AIRLINES, SICK TIME, & INTERSTATE COMMERCE: THE DORMANT COMMERCE CLAUSE AND ITS IMPACT ON STATE AND MUNICIPAL PAID SICK LEAVE LAWS

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The United States is the only industrialized nation lacking a universal paid sick leave law that guarantees employees the right to time off from work to attend to their own or their family's medical needs. Nonetheless, many states and municipalities have created their own paid sick leave laws to fill in the gap left open by the federal government. Following the passage of three state referendums on paid sick leave laws in the 2024 general election, there are now eighteen states, plus the District of Columbia, which mandate that employers provide employees with paid sick leave. Although there continues to be a growing trend in subfederal paid sick leave laws, especially since the COVID-19 pandemic, there remain questions about the constitutionality of these laws when applied to interstate transportation employers—like airlines—whose employees operate across multiple state boundaries daily. While some courts have partially addressed the possible preemption of state and municipal paid sick leave laws under the Airline Deregulation Act, courts have not addressed whether the dormant Commerce Clause preempts subfederal paid sick leave laws. This Note attempts to address these lingering questions of federalism by looking at the application of the dormant Commerce Clause to state and municipal paid sick leave laws. By examining paid sick leave laws generally, recent jurisprudence in constitutional preemption, and the evolution of the dormant Commerce Clause doctrine, this Note identifies the major issues, and solutions, to vertical federalism posed by state and municipal paid sick leave laws.

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INTRODUCTION

Since the 1990s, states, municipalities, and federal territories have passed paid sick leave laws which require certain private employers to provide their employees with paid time off for their employees' illnesses, injuries, or other physical and mental medical conditions.[1] Increasingly more states and municipalities have enacted or enhanced coverage of paid sick leave benefits across the United States since the COVID-19

[1] Ryan H. Nelson, *Federalizing Direct Paid Leave*, 20 U. PA. J. BUS. L. 623, 624 (2018).

pandemic.[2] As of 2025, eighteen states and the District of Columbia have instituted paid sick leave laws.[3] Nonetheless, some of these laws may threaten federalism and the vertical separation of powers within the United States.

Paid sick leave laws are unique in requiring employers to pay employees for a period of time that an employee does not work.[4] While there are some federal and state laws requiring employers to provide unpaid sick leave to employees,[5] there are currently no federal laws which guarantee employees a right to short-term paid sick leave.[6] Many arguments have been made about the benefits of paid sick leave to employees, employers, and the government.[7] However, few commentators have discussed the wider implications these state and local laws have on American federalism. This Note seeks to fill this gap by studying the interplay between state and local paid sick leave laws and constitutional federalism. Because there are no federal paid sick leave laws (only *unpaid* federal leave rights under the Family and Medical

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2 *See, e.g.*, Press Release, Off. of Governor Gavin Newsom, Workers Just Got More Paid Sick Days (Oct. 4, 2023), https://www.gov.ca.gov/2023/10/04/workers-just-got-more-paid-sick-days [https://perma.cc/J6UA-JBDJ].

3 *See* Jennifer Liu, *3 New States Passed Paid Sick Leave for Workers—Here's Where Employees Get the Benefit*, CNBC (Nov. 13, 2024), https://www.msn.com/en-us/news/us/3-new-states-passed-paid-sick-leave-for-workers-heres-where-employees-get-the-benefit/ar-AA1u1yBv [https://perma.cc/PER6-EKKZ]. Following the 2024 general election, the citizens of Alaska, Missouri, and Nebraska passed by referendum paid sick leave laws in their respective states, joining fifteen other states and Washington, D.C. in providing paid sick leave to workers. *Id.* The states, exclusive of Washington, D.C., which have or will have paid sick leave laws by the publication of this Note include: Alaska, Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Id.* This list of state paid sick leave laws does not include many municipalities that have their own scheme of paid sick leave ordinances. *Id.*

4 Nelson, *supra* note 1, at 625.

5 *Id.*

6 Jennifer Bennett Shinall, *Paid Sick Leave's Payoff*, 75 VAND. L. REV. 1879, 1881 (2022); *see also infra* Section III.A. On March 18, 2020, the Families First Coronavirus Response Act provided a reimbursement to employees and small and midsize businesses for time taken off due to the COVID-19 pandemic. However, the effects of this law ended on December 31, 2020. 29 U.S.C. § 2612(a)(1)(F); Press Release, Dep't of Lab., U.S. Department of the Treasury, IRS, and the U.S. Department of Labor Announce Plan to Implement Coronavirus-Related Paid Leave for Workers and Tax Credits for Small and Midsize Businesses to Swiftly Recover the Cost of Providing Coronavirus-Related Leave (Mar. 20, 2020), https://www.dol.gov/newsroom/releases/osec/osec20200320 [https://perma.cc/QP4Z-MYL7].

7 *See, e.g.*, Erin Garrity, Note, *Guacamole Is Extra but the Norovirus Comes Free: Implementing Paid Sick Days for American Workers*, 58 B.C. L. REV. 703 (2017); Rebeccah Golubock Watson, Note, *Defending Paid Sick Leave in New York City*, 19 J.L. & POL'Y 973 (2011); Jennifer Bennett Shinall, *Leave in the Time of COVID: Examining Paid Sick Leave Laws*, 59 U. LOUISVILLE L. REV. 393 (2021).

Leave Act (FMLA)),[8] states and municipalities have taken it upon themselves to enact paid sick leave laws in their own territories. However, this lack of an overarching federal paid sick leave scheme has resulted in a patchwork of state and municipal paid sick leave laws with different requirements for employees and employers across numerous jurisdictions.[9] While this myriad of laws can be a headache to navigate for employers operating in multiple cities and states,[10] it is even more challenging for interstate transportation industries like airlines whose employees operate in multiple states and cities daily.

In three recent federal court decisions—*Delta Air Lines v. New York City Department of Consumer Affairs*; *Air Transport Association of America v. Washington Department of Labor & Industries*; and *Air Transport Association of America v. Campbell*—airline companies and air carrier trade associations argued that they are not required to provide paid sick leave to their employees pursuant to the applicable state and local laws because these laws are preempted either explicitly by the Airline Deregulation Act (ADA) or implicitly by the dormant Commerce Clause.[11] Under the Supremacy Clause of the Constitution, federal statutes preempt state and local laws that conflict with federal law.[12] Preemption of state laws by federal statute can be expressly stated within the federal law or implied by the federal law's scope or purpose.[13] However, even if a subfederal law is explicitly or implicitly preempted, a state or local law can be found unconstitutional because of the dormant Commerce Clause.[14] Under the dormant Commerce Clause doctrine, a state or local law can only allow preferential treatment to in-state

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8 Shinall, *supra* note 6, at 1881–82 ("[T]he only federal law that provides workers with any leave rights is the Family and Medical Leave Act . . . ."). *See generally* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended in scattered sections of 29 U.S.C.).

9 Nelson, *supra* note 1, at 675.

10 *See id.*

11 *See generally* Delta Air Lines, Inc. v. N.Y.C. Dep't of Consumer Affs., 564 F. Supp. 3d 109, 111–12 (E.D.N.Y. 2021); Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181, 183 (9th Cir. 2021); Air Transp. Ass'n of Am., Inc. v. Campbell, No. 18-cv-10651, 2023 WL 3773743, at *1 (D. Mass. June 2, 2023); U.S. CONST. art. VI, cl. 2; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

12 U.S. CONST. art. VI, cl. 2.

13 Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

14 *Dormant Commerce Power: Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3/dormant-commerce-power-overview [https://perma.cc/8K9M-9F68]. This doctrine reflects the early concerns of the Constitution's Framers to ensure that economic Balkanization did not occur among the several states as it did under the Articles of Confederation. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 517–29 (2019) (citing Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008)).

companies, goods, or persons if that law is narrowly tailored to advance a legitimate state interest.[15] Otherwise, that law is regulating extraterritorially and may be unconstitutional.[16]

The United States District Courts for the Districts of Eastern District of New York and District of Massachusetts both recently held that airline companies do not need to provide some, or all, of their employees paid sick time because New York City's and Massachusetts's paid sick leave laws were preempted by the ADA.[17] The United States Court of Appeals for the Ninth Circuit decided the opposite, holding that airline companies must provide paid sick leave to airline employees in Washington state under Washington's paid sick leave law.[18] Nonetheless, due to the constitutional avoidance doctrine,[19] none of these three courts fully discussed the merits of the dormant Commerce Clause argument raised by the air industry plaintiffs.[20]

The aim of this Note is twofold. Firstly, this Note seeks to discuss the discrepancies between the holdings of the Eastern District of New York, the District of Massachusetts, and the Ninth Circuit in their preemption analyses. Second, this Note seeks to evaluate the dormant Commerce Clause issue raised in litigation which the three courts did not thoroughly discuss.

Part I of this Note will provide the necessary background into the three major subjects involved in these disparate holdings—the ADA, subfederal paid sick leave laws, and the dormant Commerce Clause. This Note will begin with a discussion of the origins of the ADA and the relevant Supreme Court interpretations of the ADA's preemption clause. Part I will next examine the generalities of paid sick leave laws, further exploring the specific paid sick leave laws implicated in the three decisions (i.e., the paid sick leave laws of New York City, New York State, Massachusetts, and Washington) and demonstrating how all four can be

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15 *Tenn. Wine & Spirits*, 588 U.S. at 518 ("[A] state law [that] discriminates against out of state goods or nonresident economic actors . . . can be sustained only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose.'" (quoting *Davis*, 553 U.S. at 338 (2008))).

16 *See* U.S. CONST. arts. I, § 10, cl. 2–3; VI, cl. 2.

17 *Delta Air Lines*, 564 F. Supp. 3d at 126; *Campbell*, 2023 WL 3773743, at *13.

18 Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181, 185 (9th Cir. 2021).

19 *See generally* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016) (discussing how the Supreme Court has utilized the doctrine of constitutional avoidance in recent jurisprudence).

20 *See generally Delta Air Lines*, 564 F. Supp. 3d 109, 125–26; *Campbell*, 2023 WL 3773743, at *13 n.21; *Air Transport Ass'n*, 859 F. App'x at 184–85.

treated the same in this Note's constitutional analysis. Lastly, Part I explores the dormant Commerce Clause, its surrounding doctrines, and recent dormant Commerce Clause jurisprudence. Part II begins by analyzing the courts' reasonings in three airline paid sick leave cases—*Delta Air Lines*, *Air Transport*, and *Campbell*. It will next discuss whether the relevant paid sick leave statutes are unconstitutional under the dormant Commerce Clause following recent Supreme Court jurisprudence. Part III then examines the ramifications of three proposals to solve the problems posed by the different courts' decisions and three potential solutions to the lingering federalism concerns left open by the possible ADA preemption of paid sick leave laws including: (1) implementing a federal paid sick leave law; (2) following the Ninth Circuit's decision not to preempt the subfederal law; or (3) applying past Supreme Court ADA interpretations to the Eastern District of New York and District of Massachusetts decisions under a narrower statutory preemption analysis.

