WPP Support the View that the WPP Does Not Preempt State Whistleblower Claims

The Third, Ninth, and Eleventh Circuits took the correct position that state whistleblower claims are not preempted by the WPP.¹⁹⁷ They applied the position that the alleged harm traditionally fell within state power and the express preemption clause in the ADA must be construed narrowly.¹⁹⁸ Although silence as to preemption may be interpreted both ways, it is crucial that Congress does not mention preemption in the WPP.¹⁹⁹

Contrary to the Eighth Circuit's reasoning, Congress's knowledge about the ADA's preemption provision implies nothing about its intent regarding the WPP.²⁰⁰ In fact, as the Eleventh Circuit reasoned, Congress should have been aware that the majority of courts found state whistleblower claims not to be preempted by the ADA prior to enacting the WPP.²⁰¹ Furthermore, when Congress is aware of "the operation of

¹⁹⁵ See *supra* notes 89–94 and accompanying text (discussing the deficiencies in the federal remedy and why employees may prefer to bring state whistleblower claims).

¹⁹⁶ See *supra* notes 134–37 and accompanying text (explaining how the circuit split has led to unfairness among airline employees).

¹⁹⁷ See *Ventress v. Japan Airlines*, 603 F.3d 676, 681, 683 (9th Cir. 2010) (holding that the WPP does not expand the ADA's preemption provision and does not preempt state whistleblower claims); *Gary v. Air Grp., Inc.*, 397 F.3d 190 (3d Cir. 2005) (holding that the WPP does not preempt state whistleblower claims); *Branche*, 342 F.3d at 1263–64 (holding that state whistleblower claims are not preempted by the WPP).

¹⁹⁸ See *Ventress*, 603 F.3d at 682 (analyzing preemption under "the presumption that 'because the States are independent sovereigns in our federal system, . . . Congress does not cavalierly preempt state-law causes of action'" (alteration in original)). "This is especially true in the area of employment law, which 'falls within the traditional police power of the State.'" *Id.*; see also *Gary*, 397 F.3d at 190 (explaining that preemption should not be inferred lightly when it falls within the traditional police powers of the states); *Branche*, 342 F.3d at 1259 ("[E]mployment standards fall squarely within the traditional police powers of the states, and as such should not be disturbed lightly.").

¹⁹⁹ See *Branche*, 342 F.3d at 1263 ("[I]t becomes significantly less clear that in saying nothing about pre-emption in the WPP Congress was somehow indicating that it assumed state whistleblower claims to be pre-empted.").

²⁰⁰ See *Maher*, *supra* note 101, at 118 ("Congress's knowledge of § 41713 and the Supreme Court's broad interpretation thereof certainly does not imply that Congress intended to expand the scope of § 41713 to encompass all state law whistleblower claims.").

²⁰¹ See *Branche*, 342 F.3d at 1259–60 (citing various cases that held the preemption clause of the ADA did not include whistleblower claims); *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 597–98 (5th Cir. 1993) (holding that the connection between a claim for retaliatory

state law in a field of federal interest” and has tolerated it, the argument for federal preemption is “particularly weak.”²⁰²

Additionally, the Eleventh Circuit’s position is supported by legislative history.²⁰³ The main objective of the WPP was to provide whistleblower protection to “airline employees so they can reveal legitimate safety problems without fear of retaliation.”²⁰⁴ Whistleblower protection for airline employees was one of the “important safety initiatives” in the legislation.²⁰⁵ The WPP was included in the legislation “to aid in our safety efforts and protect workers willing to expose safety problems.”²⁰⁶ Therefore, legislative history clearly supports the position that the goal of the WPP was to increase the level of safety in the airlines by encouraging violation reporting.²⁰⁷ However, the legislative history

discharge and airline “services” was too remote to be preempted by the ADA); *Espinosa v. Cont’l Airlines*, 80 F. Supp. 2d 297, 301 (D.N.J. 2000) (rejecting the argument that the state whistleblower claim was related to the quality of services of an airline and preempted by the ADA); *see also Maher, supra* note 101, at 118–19 (explaining how the majority of cases prior to the enactment of the WPP did not find that the ADA preempted state whistleblower cause of actions).

²⁰² *See Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989)) (discussing how there is no strong argument for preemption when Congress has allowed state law to exist in an area of federal interest).

²⁰³ *See H.R. REP. NO. 106-167*, pt. 1, at 85 (1999) (“Private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory action by various Federal laws.”). “These employees have become known as ‘whistleblowers.’” *Id.* Before the WPP was enacted, “[i]here [were] no laws specifically designed to protect airline employee whistleblowers.” *Id.* Airline employees are private sector employees, and the WPP was “specifically designed” to protect them. *Id.*; *see also AirTran Whistleblower, supra* note 117 (stating how private sector employees also have protection from the states).

²⁰⁴ 146 CONG. REC. 2814 (2000). Congress intended the WPP to protect airline employees who report violations and encourage them to come forward. *Id.*; *see H.R. REP. NO. 106-513*, at 216 (2000) (explaining that Title VI of the bill “[e]stablishes procedures to protect whistleblowers”). Title VI “[p]rohibits airlines and their contractors or subcontractors from taking adverse action against an employee whom provided or is about to provide (with any knowledge of the employer) any safety information.” *Id.* *But see* Thomas M. Devine & Donald G. Alpin, *Whistleblower Protection – The Gap Between the Law and Reality*, 31 HOW. L.J. 223, 224 (1988) (arguing that statutes are not effective in protecting whistleblowers).

