

**Docket No. SA-530**

Exhibit No. 5-V

**NATIONAL TRANSPORTATION SAFETY BOARD**

**Washington D.C.**

**ATA v Cuomo  
(17 pages)**

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

August Term 2007

(Argued: March 5, 2008)

Decided: March 25, 2008)

Docket No. 07-5771-cv

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AIR TRANSPORT ASSOCIATION OF AMERICA, INC.,  
*Plaintiff-Appellant,*

-v.-

ANDREW CUOMO, in his official capacity as Attorney General  
of the State of New York, MINDY A. BOCKSTEIN, in her  
official capacity as Chairperson and Executive Director  
of the New York State Consumer Protection Board,  
*Defendants-Appellees.*

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Before: WESLEY, LIVINGSTON, *Circuit Judges*, and  
COGAN, *District Judge*.\*

The Air Transport Association of America appeals from a final judgment of the United States District Court for the Northern District of New York (Kahn, J.) granting summary judgment to defendants and dismissing plaintiff's complaint seeking declaratory and injunctive relief against New York State's Passenger Bill of Rights, codified at section 553(2)(b)-(d) of the New York

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\* The Honorable Brian M. Cogan, District Judge, United States District Court for the Eastern District of New York, sitting by designation.

1 Executive Law and sections 251-f to 251-j of the New York General Business  
2 Law. We reverse and hold that the substantive provisions of the law, N.Y. Gen.  
3 Bus. Law § 251-g(1), are preempted by the Airline Deregulation Act of 1978.

4 Reversed and remanded.

5 SETH P. WAXMAN, Wilmer Cutler Pickering  
6 Hale and Dorr LLP, Washington, DC (Bruce H.  
7 Rabinowitz, Jonathan E. Nuechterlein, Heather  
8 Zachary, Daniel S. Volchok, Chad Golder,  
9 Wilmer Cutler Pickering Hale and Dorr LLP,  
10 Washington, DC, Robert S. Span, John J.  
11 Gallagher, Neal D. Mollen, Paul, Hastings,  
12 Janofsky & Walker LLP, Washington, DC, *on*  
13 *the brief*), *for Plaintiff-Appellant*.

14 BARBARA D. UNDERWOOD, Solicitor General  
15 (Andrea Oser, Deputy Solicitor General,  
16 Andrew B. Ayers, Assistant Solicitor General,  
17 *of counsel*, Andrew M. Cuomo, Attorney Gen-  
18 eral of the State of New York, *on the brief*), *for*  
19 *Defendants-Appellees*.

20 Paul S. Hudson, Sarasota, FL (Burton Jay  
21 Rubin, Alexandria, VA, *on the brief*), *for Amici*  
22 *Curiae Aviation Consumer Action Project and*  
23 *Coalition for an Airline Passengers' Bill of*  
24 *Rights in Support of Defendants-Appellees*.

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29 PER CURIAM:

30 Appellant Air Transport Association of America (“Air Transport”), the  
31 principal trade and service organization of the United States airline industry,  
32 appeals from an order of the United States District Court for the Northern

1 District of New York (Kahn, J.) granting summary judgment to Appellees and  
2 dismissing its complaint seeking declaratory and injunctive relief against  
3 enforcement of the New York State Passenger Bill of Rights (the “PBR”), 2007  
4 N.Y. Sess. Laws, ch. 472 (codified at N.Y. Exec. Law § 553(2)(b)-(d); N.Y. Gen.  
5 Bus. Law §§ 251-f to 251-j). *Air Transp. Ass’n of Am. v. Cuomo*, 528 F. Supp. 2d  
6 62 (N.D.N.Y. 2007). We hold that the PBR is preempted by the express preemp-  
7 tion provision of the Airline Deregulation Act of 1978 (the “ADA”) and therefore  
8 reverse.

## 10 BACKGROUND

11 Following a series of well-publicized incidents during the winter of 2006-  
12 2007 in which airline passengers endured lengthy delays grounded on New York  
13 runways, some without being provided water or food, the New York legislature  
14 enacted the PBR. The substantive provisions of the PBR state as follows:

15 1. Whenever airline passengers have boarded an  
16 aircraft and are delayed more than three hours on the  
17 aircraft prior to takeoff, the carrier shall ensure that  
18 passengers are provided as needed with:

19 (a) electric generation service to provide temporary  
20 power for fresh air and lights;

21 (b) waste removal service in order to service the  
22 holding tanks for on-board restrooms; and

23 (c) adequate food and drinking water and other  
24 refreshments.