I. BACKGROUND

A. *The Airline Deregulation Act*

1. Origins

The federal government first began to regulate the airline industries under the Civil Aeronautics Act of 1938.[21] Congress later passed the more extensive Federal Aviation Act of 1958 to further regulate the airline industry, creating the Federal Aviation Administration (FAA) to help administer and enforce the law.[22] However, in 1978, Congress reversed course and passed the ADA.[23] By then, members of Congress began to see the Federal Aviation Act as stifling competition among airlines;[24] in

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21 Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938); *see* Stuart J. Starry, *Federal Preemption in Commercial Aviation: Tort Litigation Under 49 U.S.C. § 1305*, 58 J. AIR L. & COM. 657, 659 (1993).

22 Starry, *supra* note 21, at 659; *see* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958).

23 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

24 *See, e.g.*, 124 CONG. REC. S10653 (daily ed. Apr. 19, 1978) (statement of Sen. Charles H. Percy) ("The umbilical cord tying Government to the commercial airline industry must be cut. If we are to develop better to smaller communities and lower fares throughout the industry, if we are to create an air transportation network responsive to the needs of all Americans, and if we are to attain the reality of healthy, unfettered competition, then the phased deregulation principles contained in [the ADA] are necessary and proper.").

response, Congress enacted the ADA to deregulate the airline industry, reduce passenger costs, and promote efficiency.[25]

To ensure deregulation occurred, Congress included an explicit preemption of certain state and municipal laws and regulations within the ADA.[26] The preemption clause of the ADA reads,

> [A] State, political subdivision of a State, or political authority of [two] or more 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 or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft . . . .[27]

As one scholar commented, preemption under the ADA is based primarily on the interplay between the interest of federal policy to deregulate the airline industry and the competing goal of preserving state police powers.[28] Before the ADA's passage, states could regulate intrastate air travel whereas the federal government regulated interstate travel.[29] After the ADA, only the federal government could regulate—or deregulate—air travel relating to prices, routes, and services.[30]

2. Preemption of State and Municipal Laws

Before the ADA, the Federal Aviation Act only added to existing state regulations and did not preempt state laws.[31] Congress passed the ADA because it saw state regulations as too restrictive, and believed that maximum reliance on market forces was required for efficiency,

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25 Eric E. Murphy, Comment, *Federal Preemption of State Law Relating to an Air Carrier's Services*, 71 U. CHI. L. REV. 1197, 1199–1200 (2004).

26 *Id.* Before the passage of the ADA, state regulations on the air industry coexisted with federal regulations. *See id.* at 1199 ("Prior to 1978 . . . State regulation was allowed to coexist with federal regulation because of the Federal Aviation Act's 'savings' clause." (footnote omitted) (citing Federal Aviation Act, Pub. L. No 85-726, 72 Stat 731 (1958), *amended by* Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705)).

27 49 U.S.C. § 41713(4)(A). Exceptions to this preemption of state and local laws are listed in subparagraph (B). *See id.* § 41713(4)(B).

28 Michael Welsh, Comment, *Navigating the Turbulence: The First Circuit Clarifies the Preemptive Scope of the Airline Deregulation Act in* Brown v. United Airlines, 55 B.C. L. REV. E-SUPP. 15, 17 (2014) ("[T]he ADA's preemptive scope turns on the interplay between the competing interests of deregulating the airline industry and preserving states' traditional police powers.").

29 Abigail A. Lahvis, Comment, *Inhumane: How the Airline Deregulation Act Shields Commercial Air Carriers from Legal Liability for Mishandling Human Remains*, 87 J. AIR L. & COM. 799, 801–02 (2022).

30 *Id.*

31 Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992).

innovation, and low prices in the airline industry.[32] Therefore, Congress wrote the ADA to explicitly preempt state and local laws and regulations relating to (1) rates, (2) routes, or (3) services.[33]

The Supreme Court interpreted the ADA's preemption clause very broadly in a trilogy of cases.[34] In *Morales v. Trans World Airlines, Inc.*, the Supreme Court first interpreted the preemption clause of the ADA to apply to state consumer protection laws and regulations on advertisements.[35] The lawsuit centered on the National Association of Attorneys General (NAAG)—a group composed of multiple states' Attorneys General—who claimed that airline advertisements, frequent flyer programs, and other practices violated existing state laws and regulations.[36] The Federal Department of Transportation and Federal Trade Commission disagreed with the NAAG's assessment, arguing these state laws and regulations did not align with the deregulatory purpose of the ADA.[37] Nevertheless, seven Attorneys General pushed forward their claims and sent multiple airlines memorandums of their intention to sue for allegedly violating state laws.[38] The airlines responded by filing this lawsuit in the Western District of Texas seeking a declaratory judgment that some Texan consumer protection laws and regulations were preempted by the ADA and requesting the Court to enjoin Texas from regulating the airline's rates, routes, or services.[39]

Writing for the Court, Justice Antonin Scalia indicated that the "relates to" language of the ADA applies to *any* law which has a connection with, or reference to, the rates, routes, or services of the airline industry.[40] In analyzing the passage, Scalia equated the ADA's preemption language to the similarly worded preemption clause of the Employee Retirement Income Security Act of 1974 (ERISA).[41] ERISA's preemptory clause indicates that it "supersede[s] any and all State laws

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32 *Id.* ("In 1978 . . . Congress, determine[d] that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality [of] . . . air transportation services,' [and thus] enacted the Airline Deregulation Act (ADA)." (quoting 49 U.S.C. §§ 40101(a)(6), 40101(a)(12))).

33 *Id.* at 378–79.

34 Lahvis, *supra* note 29, at 802.

35 504 U.S. at 388.

36 *Id.* at 379.

37 *Id.*

38 *Id.* at 379–80.

39 *Id.* at 380.

40 *See id.* at 383 ("[T]he key phrase, obviously, is 'relating to.' The ordinary meaning of these words is a broad one . . . and the words thus express a broad pre-emptive purpose.").

41 *Id.* at 383–84; *see also* 29 U.S.C. § 1144(a) ("Except as provided in subsection (b) . . . the provisions of [ERISA] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .").

insofar as they may now or hereafter *relate to* any employee benefit plan."[42] By tying the interpretation of the ADA's preemptory clause with ERISA, Scalia relied upon a significant compendium of employee benefits case law which almost always overruled state laws in favor of federal law.[43] Thus, under *Morales*, the Court set a large preemptory scope for the ADA, giving the law almost per se preemptory power over state laws and regulations even somewhat related to an airline's rates, routes, and services.[44]

In the next decision, *American Airlines, Inc. v. Wolens*, the Supreme Court held that the ADA partially preempted state law, declaring that statutory consumer fraud claims were federally preempted, but allowing state common law contract claims to remain viable.[45] This case originated in Illinois and was brought by participants in American Airlines' frequent flyer program called "AAdvantage."[46] The AAdvantage program allowed participants to earn mileage credits by flying with American Airlines that could be exchanged for tickets or service upgrades.[47] The plaintiffs alleged that the AAdvantage program violated state law when American Airlines retroactively modified the terms and benefits of the program, devaluing their AAdvantage credits.[48] The Illinois Supreme Court rejected the plaintiffs' requests for an injunction, asserting that such a decree would, in effect, regulate the airline industry contrary to the ADA.[49] However, the Illinois Supreme Court allowed the common law breach-of-contract claims to survive against the wishes of American Airlines.[50] American Airlines appealed to the Supreme Court, claiming that both common law contract claims and the state consumer protection law should be preempted by the ADA.[51]

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42 29 U.S.C. § 1144(a) (emphasis added).

43 *See Morales*, 504 U.S. at 386 (explaining that in the ERISA interpretation cases, the Court consistently held that even tenuous relations between state and federal laws demanded preemption).

44 *Id.* at 383.

45 513 U.S. 219, 227, 232–33 (1995).

46 *Id.* at 224.

47 *Id.*

48 *Id.* at 224–25 ("[P]laintiffs challenged only the retroactive application of modifications, *i.e.*, cutbacks on the utility of credits previously accumulated. These cutbacks, plaintiffs maintained, violated the Illinois Consumer Fraud and Deceptive Business Practices Act . . . and constituted a breach of contract.").

49 *Id.* at 225.

50 *Id.*

51 *Id.* at 225–26 (providing that the U.S. Supreme Court originally remanded the case to the Illinois Supreme Court after deciding *Morales*, but the Illinois Supreme Court ruled that the frequent flyer programs were peripheral to the operations of the airline and were not preempted by the ADA).

Contrary to the prior decision in *Morales*, the Court limited the expansive preemptory scope of the ADA.[52] Justice Ruth Bader Ginsburg explicitly noted from the language in *Morales* that the ADA did not preempt state laws that could apply to airlines if they were "too tenuous, remote, or peripheral" to the ADA.[53] Still, the Court determined that the Illinois Consumer Fraud Act, upon which the respondent based some of their claims, was preempted by the ADA.[54] *Wolens* also departed from *Morales* by separating the interpretation of the ADA from ERISA. Justice Ginsburg, writing for the *Wolens* majority, disconnected the ADA analysis from ERISA, noting how the ADA significantly contrasted with ERISA, since the ADA allows contract claims to be pursued in state courts, whereas ERISA requires all civil actions to be channeled into federal courts.[55] Thus, the Court narrowed the ADA's preemptory powers, permitting state common law claims and allowing state laws to remain if their effects were "too tenuous, remote, or peripheral" to an airline's prices, routes, or services.[56]

The latest Supreme Court decision interpreting the preemptory scope of the ADA occurred a decade ago in *Northwest, Inc. v. Ginsberg*.[57] Like in *Wolens*, this case centered on a tiered frequent flyer program provided this time by the airline Northwest.[58] In *Ginsberg*, the plaintiff, S. Binyomin Ginsberg, had achieved the highest level of awards available in 2005, but in 2008, Northwest terminated Ginsberg's frequent flyer benefits, claiming that Ginsberg had abused the program.[59] Northwest pointed to a provision of its frequent flyer program agreement that allowed Northwest to unilaterally, and at its own discretion, cancel memberships in the program if it believed a participant abused the program.[60] After Northwest denied his benefits, Ginsberg subsequently filed a class action lawsuit against Northwest in federal court, claiming

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52 *See id.* at 224.

53 *See id.* ("*Morales* also left room for state actions 'too tenuous, remote, or peripheral . . . to have pre-emptive effect.'" (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992)).

54 *Wolens*, 513 U.S. at 228.

55 *Id.* at 232 ("[T]he ADA contrasts markedly with the ERISA, which does channel civil actions into federal courts . . . under a comprehensive scheme, detailed in the legislation, designed to promote 'prompt and fair claims settlement.'" (quoting Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 54 (1987)).

56 *Wolens*, 513 U.S. at 232.

57 *See generally* 572 U.S. 273, 277 (2014).

58 *Ginsberg*, 572 U.S. at 277.

59 *Id.* at 277–78.