²⁰⁵ 146 CONG. REC. 2814 (2000).

²⁰⁶ 146 CONG. REC. 2178 (2000). *But see Whistleblower Bill Would Help FAA With Enforcement, Unions Say*, AVIATION DAILY, Jul. 15, 1996 at 71 (stating that the Air Transportation Association believed formal complaints and enforcement proceedings under the WPP would impede rather than encourage violation reporting).

²⁰⁷ 146 CONG. REC. 2178 (2000) (“We also have provided whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems.”).

does not state that the WPP was intended to be an exclusive remedy for whistleblowers.²⁰⁸

State law should not be preempted if it furthers the objectives of federal law, and state whistleblower claims clearly further the WPP's objectives by providing protection for airline employees, encouraging violation reporting in airline industry, and thus increasing aviation safety.²⁰⁹ The purpose of the WPP was to encourage violation reporting and ensure safety in the airline industry by "provid[ing] protection for airline employee whistleblowers."²¹⁰ Affording both state and federal whistleblower protection would allow even more protection for airline whistleblowers, thus further encouraging airline employees to report safety violations in the airlines.²¹¹ If airline employees have two remedial choices at their fingertips, the fear of retaliation will be significantly suppressed.²¹² Congress intended to protect airline

²⁰⁸ See generally 146 CONG. REC. 2178 (2000) (explaining that whistleblower protection would aid in safety efforts); 146 CONG. REC. 2814 (2000) (explaining that Congress intended the WPP to protect airline whistleblowers and encourage them to come forward).

²⁰⁹ See *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass.*, 507 U.S. 218, 224 (1993) (discussing how state law should not be preempted unless it frustrates the federal scheme); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (explaining that preemption should be judged on whether or not the state standard frustrates the objectives of the federal law); Callahan & Dworkin, *supra* note 139, at 100 (discussing the legal protection states provide for whistleblowers). "Whistleblower protection statutes have been enacted in each of the fifty states. All of these laws have the same objectives [sic]: to expose, deter, and curtail wrongdoing." *Id.*

²¹⁰ H.R. REP. NO. 106-167, pt. 1, at 85 (1999). Title VI of the reported bill would provide protection for airline employee whistleblowers by prohibiting the discharge or other discrimination against an employee who provides information to its employer or the federal government about air safety or files or participates in a proceeding relating to air safety. *Id.*; see 146 CONG. REC. 2178 (2000) (explaining that whistleblower protection would "aid in our safety efforts").

²¹¹ See Taylor, *supra* note 6 (explaining how the courts and the administrative arena are the most effective forums for whistleblowers). The author stated:

[T]he courts and the administrative arena are the forums where the whistleblower can get the most effective personal protection from retaliation for whistleblowing and the most comprehensive relief for the injuries they suffer at the hands of their adversaries. It also can provide an effective arena to hold culpable parties accountable for their actions in specific types of situations.

Id.

²¹² See OSHA, *AIR21 and Whistleblower Protection*, *supra* note 77, at 914 (explaining the benefits of increasing whistleblower protection). The author explained:

The theory behind increased whistleblower protection is that "the more money and other remedies available to the employee, the more hesitant the employer will be to take negative job action." Therefore, the stakes need to be high enough so that employers will not be tempted to wrongfully retaliate against whistleblowing.

Id. (footnote omitted).

250 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

employees who report violations; thus, it seems more plausible that Congress would embrace a state law that provided additional whistleblower protection, further encouraging such reporting, rather than preempt it.²¹³

C. *The Eighth Circuit's Approach and its Detrimental Effect on Airline Safety*

The Eighth Circuit's approach is detrimental to the future of aviation safety because it preempts all state whistleblower claims, thereby suppressing future violation reporting in the aviation industry.²¹⁴ If airline employees fear they will not be protected from retaliation, they will choose not to report violations.²¹⁵ The purpose behind enacting a federal remedy for aviation industry whistleblowers is to ensure that the airlines maintain a high standard of safety.²¹⁶ The aviation industry is unique in respect to other industries because violation reporting protects the millions of people who fly each day by ensuring their airplanes are safe for flight.²¹⁷

Conversely, in support of the Eighth Circuit's approach, violation reporting can impose frivolous claims and higher costs on the airlines.²¹⁸ Thus, "[p]rofit and loss cuts two ways in airline safety."²¹⁹ Airline

²¹³ See 146 CONG. REC. 2814 (2000) (explaining that the intent of Congress was to protect airline employees who report violations).

²¹⁴ See *Botz v. Omni Air Int'l*, 286 F.3d 488, 496-98 (8th Cir. 2002) (holding that state whistleblower claims are preempted by the WPP); 1996 *Hearings*, *supra* note 138 (statement of Patricia A. Friend) (discussing how employees are reluctant to come forward with violations even when they have whistleblower protection).

²¹⁵ See *OSHA, AIR21 and Whistleblower Protection*, *supra* note 77, at 914 (discussing the difficult choice employees must make when deciding whether to report a violation). "No employee should be put in the position of having to choose between his or her job and reporting violations that threaten the safety of passengers and crew." *Id.* at 913-14.