1  
2 N.Y. Gen. Bus. Law § 251-g(1). The law also requires all carriers to display  
3 consumer complaint contact information and an explanation of these rights. *Id.*  
4 § 251-g(2). Section 251-g took effect on January 1, 2008. 2007 N.Y. Sess. Laws,  
5 ch. 472, § 5.

6 Air Transport filed suit in the United States District Court for the  
7 Northern District of New York seeking declaratory and injunctive relief on the  
8 grounds that the PBR is preempted by the ADA and violates the Commerce  
9 Clause of the U.S. Constitution. Appellant Air Transport moved for summary  
10 judgment, and the district court granted summary judgment *sua sponte* to the  
11 appellees, holding that the PBR was not expressly preempted by the ADA  
12 because it is not “related to a price, route, or service of an air carrier,” *Air*  
13 *Transp.*, 528 F. Supp. 2d at 66-67 (quoting 49 U.S.C. § 41713(b)(1)) (internal  
14 quotation mark omitted), and was not impliedly preempted because Congress did  
15 not intend for the ADA to occupy the field of airplane safety, *id.* at 67-68. We  
16 granted Air Transport’s motion for an expedited appeal.

## 17 18 **DISCUSSION**

19 We review the district court’s grant of summary judgment de novo. *SEC*  
20 *v. Kern*, 425 F.3d 143, 147 (2d Cir. 2005); *see also Drake v. Lab. Corp. of Am.*  
21 *Holdings*, 458 F.3d 48, 56 (2d Cir. 2006) (“[A] determination regarding preemp-

1 tion is a conclusion of law, and we therefore review it de novo.”).

2 The Supremacy Clause, U.S. Const. art VI, cl. 2, “invalidates state laws  
3 that ‘interfere with, or are contrary to,’ federal law.” *Hillsborough County v.*  
4 *Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*,  
5 22 U.S. (9 Wheat.) 1, 211 (1824)). Preemption can be either express or implied.  
6 Express preemption arises when “a federal statute expressly directs that state  
7 law be ousted.” *Ass’n of Int’l Auto. Mfrs. v. Abrams*, 84 F.3d 602, 607 (2d Cir.  
8 1996). Implied preemption arises when, “in the absence of explicit statutory  
9 language, . . . Congress intended the Federal Government to occupy [a field]  
10 exclusively,” or when state law “actually conflicts with federal law.” *English v.*  
11 *Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). More specifically, preemption is implied  
12 when “the pervasiveness of the federal regulation precludes supplementation by  
13 the States, where the federal interest in the field is sufficiently dominant, or  
14 where ‘the object sought to be obtained by the federal law and the character of  
15 obligations imposed by it . . . reveal the same purpose.’” *Schneidewind v. ANR*  
16 *Pipeline Co.*, 485 U.S. 293, 300 (1988) (omission in original) (quoting *Rice v.*  
17 *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congress has enacted two  
18 statutes that potentially bear on the subject matter of the PBR: (1) the ADA,  
19 Pub. L. No. 95-504, 92 Stat. 1705 (1978); and (2) the Federal Aviation Act of 1958  
20 (the “FAA”), Pub. L. No. 85-726, 72 Stat. 731. We begin with the former.

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I.

“Since the existence of preemption turns on Congress’s intent, we are to begin as we do in any exercise of statutory construction[,] with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.” *McNally v. Port Auth. of N.Y. & N.J. (In re WTC Disaster Site)*, 414 F.3d 352, 371 (2d Cir. 2005) (alteration in original) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). The ADA’s express preemption provision states as follows:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1). The exceptions to which this provision refers are not applicable in this case. Thus, the PBR is preempted if it is “related to a price, route, or service of an air carrier.” We conclude that it is.

A.

Air Transport’s complaint asserts a claim under the Supremacy Clause and a claim that the PBR violates § 41713(b)(1). Importantly, § 41713(b)(1) does

1 not provide an express private right of action, and we have held with regard to  
2 its predecessor statute, which is substantively identical, that no private right of  
3 action can be implied. *W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d  
4 222, 225 (2d Cir. 1987); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91,  
5 97 (2d Cir. 1986). Air Transport therefore cannot sue for a violation of the  
6 statute.