60 *Id.* at 277 ("Northwest terminated [Ginsberg]'s membership . . . in reliance on a provision of the . . . agreement that provided that '[a]buse of the . . . program (including . . . improper conduct as determined by [Northwest] in its sole judgment[)] . . . may result in cancellation of the member's account.'").

that this unilateral cancellation violated, in part, a state's common law of contracts.[61]

Contrary to some of the language of *Wolens*, the Supreme Court in *Ginsberg* held that a claim based in part on state common law which sought to provide broader protections to consumers was preempted by the ADA.[62] Writing for the Court, Justice Samuel Alito stated that common law claims fit easily into the preemptive framework of the ADA,[63] and that exempting them from preemption by the ADA would undermine its deregulatory goals.[64] Thus, *Ginsberg* once again broadened the preemptory scope of the ADA, allowing the ADA to preempt even state common law claims related to airline prices, routes, or services.[65] Nevertheless, unlike the common law claims of *Wolens*, the particular common law claim in *Ginsberg* was preempted because it was considered to "enlarge" the contractual claims of the respondent.[66]

Interestingly, if ADA preemption doctrine was still closely tied to ERISA preemption jurisprudence, as suggested in *Morales*, the "relates to" language of the ADA would be less dispositive in determining subfederal preemption.[67] As Justice David Souter indicated in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, when Congress reads a preemption clause—like in ERISA—the Court must first presume that Congress does not intend to preempt the state law in question.[68] From this presumption, historic state police powers are meant to remain with the state unless there is a clear and manifest purpose of Congress to preempt.[69] Further developments in the ERISA preemption doctrine also diminished the scope of the phrase

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61 *Id.* at 278.

62 *Id.* at 276.

63 *Id.* at 281 ("[S]tate common-law rules fall comfortably within the language of the ADA pre-emption provision.").

64 *Id.* at 283 ("Exempting common-law claims would also disserve the central purpose of the ADA. The [ADA] eliminated federal regulation of rates, routes, and services . . . and the pre-emption provision was included to prevent States from undoing what the [ADA] was meant to accomplish. . . . [T]he ADA's deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statue or regulation.").

65 *Id.* at 281–82, 286–88.

66 *Id.* at 289 ("Because respondent's implied covenant of good faith and fair dealing claim seeks to enlarge his contractual agreement with petitioners, we hold that [the ADA] pre-empts the claim.").

67 Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992) ("'Some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect.") (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).

68 514 U.S. 645, 654 (1995) ("[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law.").

69 *Id.* at 655.

"relates to."[70] The Court identified that a too-literal reading of the term "relates to" is impractical and ends in ludicrous results.[71] Although the "relates to" phrase in ERISA is still fairly broad—preempting all state laws that directly reference, impliedly reference, or are impermissibly connected to ERISA plans[72]—the scope of ERISA's preemption clause is less expansive than when it was connected to the ADA's preemption clause in *Morales*. If the Court drew upon its previous connections between the ADA and ERISA to interpret the ADA's preemptory scope, the ADA's preemptive ability would be substantially diminished compared to how it has been applied in *Morales*, *Wolens*, or *Ginsberg*.[73]

The Supreme Court has defined the scope of the ADA's preemption clause to be extremely broad. Nevertheless, as *Wolens* and *Morales* concluded, there are still theoretically some state or local laws that the ADA does not preempt.[74] When the state laws or regulations are "too tenuous, remote, or peripheral" to an airline's rates, routes, or services, the ADA does not preempt that law or regulation.[75] Moreover, if the Court returned to a comparative analysis between the ADA's and ERISA's preemptive clauses, the scope of the ADA's "relates to" provision would be substantially diminished from what they are today given the developments in ERISA preemption jurisprudence.

ADA preemption arguments in relation to state and local paid sick leave laws have focused on the tenuity between these public health and employment laws to the airline industry. Thus, it is important to learn more about the key features of paid sick leave laws to determine their possible constitutionality. If the paid sick leave laws are "too tenuous,

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70 In *Morales*, Justice Scalia relies upon the case *Shaw v. Delta Air Lines, Inc.*, which took the phrase "relates to" very literally to mean any connection with or reference to an ERISA-covered plan. *Morales*, 504 U.S. at 384; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983). However, in *Travelers Insurance Co.*, the Court reasoned that *Shaw*'s literal interpretation of "relates to" was impermissibly broad and would result in impractical preemptions that would "never run its course." *Compare Shaw*, 463 U.S. at 96–97 ("A [state] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."), *with Travelers Ins. Co.*, 514 U.S. at 655 ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course . . . ." (quoting HENRY JAMES, RODERICK HUDSON xli ((New York ed., World's Classics 1980)).

71 Egelhoff v. Egelhoff, 532 U.S. 141, 146 (2001) ("[W]e have recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes pre-emption would never run its course.'" (quoting *Travelers Ins. Co.*, 514 U.S. at 655)).

72 Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 319–20 (2016) (explaining that ERISA's preemption statute preempts two categories of state laws: (1) state laws that reference ERISA plans or where the existence of ERISA plans are essential to the law's operations, and (2) when the state law has an impermissible connection with ERISA plans).

73 *See generally Morales*, 504 U.S. 374; Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); Northwest, Inc. v. Ginsberg, 572 U.S. 273 (2014).

74 *Morales*, 504 U.S. at 390; *Wolens*, 513 U.S. at 224.

75 *Wolens*, 513 U.S. at 224; *Morales*, 504 U.S. at 390; *see also* Lahvis, *supra* note 29, at 802.

remote, or peripheral" to an airline's rates, routes, or services, then they should not be preempted by the ADA, even if they affect airline employment policies.

B. *State Paid Sick and Safe Leave Laws*

1. General Properties of Paid Sick Leave Laws

Although unpaid sick leave laws or policies are very common throughout the United States, *paid* sick leave laws have become an increasingly popular supplement.[76] State paid sick leave laws traditionally allow employees to take a limited amount of short-term paid leave to tend to personal or family illnesses.[77] Typically, the amount of paid sick leave an employee accrues annually is determined by the number of hours worked.[78] This hourly accrual allows paid sick leave laws to be very inclusive in providing benefits to employees, giving even part-time workers the ability to utilize these benefits.[79] Many sick leave laws also mandate paid leave for mental or psychological issues or both, not just physical ailments.[80]

Paid sick leave laws tend to apply to most employers regardless of the number of workers employed, providing further application than even some antidiscrimination laws.[81] Unlike other paid or unpaid vacation time, most paid sick leave laws do not require employees to provide more than "as soon as practicable" notice to use their accrued paid sick time.[82] This relaxed notification requirement incentivizes employees to take time off of work when they are unexpectedly ill.[83] To counter overuse, the circumstances in which employees can use their paid sick leave are usually defined in statute and cover a limited number of

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76 This Note discusses paid sick leave laws created by state or local governments for workers within their jurisdiction. Another type of paid sick leave benefits is provided by private employers in addition to an employee's compensation. These benefits are usually classified as an "employee welfare benefit plan" and may be regulated under ERISA. This Note does not address private paid sick leave benefits. *See generally* Evan Sumner, Note, *A Fork in the Road: Paid Sick Leave Plans as a Payroll Practice and ERISA Preemption of State Laws Regulating Paid Sick Leave*, 51 CAP. U. L. REV. 27 (2023) (explaining how ERISA may affect private employer paid sick leave plans).

77 *See* Shinall, *supra* note 6, at 1888.

78 *See, e.g.*, N.Y.C. ADMIN. CODE § 20-913(2)(b) (2025).

79 Shinall, *supra* note 6, at 1889.

80 *See, e.g.*, N.Y.C. ADMIN. CODE § 20-914(2)(b) (2025); WASH. REV. CODE § 49.46.210(1)(b) (2025); MASS. GEN. LAWS ch. 149, § 148C(c) (2024).

81 Shinall, *supra* note 6, at 1889.

82 *Id.* at 1888–89.

83 *Id.* at 1889–90.

afflictions affecting the qualifying employee or their family members.[84] Employers are further provided certain guarantees by paid sick leave laws to limit potential abuses by employees.[85] For example, state paid sick leave laws generally cap the number of paid sick leave hours an employee can accrue and carry over into the next year, limit the circumstances when employees can use paid sick time, and require employees to provide a doctor's or professional's note to corroborate multiday uses of sick time.[86] These provisions are meant to ensure that employees only use their paid sick leave to deal with statutorily defined health-related situations, not for vacation.[87]

Supporters of paid sick leave laws say that these laws are valuable because they protect employees, employers, and the entire workplace.[88] Paid sick leave laws allow sick employees to recover and maintain their health without suffering more severe economic consequences from not going to work.[89] At the same time, these laws maintain the health of the workplace by incentivizing employees to take sick time off so other employees are less likely to contract illnesses at work.[90] If paid sick time is not provided, an ill employee may be forced to go to work because of their personal financial situation.[91] This decision to work while sick can spread diseases rapidly among staff and substantially harm workplace productivity.[92] These laws also arguably benefit employers by reducing the situations where one worker's illness causes a cascade of employee absences or spreads diseases to customers.[93] Overall, paid sick leave

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84 *See, e.g.*, N.Y.C. ADMIN. CODE § 20-914(a)(1) (2025).

85 Shinall, *supra* note 6, at 1891–92.

86 *Id.* at 1891–92.

87 *See id.* at 1889–91.

88 *See, e.g.*, *Paid Sick Leave Is Good for Business*, A BETTER BALANCE (May 12, 2023), https://www.abetterbalance.org/resources/sickleavebusinesscase [https://perma.cc/RC2X-QQ7N] (nonprofit legal advocacy organization providing a list of the benefits of paid sick leave laws); Tom Murphy, *More States Requiring Paid Medical or Sick Leave*, ASSOCIATED PRESS (Mar. 22, 2025, 9:00 AM), https://apnews.com/article/paid-sick-leave-family-medical-leave-d61ddb6a105af79a3191cfbffbe2f584 [https://perma.cc/7S7K-X9TM] (news article containing quotes from workers and advocates on the benefits of paid sick leave laws); *see also* Shinall, *supra* note 6, at 1888–93.

89 Shinall, *supra* note 6, at 1893–94.

90 *Id.* at 1893–94.

91 *Id.* at 1882–83.

92 *Id.* at 1893–94. This negative impact of illnesses on the workplace was most recently experienced by the whole world during the COVID-19 pandemic. *See generally* Lexi Lonas Cochran, *The COVID-19 Shutdown: A Timeline of How the Pandemic Changed the US Economy*, HILL (May 5, 2022, 3:21 PM), https://thehill.com/business/3478647-a-timeline-of-the-covid-19-economy [https://perma.cc/J5FB-CBLX] (providing a timeline of the COVID-19 pandemic and its impacts).