²¹⁶ See 146 CONG. REC. 2814 (2000) (explaining that the purpose of the WPP was to encourage airline employees to come forward and to aid in Congressional safety efforts in regards to the airlines).

²¹⁷ See 1996 *Hearings*, *supra* note 138 (statement of Patricia A. Friend) (explaining how large quantities of accidents could be prevented if airline employees discover and report safety concerns).

²¹⁸ See Jason M. Zuckerman, *Minimizing the Risk of Whistleblower Retaliation Claims* (Spring 2004) (explaining how the airlines face several regulatory and economic challenges). Airlines cannot afford more whistleblower claims. *Id.* In addition to increased costs, whistleblower claims create increased negative publicity. *Id.*; *cf. id.* (recommending that airline employees familiarize themselves with the whistleblower protection that is available to them in an effort to minimize their exposure to retaliation claims).

²¹⁹ Ronald John Lofaro & Kevin M. Smith, *Rising Risk? Risking Safety? The Millennium and Air Travel*, 25 *TRANSP. L.J.* 205, 213 (1998)

When any air carrier is in financial trouble . . . there are only a few ways open to cut costs: Reduce the "quality" and training of both flightcrew and mechanics, reduce the "quality" of the maintenance and

employees are protected under the WPP and various state claims for alleged violations, not just actual violations.²²⁰ Thus, increased violation reporting may result in more reports of alleged violations, which heightens the risk of false reporting.²²¹ Furthermore, if airline employees are allowed to bring state whistleblower claims, the airlines risk the possibility of more lawsuits and larger damages.²²² Airline employees may also face increased costs from taking planes out of service to comply with maintenance regulations.²²³ Despite these arguments, safety remains the ultimate priority in the aviation industry, and “[w]histleblower protection is sound public safety policy.”²²⁴

outsource all you can. . . . When carriers need to save money, they may try to operate at or below minimums. Result? The safety margin evaporates and is replaced by a rising risk.

Id.

²²⁰ See *Botz v. Omni Air Int’l*, 286 F.3d 488, 495 (8th Cir. 2002) (“The [state] statute’s authorization to refuse assignments is not limited to actual violations.”). The state whistleblower statute “extends to any assignment which the flight attendant has an objective, factual basis merely to believe is in violation.” *Id.*

²²¹ See Whistleblower Protection Program, 49 U.S.C. § 42121 (2006) (indicating that frivolous claims are subjected to fines).

²²² *AirTran Whistleblower*, *supra* note 117 (discussing how state whistleblower claims will result in higher costs for the airline). Jeffrey Pasek, a whistleblower litigation specialist, stated: “It opens up a lot more courthouses where these cases can be tried, In addition, some states will permit employees to sue supervisors as well as seek punitive damages.” *Id.*

²²³ MARY SCHIAVO, *FLYING BLIND, FLYING SAFE* 48–49 (1997) (discussing the costs of safety). Schiavo stated:

At its core, safety isn’t cost-effective. Recommendations for changes in airline practices, for new equipment, for improved safety rules were evaluated not in terms of how many accidents they might prevent or lives they might save, but in terms of how many dollars they would cost the airlines, aircraft builders, parts manufacturers or fleet maintenance companies.

Id. An important issue for the airlines to address when determining whether to perform maintenance, and thus comply with regulations, is “how much it would cost the airlines in lost revenue while planes were pulled out of service.” *Id.* at 49.

²²⁴ See *1996 Hearings*, *supra* note 138 (statement of Patricia A. Friend) (discussing how “Americans would be shocked to learn that flight attendants, pilots and mechanics today can be fired for reporting a safety violation.”). Patricia A. Friend, International President of the Association of Flight Attendants, stated:

To place workers in the position of risking their career when they report safety concerns to the FAA or Congress is poor aviation policy. Would American airline passengers want to fly on an airline with an unwritten company policy that gags its workers’ safety concerns? I certainly doubt it. Whistleblower protection is sound public safety policy.

Id.; *cf.* Zuckerman, *supra* note 218 (stating that over 210 claims were filed, and many employees succeeded in obtaining meaningful recoveries).

252 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

The Eighth Circuit disregarded the public policy behind whistleblower protection in the aviation industry.²²⁵ It is important to encourage violation reporting in the airline industry to ensure a high level of safety.²²⁶ In recent years, there have been many problems with the airlines and their compliance with regulations.²²⁷ Although the number of accidents per year has decreased dramatically in the last decade, the number of violations and the amount of fines imposed on airlines continues to increase.²²⁸ It is evident that the airlines are

²²⁵ See 146 CONG. REC. 2814 (2000) (statement of Rep. Shuster) (explaining that Congress intended the WPP to encourage airline employees to come forward and report violations); FISCHER ET AL., *supra* note 5, at 10 (explaining the concern that the airline industry has fallen into complacency regarding safety); Taylor, *supra* note 6 (stating that the world would be more dangerous and deceitful if whistleblowers lacked the courage to come forward).

²²⁶ See 1996 Hearings, *supra* note 138 (statement of Patricia A. Friend) (explaining that airline accidents could be avoided if airline employees discovered safety violations and reported them to proper authorities who acted upon them in an adequate manner).