7 Nevertheless, Air Transport is entitled to pursue its preemption challenge  
8 through its Supremacy Clause claim. The distinction between a statutory claim  
9 and a Supremacy Clause claim, although seemingly without a difference in this  
10 particular context, is important and is not a trifling formalism:

11 A claim under the Supremacy Clause that a federal  
12 law preempts a state regulation is distinct from a claim  
13 for enforcement of that federal law. . . . A claim under  
14 the Supremacy Clause simply asserts that a federal  
15 statute has taken away local authority to regulate a  
16 certain activity. In contrast, an implied private right of  
17 action is a means of enforcing the substantive provi-  
18 sions of a federal law. It provides remedies, frequently  
19 including damages, for violations of federal law by a  
20 government entity or by a private party. The mere  
21 coincidence that the federal law in question in this case  
22 contains its own preemption language does not affect  
23 this distinction.

24 *W. Air Lines*, 817 F.2d at 225-26. Moreover, contrary to amici's suggestion, Air  
25 Transport's preenforcement challenge presents no problem of unripeness or  
26 other barriers to justiciability. See *Morales v. Trans World Airlines, Inc.*, 504

1 U.S. 374, 380-81 (1992) (citing *Ex parte Young*, 209 U.S. 123, 145-47, 163-65  
2 (1908)).

3  
4 **B.**

5 Congress enacted the ADA in 1978, loosening its economic regulation of  
6 the airline industry after determining that “maximum reliance on competitive  
7 market forces’ would best further ‘efficiency, innovation, and low prices’ as well  
8 as ‘variety [and] quality . . . of air transportation.” *Id.* at 378 (alteration and  
9 omission in original) (quoting 49 U.S.C. app. § 1302(a)(4), (9) (1988)). “To ensure  
10 that the States would not undo [this] deregulation with regulation of their own,”  
11 Congress included an express preemption provision. *Id.*; *see also id.* at 389-91  
12 (holding that the ADA expressly preempted the application of state deceptive  
13 business practice laws to airline fare advertisements because such regulation  
14 related to air carrier prices). Recognizing this goal, the Supreme Court has  
15 repeatedly emphasized the breadth of the ADA’s preemption provision. *See Am.*  
16 *Airlines, Inc. v. Wolens*, 513 U.S. 219, 225-26 (1995); *id.* at 235 (Stevens, J.,  
17 concurring in part and dissenting in part); *Morales*, 504 U.S. at 383-84; *see also*  
18 *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. ---, 128 S. Ct. 989, 998 (2008)  
19 (Ginsburg, J., concurring) (noting the “breadth of [the] preemption language” in  
20 the Federal Aviation Administration Authorization Act of 1994, whose

1     preemption provision, 49 U.S.C. § 14501(c)(1), is in pari materia with that of the  
2     ADA).

3             Although this Court has not yet defined “service” as it is used in the ADA,  
4     we have little difficulty concluding that requiring airlines to provide food, water,  
5     electricity, and restrooms to passengers during lengthy ground delays relates to  
6     the service of an air carrier. This conclusion draws considerable support from  
7     the Supreme Court’s recent unanimous opinion in *Rowe* construing 49 U.S.C.  
8     § 14501(c)(1)’s identically worded preemption provision. In *Rowe*, the Court  
9     addressed a Maine law imposing, among other obligations, a requirement that  
10    retailers shipping tobacco products to customers within the State use a delivery  
11    service that provides certain forms of recipient verification — a law enacted,  
12    according to the State, to further its interest in preventing minors from  
13    obtaining cigarettes. The *Rowe* Court reiterated its conclusions from *Morales* in  
14    construing the ADA:

15             (1) that “[s]tate enforcement actions having a connec-  
16             tion with, or reference to” carrier “rates, routes, or  
17             services’ are pre-empted”; (2) that such pre-emption  
18             may occur even if a state law’s effect on rates, routes or  
19             services “is only indirect”; (3) that, in respect to  
20             pre-emption, it makes no difference whether a state law  
21             is “consistent” or “inconsistent” with federal regulation;  
22             and (4) that pre-emption occurs at least where state  
23             laws have a “significant impact” related to Congress’  
24             deregulatory and pre-emption-related objectives.

25     128 S. Ct. at 995 (alteration in original) (emphasis omitted) (citations omitted)

1 (quoting *Morales*, 504 U.S. at 384, 386-87, 390). The Court emphasized that  
2 Congress’s “overarching goal” with regard to the ADA was helping to assure that  
3 transportation rates, routes, and services “reflect[ed] ‘maximum reliance on  
4 competitive market forces,’ thereby stimulating” not only “‘efficiency, innovation,  
5 and low prices,’” but also “‘variety’ and ‘quality’” in transportation services. *Id.*  
6 (quoting *Morales*, 504 U.S. at 378).