93 Shinall, *supra* note 6, at 1893.

incentivizes employees to stay home while still contagious, creating a safer and healthier work environment.[94]

Many paid sick leave laws also include "safe leave" as an applicable circumstance for using paid sick leave.[95] Safe leave provisions allow employees to use their accrued paid sick time to safeguard their own or their family member's mental and physical safety if they or their family members are survivors of domestic violence, family offenses, sexual crimes, stalking, or human trafficking.[96] The ability to take time off for these circumstances can be a boon for survivors because they often deal with volatility and uncertainty after suffering intense trauma.[97] Providing survivors with the ability to take paid time off to support their mental and physical well-being can help survivors maintain employment they may otherwise lose.[98]

Because there are no overarching federal paid sick leave laws,[99] each state or municipal sick leave law may have unique characteristics making it incomparable to other state sick leave schemes. This Note seeks to tackle this problem by examining several relevant state and local laws to provide a complete analysis of the dormant Commerce Clause and preemption claims in the identified federal cases. By showing that New York's, Washington's, and Massachusetts's paid sick leave laws are comparable, this Note will create broader arguments about how relevant dormant Commerce Clause and preemption arguments are for all paid sick leave laws generally instead of resting its analysis on the minute differences that may exist between the different state approaches to paid sick leave.

2. New York State's and New York City's Paid Sick Leave Laws

New York State's paid sick leave law went into effect January 1, 2021.[100] It requires that every employer in New York State provide paid sick time to their employees if the employer has (1) four or fewer employees and a net income greater than one million dollars, or (2) more

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94 *See id.* at 1890–91.

95 *See, e.g.*, N.Y.C. ADMIN. CODE § 20-914(b) (2025).

96 Nusrat J. Khan, Comment, *Domestic Violence and Leave Laws: How New York Can Improve Its Leave Policies Based on the Laws of Washington, D.C. and New Jersey*, 25 CUNY L. REV. 336, 347 (2022).

97 *See id.* at 339–41.

98 *See id.*

99 *See infra* Section III.A.

100 Kris Janisch, *Paid Sick Leave Laws by State*, GOVDOCS (Oct. 5, 2023), https://www.govdocs.com/paid-sick-leave-laws-by-state [https://perma.cc/GY2G-XK3J].

than five employees.[101] The application of New York State's paid sick leave law to commuting or telecommuting workers is not explained specifically throughout either its law or accompanying regulations.[102] However, like most paid sick leave laws, the requirements of the law attach to workplaces based on the location of the work performed by the employee.[103]

The New York State Department of Labor (NY-DOL) further explains that paid sick leave benefits apply to all private-sector employees.[104] Since the eligibility for paid sick leave depends on the location of the work performed by the employee, employees living outside of New York who telecommute to perform work in New York may also be eligible for the benefits.[105] Additionally, because there is no requirement of a primary place of business like the Massachusetts Earned Sick Time Act,[106] the New York State paid sick leave law may apply more broadly to individuals who commute into the state to work, or who do not spend the majority of their time in the state.[107]

New York City also crafted its own paid sick leave ordinance called the Earned Safe and Sick Time Act (ESSTA).[108] Under the ESSTA, all employers must provide sick leave to an employee working within the boroughs of Brooklyn, The Bronx, Manhattan, Staten Island, or Queens if the employer (1) employs five or more employees, (2) employs a domestic worker, or (3) has fewer than five employees but a net income of one million dollars within the previous tax year.[109]

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101 N.Y. LAB. LAW § 196-b(1) (McKinney 2025).

102 *Compare* N.Y. LAB. LAW § 196-b(1) *with* COLO. REV. STAT. ANN. § 8-13.3-403(1)(a) *and* COLO. DEP'T OF LAB. & EMP., INTERPRETIVE NOTICE AND FORMAL OPINION ("INFO") #6, https://cdle.colorado.gov/sites/cdle/files/INFO %236 HFWA Summary %26 Overview 07.19.2023 accessible_0.pdf [https://perma.cc/BW6E-RJKP].

103 *See e.g.*, MASS. GEN. LAWS ch. 149, § 148C(b) (2023); N.Y. LAB. LAW § 196-b(1); COLO. REV. STAT. ANN. § 8-13.3-403(1)(a) (West 2024); *see also* N.Y. DEP'T OF LAB., NEW YORK STATE PAID SICK LEAVE FAQ 3 (2022), https://www.ny.gov/sites/default/files/atoms/files/PSL_FAQ_PaidSickLeaveFAQ.pdf [https://perma.cc/A8YQ-6A2T].

104 *New York Paid Sick Leave*, N.Y. DEP'T OF LAB., https://www.ny.gov/new-york-paid-sick-leave/new-york-paid-sick-leave [https://perma.cc/YY55-669T] ("All private-sector employees in New York State are covered [by paid sick leave], regardless of industry, occupation, part-time status, and overtime exempt status.").

105 N.Y. DEP'T OF LAB., *supra* note 103, at 3.

106 *See* MASS. ATT'Y GEN.'S OFF., EARNED SICK TIME IN MASSACHUSETTS FREQUENTLY ASKED QUESTIONS 2 (2018), https://www.mass.gov/doc/earned-sick-time-faqs/download [https://perma.cc/H5S3-AHJM]; *see also infra* Section I.B.4.

107 *See* N.Y. DEP'T OF LAB., *supra* note 104.

108 *See generally* N.Y.C. ADMIN. CODE §§ 20-911 to 20-924.2 (2025) (providing the main provisions of the codified ESSTA).

109 *Id.* § 20-913(a)(1).

The ESSTA preceded the New York State law, coming into effect in 2014.[110] It was later amended in 2020 to follow more closely with the newly passed New York State law.[111] New York City is able to enact major pieces of legislation relating to the health and welfare of citizens—like the ESSTA—within its municipality borders notwithstanding New York State because of the decentralized governance structure of New York defined in the Constitution of the State of New York and the New York Municipal Home Rule Law.[112] New York State's paid sick leave law also explicitly provides that cities with populations over one million can enact and enforce their own local paid sick leave laws as long as they meet or exceed the requirements of the New York State law and its accompanying regulations.[113] The ESSTA and New York State's paid sick leave law are very similar.[114] Because of their similar nature, the New York City Department of Consumer and Worker Protection (DCWP) and NY-DOL have overlapping enforcement authority for state or local guaranteed safe and sick leave benefits within New York City.[115]

There are some differences between New York State's paid sick leave law and the ESSTA. For example, the ESSTA more narrowly defines "employee" and "employer."[116] Although ESSTA includes the definitions of the New York State law of both groups into its definition,[117] it limits the definition to only include those who actually perform work in New

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110 N.Y.C. DEP'T OF CONSUMER & WORKER PROT., PAID SAFE AND SICK LEAVE LAW: FREQUENTLY ASKED QUESTIONS 17 (Sept. 26, 2024), https://www.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-FAQs.pdf [https://perma.cc/55YR-FPRA].

111 *Id.* at 9–10, 41.

112 N.Y. CONST. art. IX, § 2(c) ("[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government . . . ."); N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12) (McKinney 2024); *see* Watson, *supra* note 7, at 981–82.

113 N.Y. LAB. LAW § 196-b(12) (McKinney 2025). Proponents of the decentralized approach to administering health laws like paid sick leave have touted that cities like New York City can themselves become "laboratories of democracy" by enacting legislation that states traditionally do. *See* Watson, *supra* note 7, at 975.

114 *Compare* N.Y. LAB. LAW §§ 196-b(1)(a), 196-b(4) (McKinney 2025), *with* N.Y.C. ADMIN. CODE §§ 20-913(a)(1), 20-914 (2025). *See also* N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 110, at 41 (explaining that New York State's and New York City's paid sick leave laws are similar, but that the amount of leave employees get based on employer size and income, and the reasons employees can use their leave, are different).

115 N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 110, at 41; N.Y. DEP'T OF LAB., *supra* note 103, at 6.

116 *Compare* N.Y.C. ADMIN. CODE § 20-912 (2025), *with* N.Y. LAB. LAW §§ 190(2)–(3) (McKinney 2024).

117 *See* N.Y.C. ADMIN. CODE § 20-912 (2025) (explaining that the definitions of employee and employer are defined under subdivisions 2 and 3 of section 190 of the New York state labor law, respectively).

York City itself.[118] DCWP further elaborates on the application of ESSTA in Section 7-203 of the Rules of the City of New York.[119] An employee is eligible for ESSTA for any work done, including telecommuting, while physically located in New York City regardless of where the employer is located.[120] However, if the employer is located in New York City, but the employee does not perform their work in New York City, they are not eligible for ESSTA benefits.[121] Nonetheless, an employee who works outside of New York City, but regularly performs work in New York City, can qualify for ESSTA benefits for the hours worked while within the city's municipal borders.[122] Nevertheless, for the purposes of this Note, both the ESSTA and New York State's paid sick leave law can be treated the same when analyzing whether the dormant Commerce Clause impacts either, since there is overlapping jurisdiction and only minor differences between the two laws.

3. Washington's Paid Sick Leave Law

Promulgated in 2018 and amended to its current form on January 1, 2025, the Washington Paid Sick Leave (PSL) Law also mandates that employers provide paid sick leave to employees, regardless of the number of workers hired by the employer.[123] Under the PSL Law, workers earn one hour of paid sick leave for every forty hours they work.[124] At a minimum, forty hours of accrued paid sick leave carries over into the following year.[125] Similar to the ESSTA, the PSL Law allows employees to use paid leave for sick time (both mental and physical) and certain safe time reasons for themselves or their family members.[126]

Like most paid sick leave laws, the PSL Law is enforced by Washington's executive labor department—the Washington State Department of Labor & Industries (L&I)—after undertaking investigations based upon claims of retaliation for use of paid sick leave.[127] Washington considers retaliation to be an action by an employer that

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118 *Id.* (an employee "shall mean any 'employee' . . . who is employed for hire within the city of New York . . . .").

119 *See* 6 R.C.N.Y. § 7-203 (2025).

120 *Id.* § 7-203(a).

121 *Id.*

122 *Id.* § 7-203(b).

123 WASH. REV. CODE § 49.46.210(1) (2025).

124 *Id.* § 49.46.210(1)(a).

125 *Id.* § 49.46.210(1)(j).

126 *Compare id.* §§ 49.46.210(1)(b)–(c), *with* N.Y.C. ADMIN. CODE § 20-914 (2025).

127 *See* WASH. DEP'T OF LAB. & INDUS., PAID SICK LEAVE LAW 1–2 (2021), https://lni.wa.gov/forms-publications/F700-197-000.pdf [https://perma.cc/38VC-BHC8].