²²⁷ See Ahlers, *Southwest settles with FAA for \$7.5 million*, *supra* note 138 (“Southwest operated 46 of its Boeing 737 jets on nearly 60,000 flights without performing mandatory inspections for fatigue cracks in their fuselages.”); Mike M. Ahlers, *FAA levies more fines against American Eagle regional airline*, CNN (Feb. 17, 2010, 8:27 P.M.), <http://www.cnn.com/2010/TRAVEL/02/17/american.eagle.fines/index.html?iref=allsearch> [hereinafter Ahlers, *FAA levies more fines*] (stating that American Eagle airlines “flew four Bombardier regional jets on more than 1,100 flights between February and May 2008, with main landing-gear doors that had not been repaired as ordered by the FAA in August 2006”); *FAA proposes a \$1.45 million fine against Northwest Airlines*, *supra* note 138 (stating that “32 of the carrier’s 757s flew more than 90,000 passenger flights between December 1, 2005 and May 27, 2008, while not in compliance with the airworthiness directive”); Michael Ahlers, *US Airways, United face FAA fines for safety violations*, CNN (Oct. 14, 2009), http://articles.cnn.com/2009-10-14/travel/us.airlines.fines_1_faa-united-airlines-airways?_s=PM:TRAVEL [hereinafter Ahlers, *US Airways, United face FAA fines*] (stating that “US Airways operated the eight aircraft on a total of 1,647 flights last fall and winter while the planes were in a potentially unsafe condition”). United Airlines involved one aircraft that flew over 200 times in an unsafe condition. *Id.*

²²⁸ See FISCHER ET AL., *supra* note 5, at 10. Illustrating the statistics over the last decade:

Between 2002 and 2006, there were nine fatal accidents involving commercial air carriers, four of which involved passenger fatalities. The accident rate over this period was roughly one fatal accident for every ten million hours flown (0.01 fatal accidents per 100,000 flight hours). By comparison, a decade earlier, during the period from 1992 through 1996, fatal airline accidents were occurring at a rate of about one every 3.7 million flight hours (0.027 fatal accidents per 100,000 flight hours). Thus, the fatal airline accident rate has been reduced by a factor of about 2.7 over the past decade.

Id.; see Ahlers, *FAA levies more fines*, *supra* note 227 (“The [FAA] . . . proposed a \$2.9 million fine against American Eagle Airlines for allegedly conducting more than 1,100 flights using planes with landing-gear doors that had not been repaired as prescribed by the FAA.”); Ahlers, *Southwest settles with FAA*, *supra* note 138 (“Southwest Airlines will pay \$7.5 million to settle complaints that it flew unsafe aircraft, and the fine will double unless the airline completes additional safety measures within a year . . .”); Ahlers, *US Airways, United face FAA fines*, *supra* note 227 (“The FAA is seeking a \$5.4 million fine from US Airways and a

suffering from a complacent attitude, which can have a detrimental effect on air safety.²²⁹ Complacency in the aviation world has resulted in several accidents; thus, it is important that airlines avoid falling into a “false sense of security” due to their low accident rate.²³⁰ Airlines must comply with mandatory regulations to ensure their successful safety record continues; one mishap can result in hundreds of lives lost.²³¹ Furthermore, the violations incurred by airlines over the recent years are violations that should have been reported.²³² It is essential that airline employees are provided sufficient whistleblower protection to encourage violation reporting and ensure our skies are safe.²³³ Aviation

\$3.8 million fine from United Airlines for unrelated violations.”); *American Airlines fined \$7.1 million for safety violations*, CNN (Aug. 14, 2008), http://articles.cnn.com/2008-08-14/travel/american.airlines.faa_1_faa-inspector-american-airlines-md-80?_s=PM:TRAVEL (“Federal regulators announced \$7.1 million in fines against American Airlines . . .”); CNN Wire Staff, *Continental faces fine for FAA violations*, CNN (July 27, 2010, 2:51 P.M.), <http://www.cnn.com/2010/TRAVEL/07/27/continental.faa.fine/index.html?iref=allsearch> (“Continental Airlines faces a fine of \$230,000 for violations of Federal Aviation Administration regulations . . .”); *FAA proposes a \$1.45 million fine against Northwest Airlines*, *supra* note 138 (“Federal aviation regulators . . . propos[ed] a \$1.45 million civil penalty against Northwest Airlines for operating nearly three dozen of its Boeing 757 planes without proper windshield wiring inspections.”).

²²⁹ FISCHER ET AL., *supra* note 5, at 10. Explaining that despite the decrease in fatal airline accidents:

[S]ome aviation safety professionals and some Members of Congress have expressed concern that the industry and regulators may have been lulled into complacency with regard to safety. This concern has been heightened recently in response to various findings that airlines have failed to fully comply with aircraft inspections and repairs mandated by the FAA.

Id.