7 A majority of the circuits to have construed “service” have held that the  
8 term refers to the provision or anticipated provision of labor from the airline to  
9 its passengers and encompasses matters such as boarding procedures, baggage  
10 handling, and food and drink — matters incidental to and distinct from the  
11 actual transportation of passengers. *See Travel All Over the World, Inc. v.*  
12 *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Hodges v. Delta*  
13 *Airlines, Inc.*, 44 F.3d 334, 336-38 (5th Cir. 1995) (en banc); *see also Branche v.*  
14 *Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003) (referring to the  
15 *Hodges* definition as the “more compelling” of the alternative definitions that  
16 have been adopted); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998)  
17 (citing *Travel All Over the World* and *Hodges* in holding that tort claims “based  
18 in part upon [an airline’s] refusal of permission to board” are preempted because  
19 “boarding procedures are a service rendered by an airline”); *Chukwu v. Bd. of*  
20 *Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (adopting the *Hodges*

1 definition), *aff'd mem. sub nom. Azubuko v. Bd. of Dirs. British Airways*, 101  
2 F.3d 106 (1st Cir. 1996). The Third and Ninth Circuits, in contrast, have  
3 construed service to refer more narrowly to “the prices, schedules, origins and  
4 destinations of the point-to-point transportation of passengers, cargo, or mail,”  
5 but not to “include an airline’s provision of in-flight beverages, personal  
6 assistance to passengers, the handling of luggage, and similar amenities.”  
7 *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en  
8 banc); *accord Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 193-94  
9 (3d Cir. 1998).

10 *Charas’s* approach, we believe, is inconsistent with the Supreme Court’s  
11 recent decision in *Rowe*. There, the Court necessarily defined “service” to extend  
12 beyond prices, schedules, origins, and destinations. Indeed, in determining that  
13 the ADA’s preemption provision reached, among other things, the imposition of  
14 recipient verification requirements on tobacco shipments, the Court stated  
15 expressly that “federal law must . . . pre-empt Maine’s efforts directly to regulate  
16 carrier services.” *Rowe*, 128 S. Ct. at 998 (emphasis added). It noted further  
17 that to interpret the federal preemption provision not to reach such regulation  
18 “could easily lead to a patchwork of state service-determining laws, rules, and  
19 regulations,” which would be “inconsistent with Congress’ major legislative effort  
20 to leave such decisions, where federally unregulated, to the competitive

1 marketplace.” *Id.* at 996.

2 We hold that requiring airlines to provide food, water, electricity, and  
3 restrooms to passengers during lengthy ground delays does relate to the service  
4 of an air carrier and therefore falls within the express terms of the ADA’s  
5 preemption provision. As a result, the substantive provisions of the PBR,  
6 codified at section 251-g(1) of the New York General Business Law, are  
7 preempted.

8 The unanimous *Rowe* opinion held that Maine’s law resulted in Maine’s  
9 “direct substitution of its own governmental commands for ‘competitive market  
10 forces’” in determining “the services that motor carriers will provide” to their  
11 customers. *Id.* at 995 (quoting *Morales*, 504 U.S. at 378). In this respect, the  
12 PBR is indistinguishable. It substitutes New York’s commands for competitive  
13 market forces, requiring airlines to provide the services that New York specifies  
14 during lengthy ground delays and threatening the same “patchwork of state  
15 service-determining laws, rules, and regulations” that concerned the Court in  
16 *Rowe*.<sup>1</sup> *Id.* at 996.

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<sup>1</sup> At least nine other states have proposed legislation regarding lengthy ground delays. *See* H.R. 2149, 48th Leg., 2d Reg. Sess. (Ariz. 2008); Assem. 1943, 2007-2008 Reg. Sess. (Cal. 2008); S. 2062, 110th Reg. Sess. (Fla. 2008); S. 161, 115th Gen. Assem., 2d Reg. Sess. (Ind. 2008); H.R. 5475, 94th Legis., 2007 Reg. Sess. (Mich. 2007); Assem. 967, 213th Leg., 1st Ann. Sess. (N.J. 2008); H.R. 2055, 190th Gen. Assem., 2007 Sess. (Pa. 2007); S. 2088, 2008 Legis. Sess. (R.I. 2008); S. 6269, 60th Leg., 2008 Reg. Sess. (Wash. 2008). These proposed laws would impose obligations ranging from a requirement that the airline accommodate passengers on the next available route, *see* Mich. H.R. 5475 § 5(2), to a requirement that