"interfere[s] with, restrain[s], or den[ies] the exercise of any employee right [including paid sick leave]."[128] Retaliation can take the form of refusing employee requests for paid safe or sick leave, failing to pay the correct amount for taken paid sick leave, or adopting or enforcing policies that count use of paid sick leave as an absence thereby allowing discipline against employees.[129]

4. Massachusetts's Paid Sick Leave Law

The Massachusetts Earned Sick Time (EST) Law is slightly less inclusive compared to New York and Washington. According to the EST Law, in Massachusetts, employers are only required to provide paid sick leave to employees if the employer employs more than eleven workers.[130] The EST Law is similar to ESSTA in its accrual of sick time by employees, allowing employees to accrue one hour of paid sick leave for every thirty hours worked instead of every forty hours worked.[131] Although the EST Law only references application of the law to employees working while physically present in Massachusetts,[132] the Massachusetts Attorney General's Office clarifies that to be eligible for the EST Law, the employee's primary place of work must be in the state of Massachusetts.[133]

The Massachusetts Attorney General's Office investigates five factors to determine whether an employee's primary place of work is Massachusetts. First, if the employee returns regularly to Massachusetts before resuming new travel, then Massachusetts is their primary place of work.[134] Second, if the employee is constantly switching locations, the primary place can be determined by seeing where the employee spent the majority of their working time.[135] Third, if the employee "telecommutes" to Massachusetts, and Massachusetts is the primary place of work even though the employee is not physically there, then they qualify for the EST

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128 WASH. ADMIN. CODE § 296-128-770(1) (2018).

129 WASH. DEP'T OF LAB. & INDUS., *supra* note 127, at 1–2.

130 MASS. GEN. LAWS ch. 149, § 148C(d)(4) (2024).

131 *Compare id.* § 148C(d)(1), *with* N.Y.C. ADMIN. CODE § 20-913 (2025), *and* WASH. REV. CODE § 49.46.210(1)(a) (2025).

132 MASS. GEN. LAWS ch. 149, § 148C(b) (2024) ("All employees who work in the [C]ommonwealth [of Massachusetts] who must be absent from work for the reasons set forth in [Section 148C(c)] shall be entitled to earn and use not less than the hours of earned sick time provided in [Section 148C(d)].").

133 MASS. ATT'Y GEN.'S OFF., EARNED SICK TIME IN MASSACHUSETTS FREQUENTLY ASKED QUESTIONS 2 (2018), https://www.mass.gov/doc/earned-sick-time-faqs/download [https://perma.cc/H5S3-AHJM]; *see also* 940 MASS. CODE REGS. 33.03(1) (2025).

134 MASS. ATT'Y GEN.'S OFF., *supra* note 133, at 3.

135 *Id.* at 3–4.

Law benefits.[136] Fourth, the Massachusetts Attorney General's Office does not require that an employee spend fifty percent or more of their time in Massachusetts for the state to be their primary place of work.[137] Fifth, the primary place of work becomes Massachusetts on the first day of actual work in Massachusetts if the employee relocates.[138]

ESSTA, the New York State paid sick leave law, PSL Law, and EST Law all appear sufficiently similar in application and jurisdiction.[139] Although there are minute differences between the laws, they all provide paid sick leave benefits in approximately the same way.[140] Thus, for the purpose of a constitutional preemption analysis, these laws can be treated the same.

Having discussed the preemption case law of the ADA, paid sick leave laws generally, and the specific laws scrutinized in the cases identified in this Note, this Note will next examine the dormant Commerce Clause and the arguments presented by some parties that state and municipal paid sick leave laws are unconstitutional pursuant to the dormant Commerce Clause doctrine.

C. *The Dormant Commerce Clause and Recent Jurisprudence*

The dormant Commerce Clause doctrine is controversial. Critics argue the doctrine has no textual foundation, that there is no indication of its use by the Framers of the Constitution, and that if the Framers had wanted to include the doctrine, they would have condemned the current dormant Commerce Clause doctrine's effects on state police powers.[141] However, proponents of the doctrine indicate that the dormant Commerce Clause demonstrates the Framers' intent to fix one of the major problems with the Articles of Confederation—state discrimination against out-of-state commerce.[142] Regardless of the arguments for or against the doctrine, the dormant Commerce Clause is a fundamental constitutional issue derived from the inherent tensions born from the

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136 *Id.* at 4.

137 *Id.*

138 *Id.*

139 *See supra* Sections I.B.2–4.

140 For the purposes of a constitutional federalism analysis, this Note will treat each of these laws the same to determine the constitutionality or unconstitutionality of any one of the laws under the dormant Commerce Clause doctrine.

141 Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 37 (2006).

142 *Id.* at 92 (providing that the dormant Commerce Clause demonstrates the "interest[s] [of the Framers] in arresting [the] extant abuses of state commercial power[s] that the Articles [of Confederation] were powerless to stop.").

federal structure of the United States.[143] To oversimplify, dormant Commerce Clause jurisprudence permits a federal court to declare a state or local law, regulation, or policy unconstitutional and impliedly overruled if that law, regulation, or policy effectively reaches extraterritorially into, and regulates within, the domain of the federal government or another state.[144]

The most recent Supreme Court case that touches upon the dormant Commerce Clause doctrine is *National Pork Producers Council v. Ross*.[145] Decided in 2023, this case considered a California law banning the in-state sale of pork if the pigs used for the pork were kept in stalls so cramped that the pigs could not lay down.[146] The petitioners, National Pork Producers Council and American Farm Bureau Federation, argued that California's regulation violated the dormant Commerce Clause since it impliedly regulated interstate commerce and commerce outside of California in a way that only Congress could constitutionally regulate.[147] Writing for the Court, Justice Neil Gorsuch laid out the development of the dormant Commerce Clause in *National Pork*, stating that the fundamental reasoning of the dormant Commerce Clause is to prohibit enforcement of state laws that are driven by economic protectionism to benefit in-state economic interests at the expense of out-of-state competitors.[148]

To better understand the Supreme Court's decision in *National Pork* and see whether the dormant Commerce Clause applies to disputes between airlines and state paid sick leave laws, it is important to discuss how the current dormant Commerce Clause doctrine came to be. There are primarily two principles the Supreme Court has followed in deciding dormant Commerce Clause claims:[149] "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."[150] The first test looks to

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143 *See id.* at 90–93.

144 *See* Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083, 1087–88 (2023); *see also* Michael S. Knoll & Ruth Mason, Bibb *Balancing: Regulatory Mismatches Under the Dormant Commerce Clause*, 91 GEO. WASH. L. REV. 1, 3, 6 (2023).

145 598 U.S. 356, 368–71 (2023).

146 *Id.* at 363–64.

147 *See id.* at 368 ("Reading between the Constitution's lines, petitioners observe, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also 'contain[s] a further, negative command,' one effectively forbidding the enforcement of 'certain state [economic regulations] even when Congress has failed to legislate on the subject.'" (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995))).

148 *Id.* at 369.

149 Goldsmith & Volokh, *supra* note 144, at 1088.

150 South Dakota v. Wayfair, Inc., 585 U.S. 162, 173 (2018).

principles of antidiscrimination, which are the core to dormant Commerce Clause claims.[151] As Justice Anthony Kennedy noted in *South Dakota v. Wayfair, Inc.*, if a state law discriminates against interstate commerce, it is almost always facially invalid.[152] Another decision addressing this facial discrimination analysis of the dormant Commerce Clause doctrine is *Granholm v. Heald* from 2005.[153] In that decision, the Court invalidated state regulatory laws that allowed in-state wineries to sell wine directly to in-state consumers, but prohibited out-of-state wineries from selling directly to in-state consumers by either explicit prohibition or making the sales economically impracticable.[154] The Court straightforwardly denounced the law, holding that states could not create laws that burden out-of-state companies to give a competitive advantage to in-state companies.[155] Most of the dormant Commerce Clause facial discrimination analyses look into laws between in-state and out-of-state parties, not laws that regulate interstate companies like paid sick leave laws.[156] Therefore, this portion of the dormant Commerce Clause doctrine would not apply to the arguments advanced by airline companies to overturn state paid sick leave laws.

The second test for the dormant Commerce Clause concerns state laws that are facially neutral but affect interstate commerce.[157] As the Supreme Court articulated in *Pike v. Bruce Church, Inc.*, neutral state and local laws are generally upheld unless their intrastate regulations impose a burden on out-of-state commerce that outweighs the laws' local benefits.[158] Despite this test for neutral state laws under the dormant Commerce Clause, commonly referred to as the *Pike* balancing test,[159] the Supreme Court has not been forthcoming on what would be an undue

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151 *Nat'l Pork Producers Council*, 598 U.S. at 371.

152 585 U.S. at 173 ("State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" (quoting Granholm v. Heald, 544 U.S. 460, 476 (2005))).

153 544 U.S. at 472–76.

154 *Id.* at 466.

155 *Id.* at 472 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.").

156 *See* Knoll & Mason, *supra* note 144, at 12 ("Facial discrimination involves explicit distinctions between instate and out-of-state economic actors or between in-state and interstate commerce.").

157 *Id.* at 13 ("A state law that does not facially discriminate may nevertheless violate the dormant Commerce Clause by imposing an 'undue burden' on interstate commerce."); *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

158 397 U.S. at 142 ("Where the [state or local] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960))).

159 *See* James D. Fox, Note, *State Benefits Under the* Pike *Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 187 (2003).

burden on commerce through facially neutral laws.[160] As discussed later, it is unlikely that the *Pike* balancing test would apply to paid sick leave laws either.[161]

Scholars Jack Goldsmith and Eugene Volokh argue that there is a third distinctive test for the dormant Commerce Clause, the extraterritorial test.[162] The elements of this possible third dormant Commerce Clause test were articulated by the Court in the 1980s in *Healy v. Beer Institute, Inc.*.[163] In *Healy*, Connecticut passed a law on out-of-state shippers of beer, requiring them to keep their prices the same or lower than beer sold in Massachusetts, New York, or Rhode Island.[164] There, the Court summarized its holdings on cases regarding extraterritoriality and said that laws which have the "practical effect" of regulating outside of the state's boundaries may impliedly violate the Commerce Clause.[165] The Court reasoned that the Commerce Clause is meant to protect against one state being able to impose its policies and regulations upon the jurisdiction of another state.[166] Nevertheless, in *National Pork*, the Court limited this extraterritorial dormant Commerce Clause inquiry.[167] The Court rejected the idea that *Healy* cemented an "almost *per se*" rule against state laws with extraterritorial effects.[168] Justice Gorsuch noted that having such a rule would invite endless litigation and harm a state's ability to use its constitutionally permissive police powers.[169]

With this prerequisite knowledge about the interplay of ADA preemption, paid sick leave laws, and the dormant Commerce Clause, this Note next discusses how these factors come together in three recent cases that questioned the constitutionality of paid sick leave laws. Despite

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160 Goldsmith & Volokh, *supra* note 144, at 1088–89.

161 *See infra* Section II.B.

162 Goldsmith & Volokh, *supra* note 144, at 1089; *see also* Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 504 (2023).

163 Goldsmith & Volokh, *supra* note 144, at 1089–90; *see also* Healy v. Beer. Inst., Inc. 491 U.S. 324, 326 (1989).

164 *Healy*, 491 U.S. at 326.

165 *See id.* at 336 ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579))).

166 *Id.* at 336–37 ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.").

167 *See* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 371 (2023).

168 *Id.* at 373.