²³⁰ See ALEXANDER T. WELLS & CLARENCE C. RODRIGUES, *COMMERCIAL AVIATION SAFETY* 149 (4th ed. 2004) (discussing the dangers of complacency in commercial aviation). “Complacency or a false sense of security should not be allowed to develop as a result of long periods without an accident or serious incident. An organization with a good safety record is not necessarily a safe organization.” *Id.*; see also Lt. Col. Devon McCollough, *Commentary, Why Worry About Complacency?*, U.S. AIR FORCE (July 23, 2010), <http://www.lajes.af.mil/news/story.asp?id=123214637> (explaining the importance of staying “alert for hazards” and avoiding the complacency attitude in aviation). Complacency has been a major factor in several aviation accidents and incidents. *Id.*

²³¹ See McCollough, *supra* note 230 (discussing the problems with complacency). ““Complacency kills”” is a popular saying in the aviation world. *Id.* Even when the accident rate is low, it is important to stay “vigilant” and detect hazards before they result in accidents. *Id.*

²³² See 1996 *Hearings*, *supra* note 138 (statement of Patricia A. Friend) (explaining how some airlines continue to fly airplanes when safety is compromised).

²³³ See 146 CONG. REC. 2814 (2000) (statement of Rep. Shuster) (explaining that the WPP was enacted to encourage airline employees to come forward and report violations); Callahan & Dworkin, *supra* note 139, at 100 (stating that the objectives behind state whistleblower statutes are the same).

whistleblowers should not be retaliated against; rather, the public should be grateful for their efforts to ensure passenger safety.²³⁴

Airline employees, such as mechanics and pilots, are “trained and skilled safety professionals” who work in and around aircrafts daily.²³⁵ They have firsthand experience of the problems that can threaten the safety of an air carrier in flight.²³⁶ Therefore, aviation employees “should be able to step forward and report their concerns” when an “airline decides to compromise safety in order to lower its costs.”²³⁷ However, “without strong whistleblower protections, employees are reluctant to come forward and many safety problems could go unreported.”²³⁸ Many of these employees stay silent in fear of being retaliated against.²³⁹ In order to encourage violation reporting, airline employees must know their career is not on the line. These employees are more than entitled to sufficient protection; therefore, state whistleblower claims should not be preempted by the WPP.²⁴⁰

IV. CONTRIBUTION

Since the enactment of the WPP, the circuit courts have generated confusion as to whether the WPP expands the scope of the ADA’s

²³⁴ See OSHA, *AIR21 and Whistleblower Protection*, *supra* note 77, at 913 (explaining that aviation employees “perform an important public service when they choose to report safety concerns”); Taylor, *supra* note 6 (stating that the world would be a more dangerous place without whistleblowers’ acts of courage).

²³⁵ 1996 Hearings, *supra* note 138 (statement of John J. Duncan, Chairman).

²³⁶ See *id.* (explaining that airline employees are the best people to report safety violations because they have experience with the certain problems and violations that can threaten the safety of an airplane in flight).

²³⁷ See *id.* (statement of Patricia A. Friend) (explaining that the result of reporting a violation in the airlines will be “a safer, stronger airline and industry”). Patricia A. Friend stated:

Airlines argue that they monitor their own safety and encourage employees to bring forward their concerns. For many airlines, this is true. Yet, judging by the number of fines, groundings and investigations by the Federal Aviation Administration, we know that some airlines do cut corners and compromise safety. Nonetheless, airlines committed to safety have nothing to fear in this legislation.

Id.

²³⁸ *Id.* (statement of John J. Duncan, Chairman S. Comm. on Aviation).

²³⁹ See *id.* (statement of Patricia A. Friend) (explaining how she has “received reports of incidents from several other airlines where supervisors have threatened and harassed flight attendants in an effort to deter the reporting of safety violations”). It is difficult to encourage employees to come forward with violations, even when they have whistleblower protection. *Id.*

²⁴⁰ See *id.* (explaining airline employees’ entitlement to whistleblower protection).

preemption clause.²⁴¹ The courts' inconsistent application of the WPP has resulted in state whistleblower claims being heard in some courts, while being completely preempted in others.²⁴² Preempting state whistleblower claims will decrease the amount of whistleblower protection given to airline employees, which will suppress future violation reporting and have a detrimental effect on the overall safety of the airline industry.²⁴³ Therefore, the conflict must be resolved to ensure the highest level of safety in the airlines.²⁴⁴

Accordingly, this Part proposes two solutions to ameliorate the circuit split concerning whether the WPP preempts equivalent state claims.²⁴⁵ First, this Part proposes an amendment to the WPP, which expressly indicates that state laws are not preempted.²⁴⁶ Alternatively, this Part proposes that the Supreme Court grant certiorari, uphold the majority position, and clarify "services."²⁴⁷

A. *Proposed Amendment to the WPP*

This section proposes an amendment that will ensure state laws are not preempted under the WPP.²⁴⁸ In addition, the amendment will make it clear that a claim may not be brought under both the WPP and an equivalent provision of law.²⁴⁹ Consequently, the proposed amendment will guarantee that the statute is interpreted consistently among the circuits.²⁵⁰ The proposed amendment, and its recommended subsection, is as follows:

²⁴¹ See *supra* Part II.E (discussing the circuit split concerning whether the WPP preempts state whistleblower claims).

²⁴² See *supra* notes 134–35 and accompanying text (illustrating the different conclusions reached by the courts regarding the preemptive effect of the WPP); *supra* Part III.A (discussing the non-uniformity among the courts regarding the preemption of state whistleblower claims and the unfairness that has resulted among airline employees).

²⁴³ See *supra* Part III.C (examining the detrimental effect the preemption of state whistleblower claims will have on airline safety).