1 note, finally, that it may also be impliedly preempted by the FAA and regula-  
2 tions promulgated thereunder. The FAA was enacted to create a “uniform and  
3 exclusive system of federal regulation” in the field of air safety. *City of Burbank*  
4 *v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973). Shortly after it became  
5 law, we noted that the FAA “was passed by Congress for the purpose of  
6 centralizing in a single authority — indeed, in one administrator — the power  
7 to frame rules for the safe and efficient use of the nation’s airspace.” *Air Line*  
8 *Pilots Ass’n, Int’l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960); *see also British*  
9 *Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75, 83 (2d Cir. 1977) (“[The  
10 FAA] requires that exclusive control of airspace management be concentrated  
11 at the national level.”). Congress and the Federal Aviation Administration have  
12 used this authority to enact rules addressing virtually all areas of air safety.  
13 These regulations range from a general standard of care for operating  
14 requirements, *see* 14 C.F.R. § 91.13(a) (“No person may operate an aircraft in a  
15 careless or reckless manner so as to endanger the life or property of another.”),  
16 to the details of the contents of mandatory onboard first-aid kits, *id.* pt. 121, app.  
17 A, to the maximum concentration of carbon monoxide permitted in “suitably  
18 vented” compartments, *id.* § 125.117. This power extends to grounded planes  
19 and airport runways. *See id.* § 91.123 (requiring pilots to comply with all orders  
20 and instructions of air traffic control); *id.* § 139.329 (requiring airlines to restrict

1 movement of pedestrians and ground vehicles on runways).

2 The intent to centralize air safety authority and the comprehensiveness  
3 of these regulations pursuant to that authority have led several other circuits  
4 (and several courts within this Circuit) to conclude that Congress intended to  
5 occupy the entire field and thereby preempt state regulation of air safety. *See,*  
6 *e.g., Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007) (“[T]he FAA  
7 preempts the entire field of aviation safety through implied field preemption.  
8 The FAA and regulations promulgated pursuant to it establish complete and  
9 thorough safety standards for air travel, which are not subject to supplemen-  
10 tation by . . . state laws.”); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d  
11 784, 795 (6th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Abdullah v. Am.*  
12 *Airlines, Inc.*, 181 F.3d 363, 367-68 (3d Cir. 1999); *French v. Pan Am Express,*  
13 *Inc.*, 869 F.2d 1, 5 (1st Cir. 1989); *Curtin v. Port Auth. of N.Y. & N.J.*, 183 F.  
14 Supp. 2d 664, 671 (S.D.N.Y. 2002). Although we have not addressed this precise  
15 issue, we have acknowledged that the FAA does not preempt all state law tort  
16 actions. *See In re Air Crash Disaster at John F. Kennedy Int’l Airport on June*  
17 *24, 1975*, 635 F.2d 67, 75 (2d Cir. 1980). However, the FAA has a savings clause  
18 that specifically preserves these actions. *See* 49 U.S.C. § 40120(c).

19 If New York’s view regarding the scope of its regulatory authority carried  
20 the day, another state could be free to enact a law prohibiting the service of soda

1 on flights departing from its airports, while another could require allergen-free  
2 food options on its outbound flights, unraveling the centralized federal  
3 framework for air travel. On this point, the decisions of the Fifth and Ninth  
4 Circuits finding preemption of state common law claims for failure to warn of the  
5 risk of deep vein thrombosis are instructive. *See Montalvo*, 508 F.3d at 473 (“[A]  
6 state [is not] free to require any announcement it wishe[s] on all planes arriving  
7 in, or departing from, its soil . . . .”); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380,  
8 383-84 (5th Cir. 2004).

9 In light of our determination that the PBR is preempted by the ADA,  
10 however, we need not address the scope of any FAA preemption, and we decline  
11 to do so here. Although the goals of the PBR are laudable and the circumstances  
12 motivating its enactment deplorable, only the federal government has the  
13 authority to enact such a law. We conclude, then, by reiterating our holding that  
14 the PBR’s substantive provisions, codified at section 251-g(1) of the New York  
15 General Business Law, are preempted by 49 U.S.C. § 41713(b)(1).

16  
17 **CONCLUSION**

18 For the foregoing reasons, the judgment of the district court is RE-  
19 VERSED, and the case is REMANDED to the district court so that it may enter  
20 summary judgment in favor of Air Transport.