169 *Id.* at 375 ("Petitioners' 'almost *per se*' rule against laws that have the 'practical effect' of 'controlling' extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. . . . Instead, it would invite endless litigation and inconsistent results.").

close similarities in the scrutinized paid sick leave laws, the courts in the Eastern District of New York, the District of Massachusetts, and the Ninth Circuit came to very different conclusions.

II. ANALYSIS

A. *Three Approaches to Preempting State Sick Leave Laws*

1. *Delta Air Lines v. New York City Department of Consumer Affairs*

After the ESSTA passed in 2014, Delta Air Lines challenged the application of New York City's paid sick leave law as it pertained to its in-flight crewmembers working in the city.[170] The municipal administrative body which enforces the ESSTA, the DCWP,[171] created guidelines in 2018 which clarified that flight attendants were presumptively covered by ESSTA if they were based in New York City (i.e., employed primarily at LaGuardia International Airport or John F. Kennedy (JFK) International Airport).[172] Under this rebuttable presumption, flight attendants based in New York City were assumed to be entitled to paid sick leave under the ESSTA.[173]

Delta raised two arguments of preemption against the ESSTA. First, Delta argued that the ESSTA "related to" Delta's "services" as defined in the ADA.[174] Delta contended that the ESSTA encouraged employees to take more time off, which would result in short-notice and unexpected call-outs by flight attendants.[175] This in turn would impact Delta's ability to staff flights and ultimately affect its timely services to its customers.[176] Second, Delta argued that the ESSTA violated the ADA by regulating Delta's "routes" since the increased potential of employee call-outs would

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170 Delta Air Lines, Inc. v. N.Y.C. Dep't of Consumer Affs., 564 F. Supp. 3d 109, 111–12 (E.D.N.Y. 2021). Delta did not challenge the application of ESSTA to ground crews working in LaGuardia or JFK Airports. *Id.* at 112 n.1.

171 Throughout the decision, the DCWP is referred to by its prior name, the N.Y.C. Department of Consumer Affairs (DCA). The department's name was changed from DCA to DCWP in 2019. Press Release, N.Y.C. Dep't of Consumer & Worker Prot., Mayor de Blasio: Delivering on our Promise to Make New York City the Fairest Big City in America (Jan. 10, 2019), https://www.nyc.gov/site/dca/news/004-19/mayor-de-blasio-delivering-our-promise-make-new-york-city-fairest-big-city-america [https://perma.cc/2ST9-2MWR].

172 *Delta Air Lines*, 564 F. Supp. 3d at 115.

173 *Id.*

174 *Id.* at 117.

175 *Id.*

176 *Id.*

disincentivize Delta to create routes in locations like New York City, which required paid sick leave.[177]

In its analysis of the ADA, the Eastern District of New York explicitly rejected the conclusions of the Ninth Circuit and held that the ADA preempted the ESSTA.[178] Citing the Supreme Court in *Ginsberg*, the court said that the "related to" provision of the ADA's preemptive language expressed a broad preemptive purpose.[179] The court decided that the ADA's preemption clause meant that state or local laws would be preempted if those laws had even a connection or reference to rates, routes, or services.[180] Thus, Delta flight attendants were not entitled to New York City's paid sick leave benefits.[181] Ground crews were not included in the decision and presumably could still seek paid sick leave under the ESSTA.[182] No mention was given to dormant Commerce Clause claims in the decision, likely because of the constitutional avoidance doctrine.[183]

2. *Air Transport Association of America v. Washington Department of Labor & Industries*

At the same time as the *Delta Air Lines* decision, another lawsuit by an airline trade group sought to enjoin the similar Washington PSL Law. Airlines for America (A4A), formerly known as the Air Transport Association of America,[184] sought to enjoin the PSL Law, claiming that it was preempted by the ADA and violated the dormant Commerce Clause.[185]

Unlike the Eastern District of New York, the Ninth Circuit indicated that the preemptory clause of the ADA does not apply to state labor statutes like paid sick leave, which are too tenuously related to the ADA's

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177 *Id.*

178 *Id.* at 118 ("The Court declines to follow the Ninth Circuit's decision [in *Air Transport Association of America., Inc. v. Washington Department of Labor & Industries*].")*; see also infra* Section II.A.2.

179 *Delta Air Lines*, 564 F. Supp. 3d at 119.

180 *Id.*

181 *Id.* at 126 ("Delta's motion for summary judgment is GRANTED on the ground that the [ESSTA], as applied to Delta's flight attendants, is preempted under the ADA.").

182 *See id.* at 112 n.1.

183 *See id.* at 126 ("Because the Court can resolve the pending motions on statutory preemption grounds, it refrains from ruling on Delta's contention that the [ADA] violates the dormant Commerce Clause.").

184 *History*, AIRLINES FOR AM., https://www.airlines.org/who-we-are/history [https://perma.cc/9FE5-XT3A].

185 Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181, 183 (9th Cir. 2021).

preempting language.[186] The Ninth Circuit did not spend much time discussing the "related to" language of the ADA, like the Eastern District of New York,[187] instead adhering to the tenuity language of *Morales*.[188]

The Ninth Circuit also dispatched A4A's dormant Commerce Clause argument.[189] Although A4A provided some evidence that flights could be affected through the adoption of the PSL, the conclusions only indicated a 1.2% increase in flight delays.[190] This was not enough to demonstrate a burden on interstate commerce.[191] The Ninth Circuit also dismissed another aspect of A4A's dormant Commerce Clause claims, saying that an airline could follow the strictest paid sick leave law to overcome conflicts with multiple state paid sick leave laws.[192] The Ninth Circuit posited that, even if there was an incentive to follow the strictest paid sick leave law among several states for interstate airlines, this mere incentive was insufficient to show a state was regulating beyond its borders.[193] However, because the PSL Law only applied to Washington-based employees of employers doing business in Washington, the Ninth Circuit also held that the scope of the law was too limited to affect interstate commerce.[194] With this unfavorable ruling, A4A petitioned the Supreme Court for certiorari, but was denied in 2022.[195]

3. *Air Transport Association of America v. Campbell*

Following the decisions of *Delta Air Lines* and *Air Transport*, A4A attempted again to enjoin a paid sick leave law—this time in Massachusetts.[196] Unlike the rulings in *Delta Air Lines* and *Air Transport*, the District of Massachusetts held that the EST Law was preempted by

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186 *Id.* at 184.

187 *See Delta Air Lines*, 564 F. Supp. 3d at 119.

188 *Air Transp. Ass'n*, 859 F. App'x at 184 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992)).

189 *Id.* at 184 ("Viewing the evidence in the light most favorable to A4A, we hold that the evidence does not demonstrate that requiring A4A's members to comply with the PSL would impose a substantial burden on interstate commerce.").

190 *Id.* at 185.

191 *Id.*

192 *Id.* at 185 n.6.

193 *See id.*

194 *Id.* at 185.

195 Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 142 S. Ct. 2903 (2022) (mem.) (denying certiorari).

196 *See* Air Transp. Ass'n of Am., Inc. v. Campbell, No. 18-cv-10651, 2023 WL 3773743, at *1 (D. Mass. June 2, 2023).

the ADA and did not cover *both* in-flight crewmembers and ground employees.[197]

During the trial, A4A demonstrated that employees were abusing the Massachusetts EST Law.[198] For example, A4A witnesses recounted that there were "unexplained spikes" in calls for sick time around "Halloween, Thanksgiving, Christmas, New Years, and the Super Bowl."[199] Although this correlative evidence does not necessarily mean paid sick leave was used without actual illnesses, the evidence presented employee usage of paid sick leave as abusive of the EST Law.[200] The district court focused on the potential abuses of a sick time policy, seeing it as incentivizing last-minute call-outs and leading to major disruptions in airline services.[201] The court concluded that the EST Law related to airline services and was thus preempted by the ADA.[202]

This analysis of the ADA completely differed from the Ninth Circuit, which pointed to the small disruption as inconsequential.[203] Unlike the Ninth Circuit or the Eastern District of New York, the District of Massachusetts found the EST Law to be "so entwined" with the preemption provision of the ADA that it did not apply to airlines whatsoever, blocking both airline in-flight and ground-crew employees from using paid sick leave even if they are based in and work in Massachusetts.[204] However, under the constitutional avoidance doctrine, the court again did not discuss the A4A claims that the EST Law "violate[d] the [d]ormant Commerce Clause."[205]

Even after analyzing the arguments presented in *Delta Air Lines*, *Air Transport*, and *Campbell*, a significant issue remains: whether the municipal and state paid sick leave laws, as applied to airlines, are constitutional under the dormant Commerce Clause doctrine.

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197 *Id.*

198 *See id.* at *5–6.

199 *Id.* at *5 ("Witnesses recounted numerous experiences observing and investigating suspected and confirmed sick leave abuse during holidays such as Halloween, Thanksgiving, Christmas, New Years, and the Super Bowl, as well as otherwise unexplained spikes in sick calls on weekends.").

200 *Id.*

201 *Id.* at *7.

202 *Id.* at *10–11.

203 *Compare* Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181, 184–85 (9th Cir. 2021), *with Campbell*, 2023 WL 3773743, at *8–10.

204 *Campbell*, 2023 WL 3773743, at *13 ("The Court therefore finds that the preempted provisions . . . are so entwined with the otherwise presumably valid provisions of [the EST Law] that the Legislature would not have intended [the EST Law] to survive without them.").

205 *See id.* at *13 n.21.

B. *The Underlying Dormant Commerce Clause Issue*

Given that the decisions in *Delta Air Lines*, *Air Transport*, and *Campbell* were based upon the interpretation of the ADA, the dormant Commerce Clause issue was not thoroughly addressed because of the constitutional avoidance doctrine.[206] Yet, the dormant Commerce Clause issue remains. Although varying and contrasting interpretations of the ADA's preemption clause across multiple federal courts would be sufficient grounds to appeal to the Supreme Court, A4A continued to put forward a constitutional preemption claim under the dormant Commerce Clause in its appeal from the Ninth Circuit.[207]

In A4A's Petition for Certiorari, A4A argued in the alternative that if the ADA did not preempt Washington's PSL Law, the law was still invalid under the dormant Commerce Clause.[208] Nevertheless, A4A's dormant Commerce Clause argument was eerily reminiscent of its argument under the preemption provision of the ADA.[209] A4A argued that Washington's law must violate interstate commerce because it "has a substantial effect on air carrier prices, routes, or services [which] by definition have a substantial effect on interstate commerce."[210] Citing to *Pike*, A4A argued that even though the PSL Law was facially neutral, it would unduly burden interstate commerce and fail the *Pike* balancing test.[211] Only a small portion of the petition discussed this line of argument,[212] and A4A even expressed that the Court did not have a reason to engage in dormant Commerce Clause analysis due to the ADA's preemption clause.[213]

Washington did not engage much with A4A's dormant Commerce Clause dispute when responding to A4A's petition for certiorari. In a single footnote, Washington dispensed with A4A's argument.[214] Washington stated it was illogical to claim that the PSL Law violated the dormant Commerce Clause if it was not preempted by the ADA.[215] The

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206 *See supra* note 19 and accompanying text.