²⁴⁴ See *infra* notes 253–70 and accompanying text (discussing the benefits of amending the WPP to include the proposed amendment).

²⁴⁵ See *infra* Part IV.A–B (discussing two proposed solutions to resolve the circuit split).

²⁴⁶ See *infra* Part IV.A (proposing an amendment to the WPP that will resolve the circuit split and benefit the airline industry).

²⁴⁷ See *infra* Part IV.B (proposing a model test to apply when determining preemption under the WPP).

²⁴⁸ See *infra* text accompanying notes 248–70 (proposing a no-preemption clause be added to the WPP indicating that state whistleblower claims are not preempted).

²⁴⁹ See *infra* text accompanying note 252 (proposing an amendment that will prevent employees from bringing two equivalent causes of action for the same unlawful act).

²⁵⁰ See *infra* text accompanying note 252 (explaining how the amended WPP will expressly indicate that state whistleblower claims are not preempted, resulting in a uniform interpretation of the WPP).

Proposed Amendment to 49 U.S.C. § 42121²⁵¹

*(f) No Preemption: The WPP shall not preempt or diminish any other safeguards provided by Federal or State law against discharge of an employee or discrimination against an employee in violation of subsection (a). An employee shall not seek protection under both this section and another provision of Federal or State law for the same allegedly unlawful conduct of the employer.*²⁵²

Commentary

The proposed amendment is the most beneficial solution regarding statutory remedies because: it is a simple fix that indicates state claims are not preempted; it provides consistent application of the WPP among the circuits; and it provides airline employees with an option other than the WPP's investigative process through the DOL.²⁵³ The amended WPP will increase the amount of whistleblower protection for airline employees, encourage airline employees to report violations, and promote the highest level of safety in the airlines.²⁵⁴

First, the amended WPP will increase whistleblower protection by providing airline employees with the option of pursuing a federal or state claim.²⁵⁵ A no-preemption provision will explicitly indicate that the WPP is not the sole remedy for airline whistleblowers.²⁵⁶ The result will be a consistent interpretation of the WPP among the circuits.²⁵⁷ Therefore, the amended WPP will provide airline employees with more

²⁵¹ Whistleblower Protection Program, 49 U.S.C. § 42121(2006).

²⁵² This proposal is the contribution of the author. The proposed amendment is italicized and was modeled after 6 U.S.C. § 1142(e)-(f) (2006). For purposes of this amendment, retaliatory discharge shall be defined according to the common legal usage. See BLACK'S LAW DICTIONARY, *supra* note 6, at 530 (defining retaliatory discharge as "[a] discharge that is made in retaliation for the employee's conduct (such as reporting unlawful activity by the employer to the government) and that clearly violates public policy"). See generally 6 U.S.C. § 1142(e)-(f) (2006) (providing a no preemption clause and an election of remedies clause).

²⁵³ See *supra* notes 83-88 and accompanying text (discussing the process one must go through with the DOL when pursuing a claim under the WPP).

²⁵⁴ See *infra* notes 253-70 and accompanying text (discussing the impact the amended WPP will have on the airline industry).

²⁵⁵ See OSHA, AIR21 and Whistleblower Protection, *supra* note 77, at 914 (explaining the benefits of increasing whistleblower protection); *supra* notes 183-96 and accompanying text (discussing the inconsistency among the circuits in allowing state whistleblower claims and the unfairness that has resulted among airline employees).

²⁵⁶ See *supra* text accompanying note 252 (illustrating the text of the no-preemption provision that should be amended to the WPP).

²⁵⁷ See *supra* notes 134-35 (stating the different holdings reached by courts when confronted with the issue of whether the WPP preempts state whistleblower claims); *infra* text accompanying notes 253-70 (explaining the benefits of allowing state whistleblower claims to be brought by airline employees).

protection when their employers retaliate against them for reporting violations to the airline or the FAA.²⁵⁸

Consequently, the amended WPP will encourage violation reporting to the FAA.²⁵⁹ The additional protection will entice airline employees to report safety violations to the FAA, even though states afford varying levels of protection to whistleblowers.²⁶⁰ If violation reporting is increased, the FAA's safety program will be more successful, airlines will not get away with as many violations as they currently are, and airline safety will not be compromised.²⁶¹ Furthermore, the WPP's objectives will remain unchanged with the addition of the proposed amendment because the amendment shares the WPP's purpose of encouraging airline employees to come forward with violations by giving them proper protection when employers retaliate against them.²⁶² In fact, the amended WPP will advance the purpose of the WPP by providing more protection to airline employees, thus encouraging more violation reporting and ultimately increasing the amount of violations that are reported.²⁶³

Although the amended WPP may result in higher costs and more litigation for the airlines, it will promote the highest level of airline safety.²⁶⁴ The FAA created a program to protect information submitted to the FAA.²⁶⁵ The program was intended to encourage airline employees, such as pilots and mechanics, to report violations to the FAA, which would aid in the efforts of increasing safety in the aviation industry.²⁶⁶ However, when there is insufficient whistleblower

²⁵⁸ See *supra* Part III.C (discussing the benefits of increased whistleblower protection). But see Susan Sauter, *The Employee Health and Safety Whistleblower Protection Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment At Will*, 59 U. CIN. L. REV. 513, 513 (1990) (arguing that state whistleblower claims cause inconsistent and erratic results in state courts).