207 *See* Petition for Writ of Certiorari at 25, Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 142 S. Ct. 2903 (2022) (No. 21-627).

208 *Id.* at 25–26.

209 *Compare id.* at 25, *with id.* at 19.

210 *Id.* at 25.

211 *Id.* at 25–26 (citing Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970)).

212 *Id.* at 25–27.

213 *Id.* at 27 ("[T]here is no reason for courts to engage in a [d]ormant Commerce Clause analysis in this context.").

214 *See* Wash.'s Brief in Opposition at 33 n.9, Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 142 S. Ct. 2903 (2022) (No. 21-627).

215 *Id.*

state claimed that "losing" the *Pike* balancing test demonstrated that the Washington PSL Law has "minimal impact" on interstate commerce and does not substantially burden interstate commerce.[216] Essentially, the impact of the PSL Law was so de minimis that it could not be an unconstitutional interference with interstate commerce.[217]

Given these arguments, and the recent dormant Commerce Clause jurisprudence of the Supreme Court, how applicable are the dormant Commerce Clause arguments to preempting state paid sick leave laws? The paid sick leave laws evaluated in the three cases (ESSTA, PSL Law, and EST Law) are all facially neutral laws which effectuate a "legitimate local public interest" of workplace and worker health and safety.[218] There are no facially discriminatory purposes shown in these laws to advantage in-state corporations or air carriers to the disadvantage of out-of-state companies.[219] Thus, to successfully show that these paid sick leave laws violate the dormant Commerce Clause, the laws must be shown under the *Pike* balancing test to have a clearly excessive burden on interstate commerce in relation to the benefits of the law.[220] A state law does not excessively burden interstate commerce just because it has extraterritorial effects, as *National Pork* has recently clarified.[221] There is no per se rule that a state or local law which impacts commerce outside of the state is unconstitutional under the dormant Commerce Clause.[222]

Consequently, the dormant Commerce Clause argument does not apply to either *Delta Airlines*, *Air Transport*, or *Campbell*.[223] Like many

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216 *Id.* ("[L]osing the commerce clause claim shows the minimal impact of Washington's law [on the Airlines]. The Airlines could not even show a substantial burden on commerce, let alone on their prices, routes, and services.").

217 *Id.*

218 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). ESSTA, PSL Law, and EST Law do not explicitly require out-of-state parties to conform to different standards than in-state parties, applying equally to all qualifying employers within New York City's, Washington's, or Massachusetts's jurisdiction, respectively. *See generally* N.Y.C. ADMIN CODE § 20-913 (2024); WASH. REV. CODE § 49.46.210 (2025); MASS. GEN. LAWS ch. 149, § 148C (2024). Therefore, these laws are facially neutral because they do not explicitly create differences between in-state and out-of-state actors or make distinctions between in-state and interstate commerce. Knoll & Mason, *supra* note 144, at 12 ("Facial discrimination involves explicit distinctions between instate and out-of-state economic actors or between in-state and interstate commerce."); *see also* Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181, 184 n.4 (9th Cir. 2021) ("The parties agree that the PSL [Law] is not facially discriminatory.").

219 Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 370–71 (2023).

220 *Pike*, 397 U.S. at 142.

221 *Nat'l Pork Producers Council*, 598 U.S. at 375.

222 *Id.* at 375–76.

223 *See generally* Delta Air Lines, Inc. v. N.Y.C. Dep't of Consumer Affs., 564 F. Supp. 3d 109 (E.D.N.Y. 2021); Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181 (9th Cir. 2021); Air Transp. Ass'n of Am., Inc. v. Campbell, No. 18-cv-10651, 2023 WL 3773743 (D. Mass. June 2, 2023).

labor laws, paid sick leave laws can have impacts beyond their immediate state borders.[224] Evidence presented by A4A in its petition to the Supreme Court identified that, following the passage of the ESSTA in 2014, many flight attendants from air carrier Virgin Airlines requested transfers to New York City to presumably take advantage of the new paid sick leave benefits.[225] Indeed, like the EST Law and New York State's paid sick leave law, paid sick leave may even apply to telecommuting workers outside of the state's borders, allowing states to affect companies with employees not physically present in the state.[226] Nevertheless, there is no excessive burden on *interstate commerce*. All air carriers operating in the state employing people out of New York, Washington, or Massachusetts must follow the same respective laws of the states in which they operate. There is no indication of a "winner" or "loser" as is typically needed to indicate a dormant Commerce Clause violation.[227] Because there are no per se violations of the dormant Commerce Clause based upon extraterritorial effect,[228] and sick time laws are well within the police powers of the state without a clearly excessive burden on interstate commerce,[229] a challenge under the dormant Commerce Clause to paid sick leave laws like those in New York, Washington, and Massachusetts is likely to fail.

Still, challenges to these paid sick leave laws persist based upon the preemption clause of the ADA. Although this Note primarily discusses the relevancy of recent dormant Commerce Clause jurisprudence to challenges of state paid sick leave laws, this Note will next look at three possible ways that Congress or the courts could decide on the remaining preemption issue of the ADA. There are three ways to overcome the preemption of the ADA: (1) legislate around it; (2) declare the relation between the airline "service" and paid sick leave as "too tenuous;" or (3) diminish the scope of the ADA's preemption clause. This final Section will briefly discuss each of these outcomes and their drawbacks.

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224 *See* Nelson, *supra* note 1, at 675–76 (explaining that municipal and state paid sick leave laws can have impacts on multistate employers who employ workers outside of the jurisdiction of said municipal or state paid sick leave laws).

225 Petition for Writ of Certiorari, *supra* note 207, at 14–15.

226 *See* MASS. ATT'Y GEN.'S OFF., *supra* note 133, at 4.

227 *See Nat'l Pork Producers Council*, 598 U.S. at 378.

228 *See id.* at 375.

229 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

III. PROPOSALS

A. *Implementing a Federal Paid Sick Leave Law*

The simplest way to avoid preemption challenges or burdens on interstate commerce from state and municipal paid sick leave laws is to create a federal paid sick leave law. Since the COVID-19 pandemic, there is now precedent for a federal response to paid sick leave. The Families First Coronavirus Response Act (FFCRA) required "employers to provide employees with paid sick leave or expanded . . . medical leave" as long as the leave was related to COVID-19.[230] Before FFCRA, "the United States was the only highly-developed country in the world" which did not guarantee employees paid time off from work to raise children, support loved ones, and overcome sickness.[231] However, even though the FFCRA was temporary, ending on December 31, 2020,[232] other current legislation like the FMLA demonstrates that Congress can legislate paid sick leave nationally.[233] Paid sick leave has even been promulgated unilaterally from the Executive Branch, such as with Executive Order 13,706, which established paid sick leave requirements for federal contractors.[234]

To combat the patchwork of state paid sick leave laws already on the books under a federal paid sick leave law, Professor Ryan H. Nelson in his article, *Federalizing Direct Paid Leave*, identifies that Congress could use the same preemption mechanism as the ADA, although Nelson identifies this mechanism through ERISA.[235] Using federal preemption would help employees by expanding their rights nationwide while relieving employers of multiple state and local paid sick leave laws to comply with across the United States.[236] Preempting state and local paid sick leave laws with a federal paid sick leave law would also provide administrative ease for the government.[237] Thus, a federal paid sick leave law would help employees, employers, and the government.

However, the largest hurdle to federal paid sick leave legislation is congressional gridlock. Many attempts have been made to pass a federal

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230 29 U.S.C. §§ 2612(a)(1)(F), 2620(a)(1)–(2); *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave#_ftn2 [https://perma.cc/LA6M-JGRC].

231 Caroline M. Gelinne, Note, *A Trip Down Legislative Memory Lane: How the FMLA Charts a Path for Post-COVID-19 Paid Leave Reform*, 62 B.C. L. REV. 2515, 2516–17 (2021).

232 29 U.S.C. § 2612(a)(1)(F); U.S. DEP'T OF LAB., *supra* note 230.

233 Gelinne, *supra* note 231, at 2571.

234 Nelson, *supra* note 1, at 640–41. *See generally* Exec. Order No. 13,706, 29 C.F.R. § 13 (2016).

235 *See* Nelson, *supra* note 1, at 681.

236 *Id.*

237 *Id.*

paid sick leave law since 2004.[238] Most recently in 2021, the newest version of the Healthy Families Act was introduced into both houses of Congress.[239] However, none of these attempts have passed.[240] In fact, in every congressional session since 2004, Representative Rosa DeLauro and Senator Patty Murray have tried to pass a federal paid sick leave law to no avail.[241] Thus, even though a federal paid sick leave law would likely benefit all parties, and not be endangered by preemption or burdening interstate commerce, it is unlikely to be passed by Congress anytime soon.

B. *State Control of Paid Sick Leave Laws—The Ninth Circuit Approach*

Since a federal paid sick leave law is unlikely to be passed given its past record of failed attempts, are employees of air carriers still entitled to state or local paid sick leave laws under the ADA? Following the Ninth Circuit's decision, the answer would unequivocally be yes.[242] In *Air Transport*, the Ninth Circuit highlighted that Washington's PSL Law was "too tenuously related to" the ADA to be preempted.[243] Under the Ninth Circuit's opinion, labor laws and regulations as a group are generally "too tenuously related to airlines' services to be preempted" since they are broadly applicable to all employees in the state.[244] Therefore, if courts nationwide adopted the Ninth Circuit's interpretation of the ADA, then most (if not all) state and local paid sick leave laws would not be preempted by the ADA.

The Ninth Circuit's interpretation of the ADA's preemption clause provides airline flight attendants, ground crews, pilots, and other airline employees the benefits of state paid sick leave laws as any other workplace.[245] However, since most paid sick leave schemes are applicable to where the employee performs their work, there are still issues about

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238 *Id.* at 642.

239 Molly Weston Williamson, *The State of Paid Sick Time in the U.S. in 2023*, CTR. FOR AM. PROGRESS (Jan. 5, 2023), https://www.americanprogress.org/article/the-state-of-paid-sick-time-in-the-u-s-in-2023 [https://perma.cc/RQV3-KFVU]; *see* S. 1195, 117th Cong. (2021); H.R. 2465, 117th Cong. (2021).

240 *See* Williamson, *supra* note 239.

241 *Id.*

242 Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181, 184–85 (9th Cir. 2021).

243 *Id.* at 184.

244 *See id.*

245 *See id.* at 185 ("[W]e deduce that the PSL [Law] primarily—or perhaps solely—applies to employees of Alaska Airlines . . . .").

where some airline employees actually "work."[246] Ground crews and other employees staffed in airports are straightforward cases; because they do not work across multiple states on a day-to-day basis, the applicable paid sick leave laws are likely determined based on the physical location of the airport where they work. Flight crews are more complex. As A4A pointed out in its brief to the Supreme Court, pilots and flight attendants spend most of their work across federally controlled or international airspace, not typically in any one state.[247] Flight crews rarely even spend time in the locations where they are "base[d]" or "domicile[d]."[248] Nevertheless, the Ninth Circuit rejected these contentions based upon the specific wording of Washington's PSL Law.[249] As the Ninth Circuit indicated, the PSL Law would not apply to flight crews operating in Washington generally since the PSL Law only applies to Washington-based employees doing business in Washington.[250] Thus, flight crews would likely still be covered by a nationwide adoption of the Ninth Circuit's interpretation.

Another major problem stemming from *Air Transport* is the possible multiplicity of paid sick leave laws that major air carriers would have to potentially comply with. For example, if an air carrier had flight crews based in every state and major city in the United States, then airlines could theoretically have more than fifty different paid sick leave laws with which they must comply. However, the Ninth Circuit also disregarded this concern, citing its previous decision in *Ward v. United Airlines, Inc.*.[251] In *Ward*, the Ninth Circuit reasoned that airlines could easily follow all paid sick leave schemes by crafting a paid sick leave policy according to the strictest paid sick leave law.[252] This interpretation, which favors following the strictest paid sick leave law, would also not violate the dormant Commerce Clause because of the Supreme Court's limitations on the extraterritoriality doctrine.[253]

The last issues that could arise if the Ninth Circuit's interpretation of the ADA's preemption clause was applied nationwide would be abuses of paid sick time and relocation of airline employees. A major issue that air carriers could face under the Ninth Circuit's interpretation is the

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246 *See supra* Section I.B.

247 Petition for Writ of Certiorari, *supra* note 207, at 9.

248 *Id.*

249 *Air Transp. Ass'n*, 859 F. App'x at 185.

250 *Id.* It should be noted that the Ninth Circuit indicated that the only airline this law may affect would be Alaska Airlines because it was headquartered in Washington and was the only A4A-member airline to have a "base" in the state. *Id.*

251 986 F.3d 1234 (9th Cir. 2021).

252 *Id.* at 1242.

253 *See supra* Section II.B.

abuse of sick time.[254] Sick leave calls can tend to spike near weekends and holidays, which may indicate the paid sick leave is used for recreation and not recovery.[255] However, this argument obfuscates the inherent safeguards paid sick leave laws have for employers. Paid sick leave laws typically cap the number of hours an employee can use, cap carryover hours, limit times of use, and require corroboration of use by doctors or other professionals.[256] These policies make paid sick leave abuse an insignificant consequence under the Ninth Circuit's interpretation, even if it has anecdotally occurred in the airline industry.[257]

Additionally, if paid sick leave laws were not preempted by the ADA, there may be increased relocation of airline employees. For example, after the passage of ESSTA in New York City, air carriers like Virgin Airlines observed an increase in flight attendants requesting "base transfers" to New York City to presumably take advantage of the ESSTA.[258] Although this problem could result in increased problems for air carriers,[259] the obvious solution for airlines is to follow the strictest paid sick leave law across all its operations in the United States. By crafting a nationwide airline paid sick leave policy that adheres to the strictest state paid sick leave law, the airline not only complies with all paid sick leave laws across the country,[260] but disincentivizes employees from requesting transfers.

Adopting the Ninth Circuit's approach nationwide would incentivize airlines to follow the strictest state or local paid sick leave scheme, potentially extending the benefits of paid sick leave to hundreds of employees across the country. However, interpreting paid sick leave regulations as too tenuous to affect the service of air carriers could lead to application questions and may promote abuse of sick time. A federal paid sick leave law would still be the best option for delivering the benefits of paid sick leave to airline employees and employers; however, *Air Transport* allows these benefits to more rapidly be applied to the airline industry.

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254 *See* Air Transp. Ass'n of Am., Inc. v. Campbell, No. 18-cv-10651, 2023 WL 3773743, at *5 (D. Mass. June 2, 2023); Petition for Writ of Certiorari, *supra* note 207, at 11.

255 *See* Petition for Writ of Certiorari, *supra* note 207, at 11.

256 Shinall, *supra* note 6, at 1889–92.

257 *See, e.g.*, *Campbell*, 2023 WL 3773743, at *5.

258 Delta Air Lines, Inc. v. N.Y.C. Dep't of Consumer Affs., 564 F. Supp. 3d 109, 121 (E.D.N.Y. 2021).

259 *See id.*

260 *See* Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus., 859 F. App'x 181, 185 (9th Cir. 2021).

C. *A Broader Interpretation of the ADA*

Even though a broad application of the Ninth Circuit's interpretation of the ADA could provide paid sick leave benefits to all airline employees, the Supreme Court's precedent in interpreting the ADA's preemption clause is similar to the reasoning of the Eastern District of New York and District of Massachusetts.[261] As discussed earlier, much of the Supreme Court precedent on the ADA preemption clause gives greater deference to the ADA than to state laws.[262] The only way a state statute survives preemption by the ADA is if the relationship between the law is "too tenuous, remote, or peripheral[ly]" related to the airlines rates, routes, or services.[263] In both *Delta Air Lines* and *Campbell*, the courts found that the effects of the paid sick leave laws were related to the services of airlines.[264] As the Eastern District of New York pointed out, the key phrase "related to" is broad and shows the preemptive purpose of the ADA.[265] Moreover, the District of Massachusetts defined an airline "service" so broadly that it essentially negated any legislation that affected airlines' ticketing, boarding procedures, provision of food and drink, and baggage handling.[266] Under these decisions and the deferential interpretation of Supreme Court precedent on ADA interpretation, paid sick leave was not extended to all, or part, of the airline employees in New York City and Massachusetts.[267]

The most substantial ramification of adopting these broad interpretations of the ADA's preemptive language nationwide would be a significant diminishing of state police powers pertaining to public health and labor. If the "related to" language is the key to the ADA's

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261 *Compare id.* at 184 *with Delta Air Lines*, 564 F. Supp. 3d at 118–19 *and* Air Transp. Ass'n of Am. v. Campbell, No. 18-cv-10651, 2023 WL 3773743, at *11–12 (D. Mass. June 2, 2023).

262 *See supra* Section I.A.2.

263 *See* Am. Airlines v. Wolens, 513 U.S. 219, 224 (1995) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992)).

264 *See Delta Air Lines*, 564 F. Supp. 3d at 120 (holding that the work of flight attendants and their availability relates to airline services under the ADA); Air Transp. Ass'n of Am., Inc. v. Campbell, No. 18-cv-10651, 2023 WL 3773743 at *11 (D. Mass. June 2, 2023) (holding that the EST Law will have a "significant impact" on airline services).

265 *Delta Air Lines*, 564 F. Supp. 3d at 119 (quoting Northwest, Inc. v. Ginsberg, 572 U.S. 273, 280 (2014)).

266 *See Campbell*, 2023 WL 3773743, at *12 (citing Tobin v. Fed. Express Corp., 775 F.3d 448, 453 (1st Cir. 2014) ("Matters 'appurtenant and necessarily included with the [services] . . . between the passenger or shipper and the airline' . . . [include] 'ticketing, boarding procedures, provision of food and drink, and baggage handling' . . . .")).

267 *Compare Delta Air Lines*, 564 F. Supp. 3d at 112 n.1, *with Campbell*, 2023 WL 3773743, at *13.

interpretation, as the Eastern District of New York suggests,[268] and almost anything can be included within the "service[s]" of an airline, as *Campbell* opines,[269] then most general employment regulations that affect the airline industry may become grounds for preemption under the ADA. For example, *Campbell* stated that any law or regulation that would deprive the airline of even a single employee, even if it could be solved by different hiring practices, related to the services of air carriers.[270] Exploring this analysis further, any state or local law that sought to provide minimum standards to all employees (e.g., working hours, reduced number of workdays, state holidays, break periods, etc.) may not apply to airline employees. At its most extreme, states would not be able to protect the public safety of some of their own citizens within their own state boundaries based on their occupation with an airline. The only solution in this scenario would be federal legislation on workers' rights, which is unlikely to occur in the current political climate.[271]

However, even though the ADA's preemption clause is broad, the courts could textually resolve this by looking back to ERISA for guidance. As previously stated, the Supreme Court originally interpreted the ADA's preemption clause by comparing it to the similarly broad ERISA preemption clause.[272] Although this comparison originally expanded the preemptive scope of the ADA,[273] subsequent ERISA preemption jurisprudence has drastically redefined the interpretation of the key phrase "relate to."[274] The Supreme Court long ago recognized that "relate to" in ERISA jurisprudence cannot be interpreted so broadly as to extend into every nook and cranny of life.[275] Using a similar analysis as guidance for deciding ADA preemption, subsequent litigants could argue that the ADA's preemptive language should be interpreted in comparison to ERISA jurisprudence so as not to enjoin laws firmly within the traditional police powers of states, like paid sick leave laws.

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268 *See Delta Air Lines*, 564 F. Supp. 3d at 119.

269 *See Campbell*, 2023 WL 3773743, at *12.

270 *See id.*

271 *See supra* Section III.A.

272 Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383–84, 386 (1992); *see supra* Section I.A.2.

273 *See Morales*, 504 U.S. at 386.

274 *See* N.Y. State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co., 514 U.S. 645, 655 (1995); Egelhoff v. Egelhoff, 532 U.S. 141, 146 (2001); Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 319–20 (2016); *see also supra* Section I.A.2.

275 *Egelhoff*, 532 U.S. at 146 ("[W]e have recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes pre-emption would never run its course.'" (quoting *Travelers Ins. Co.*, 514 U.S. at 655))).

CONCLUSION

The increase of state-legislated paid sick leave instead of a federal paid sick leave law has created a host of potential constitutional issues involving interstate carriers like airlines. Although airlines contend that state and local paid sick leave laws are preempted under the ADA via the Supremacy Clause, the dormant Commerce Clause could also theoretically find subfederal paid sick leave laws to be unconstitutional. Nonetheless, as this Note's analysis of recent dormant Commerce Clause decisions shows, subfederal paid sick leave laws are unlikely to be found unconstitutional under the current dormant Commerce Clause doctrine.

Yet paid sick leave laws could still be deemed inapplicable to airline employees because of recent ADA preemption clause precedents. A federal paid sick leave law, though the "cleanest" solution to this federalism dilemma, looks unlikely to happen soon. The Ninth Circuit's approach to seeing paid sick leave as too tenuously related to the ADA to be preempted would provide hundreds of airline employees with paid sick leave benefits.[276] However, following the Ninth Circuit would possibly result in further jurisdictional questions and federalism problems given the differences in the patchwork of paid sick leave legislation across the United States. By contrast, adopting the holdings of the Eastern District of New York and District of Massachusetts nationwide would follow closely with the Supreme Court's broad reading of the ADA's preemption clause. Yet this interpretation of the ADA could substantially diminish state police powers and preempt additional state worker protection laws. Comparing the ADA's preemption clause once again to ERISA's preemption clause could be another solution to avoiding the preemption of subfederal paid sick leave laws given the Supreme Court's narrowed interpretation of the "relates to" phrase in ERISA preemption clause jurisprudence.

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276 *See supra* Sections II.A–B.