²⁵⁹ See *supra* Part III.B (discussing how the WPP was enacted to encourage violation reporting).

²⁶⁰ See *supra* Parts III.A–C (explaining why state whistleblower laws should not be preempted by the WPP).

²⁶¹ See *supra* Part III.C (explaining the importance of violation reporting and its effect on safety).

²⁶² See *supra* Part III.B (discussing the legislative history of the WPP); *supra* notes 204–08 (indicating that the WPP's objective was to encourage violation reporting and ensure safety).

²⁶³ See *supra* Part III.C (discussing how sufficient whistleblower protection will encourage violation reporting).

²⁶⁴ See *infra* text accompanying notes 264–70 (indicating that the amended WPP will promote safety in the airline industry).

²⁶⁵ See *supra* note 77 (explaining the safety program of the FAA).

²⁶⁶ See *supra* notes 235–36 and accompanying text (explaining that airline employees, such as pilots and mechanics, are the best identifiers of violations due to their first hand experiences).

protection, people fail to report violations due to their fear of employer retaliation.²⁶⁷ Thus, by ensuring a sufficient amount of whistleblower protection and encouraging airline employees to report violations, the amended WPP will aid the FAA in its mission “to provide a safe, secure, and efficient global aviation system.”²⁶⁸ Airlines must conform to regulations to ensure every plane is airworthy before it flies to its destination carrying hundreds of passengers.²⁶⁹ Ultimately, the amended WPP benefits the public as a whole by ensuring violations are reported to the proper authorities and that no plane takes off when it fails to comply with regulations.²⁷⁰

B. The Supreme Court Should Grant Certiorari, Adopt the Majority Position, and Clarify “Services”

This section proposes an alternative solution to the circuit split—adoption of the majority position and clarification of “services.”²⁷¹ The ADA’s preemption provision has only been interpreted twice by the Supreme Court.²⁷² After the *Morales* test was established, some circuits adopted a narrow definition of “service” and others adopted a broad definition.²⁷³ The WPP further complicated the *Morales* analysis when it was amended to the ADA without clearly addressing preemption of state whistleblower claims.²⁷⁴ Therefore, the Supreme Court should grant certiorari to resolve the circuit split regarding whether the ADA, as amended by the WPP, preempts state whistleblower claims.²⁷⁵

The Court should adopt the view taken by the Third, Ninth, and Eleventh Circuits, which held that the WPP does not preempt state

²⁶⁷ See *supra* notes 238–39 and accompanying text (noting airline employees’ fear of reporting violations due to possible retaliation by their employers, and how this can affect the number of violations that are reported and safety in flight).

²⁶⁸ See *supra* note 5 (quoting the mission of the FAA); *supra* Part III.C (discussing the importance of reporting violations to the FAA to ensure the highest level of safety).

²⁶⁹ See *supra* Part III.C (discussing the importance of ensuring each plane is safe and airworthy before it takes off).

²⁷⁰ See *supra* note 234 and accompanying text (explaining that the public should be grateful for airline employees who blow the whistle).

²⁷¹ See *infra* notes 275–94 and accompanying text (proposing that the Supreme Court adopt the majority position and a clear interpretation of “services”).

²⁷² See *supra* Part II.C (discussing the two Supreme Court cases that interpreted the ADA’s preemption clause).

²⁷³ See *supra* notes 40–42 and accompanying text (discussing the different definitions of “service” adopted by the courts).

²⁷⁴ See *supra* Part II.E (illustrating the different views taken by the circuit courts after enactment of the WPP).

²⁷⁵ See *supra* notes 271–74 and accompanying text (proposing why the Court should adopt the majority position and reverse the Eighth Circuit).

whistleblower claims.²⁷⁶ The majority position should be adopted, and the Eighth Circuit overturned, because the mere enactment of a federal remedy is not evidence of Congress's "clear and manifest purpose" to preempt of all equivalent state remedies.²⁷⁷ However, adoption of the majority position will not resolve the circuit split unless an additional step is taken: clarification of "services."²⁷⁸ If the majority position is upheld, the ADA's preemption provision encompasses state whistleblower claims that relate to "services."²⁷⁹ Thus, the Court must address whether whistleblower claims fall under "services" to ensure they are treated consistently among the circuits.²⁸⁰

The *Morales* test fails to consider the WPP's objectives because it was established solely for the ADA's preemption provision.²⁸¹ The Court should consider the purpose of the ADA in conjunction with the WPP's objectives when clarifying "services" regarding state whistleblower claims.²⁸² The ADA and its preemption provision were enacted to deregulate the airlines, ensure maximum reliance on the competitive market, prevent states from regulating the newly deregulated industry, and make airlines more customer-friendly.²⁸³ The WPP was enacted twenty-two years after the ADA to encourage violation reporting and ensure airline safety.²⁸⁴ Therefore, the meaning of "services" in *Morales* must be clarified with respect to the WPP and its objectives.²⁸⁵

The Court should adopt a case-by-case analysis that consists of two steps: (1) determine if the state whistleblower claim adversely affects the "services" of an airline, such that it interferes with the airline's ability to

²⁷⁶ See *supra* Part II.E.2 (explaining the majority position).

²⁷⁷ See *supra* text accompanying note 159 (stating that Congress would have enacted an express preemption provision in the WPP if it intended to preempt all state whistleblower statutes).

²⁷⁸ See *supra* notes 40–42 and accompanying text (discussing the ambiguity of the term "services").

²⁷⁹ See *supra* Part II.E.2 (discussing why the WPP does not expand the scope of the ADA's preemption provision, and further explaining why the only issue to determine is whether the state whistleblower claim relates to "services").

²⁸⁰ See *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1260 (11th Cir. 2003) (holding that the state whistleblower claim was not preempted because it did not relate to "services" of an airline); cf. *Botz v. Omni Air Int'l*, 286 F.3d 488, 496–97 (8th Cir. 2002) (holding that the state whistleblower statute related to "services").

²⁸¹ See *supra* notes 54–66 and accompanying text (discussing how *Morales* interpreted the ADA's preemption provision).

²⁸² See *supra* Part II.A–B (discussing the purpose of the ADA and its preemption provision); *supra* Part III.B (discussing why the WPP was enacted).

²⁸³ See *supra* Part II.A (explaining that the ADA was enacted to deregulate the airlines).

²⁸⁴ See *supra* Part II.D (discussing the enactment of the WPP).

²⁸⁵ See *supra* Part II.C (discussing the interpretation of the ADA's preemption provision); *supra* notes 174–78 and accompanying text (explaining that the WPP is related to safety and not economic factors such as the ADA).

compete in the market, and (2) balance the adverse effect the state claim has on airline competition against safety.²⁸⁶ If airline competition is adversely effected, the state whistleblower claim interferes with the ADA's objectives.²⁸⁷ The proposed test balances this interference against safety, which is the WPP's main objective.²⁸⁸ Thus, both statutes' objectives are taken into account when determining preemption of state whistleblower claims under the ADA.²⁸⁹ Factors to consider under safety include: (1) the effect preemption of the claim will have on future violation reporting; (2) the seriousness of the violation; (3) past conduct of the airline concerning previous violations; and (4) the amount of time between detecting the violation and complying with the violation.²⁹⁰

The proposed clarification of "services" considers congressional intent and ensures that state whistleblower claims are not preempted if they further the values and goals intended by the WPP.²⁹¹ The new interpretation of "services" also deters frivolous claims by preempting state whistleblower claims when the proper circumstances exist, such as when their adverse effect on airline competition outweighs safety concerns.²⁹² Granting certiorari, adopting the majority approach, and clarifying "services" regarding whistleblower claims will resolve the circuit split by providing an approach that can be applied successfully and consistently among the courts.²⁹³ Furthermore, this solution gives airline employees the opportunity to pursue state whistleblower claims, which benefits the airline industry similar to the proposed amendment discussed in Part IV.A: Airline employees will have increased whistleblower protection, which will encourage violation reporting and promote safety in the airline industry.²⁹⁴

V. CONCLUSION

Dave would benefit from either of the proposed solutions. The amended WPP would give Dave the option to pursue either a state or

²⁸⁶ This proposed test is the contribution of the author.

²⁸⁷ See *supra* Part II.A (discussing the history and purpose behind the ADA).

²⁸⁸ See *supra* Part III.B (stating the objectives of the WPP).

²⁸⁹ See *supra* text accompanying note 286 (explaining how to incorporate the goals of each statute into an analysis to determine if state whistleblower claims fall under "services").

²⁹⁰ These proposed factors are the contribution of the author.

²⁹¹ See *supra* Part III.B (explaining the goals Congress intended when it enacted the WPP).

²⁹² See *supra* text accompanying note 286 (explaining that state whistleblower claims are preempted if their interference with airline competition outweighs the safety concerns).

²⁹³ See *supra* text accompanying note 286 (proposing a test that clarifies "services," which can be applied consistently across the circuits).

²⁹⁴ See *supra* notes 255-70 and accompanying text (explaining the benefits of allowing state whistleblower claims to be brought by airline employees).

federal claim. Thus, Dave would be allowed to proceed with his state whistleblower claim and avoid the hassle involved with filing a complaint with the DOL. The court would also find that Dave's claim is not preempted by the WPP if it applied the majority position with the new "services" analysis. Even if the court found his claim was related to "services" and interfered with the ADA's objectives, the court would find that the safety concerns in Dave's case strongly outweigh the interference, and Dave would succeed in pursuing his state claim. There is no "clear and manifest purpose" of Congress regarding preemption of state whistleblower claims under the WPP. If Congress intended such a result, it would have enacted an express preemption provision in the statute. Furthermore, airline employees deserve proper whistleblower protection. Providing airline employees with both state and federal remedies will increase the amount of whistleblower protection available to employees, which will encourage violation reporting and ensure that safety in the airlines remains a top priority. Therefore, state whistleblower claims should not be preempted by the ADA, as amended by the WPP.

Katie Lynn Patrick*

* J.D. Candidate, Valparaiso University School of Law (2012); B.S., Aviation Technology Professional Flight, Purdue University (2008). I would like to thank Professor Rosalie Levinson for her comments on earlier versions of this Note. I would also like to thank my husband, Kellen, for his love and support throughout my law school career, my parents, Beth and Dave, for always believing in me no matter how extraordinary my goals become, and my Law Review mentor, Alex Leuchtag, for all of his patience and help throughout the Notewriting process.