SUPREME COURT OF THE UNITED STATES

No. 92–97

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS *v.* COUNTY OF KENT, MICHIGAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January 24, 1994]

JUSTICE THOMAS, dissenting.

Today the Court transforms a statutory prohibition on a narrow class of charges on air travel into a broad mandate for federal regulation and review of virtually all airport fees. I disagree with the Court that the landing fees, rental charges, and carrying charges challenged here fall within the scope of the Anti-Head Tax Act (AHTA or the Act), 49 U. S. C. App. §1513. Unlike the Court, I do not believe that the Act imposes a "reasonableness" requirement on all airport charges and user fees. Instead, the Act merely prohibits fees, taxes and charges imposed on the bases specified in §1513(a), and leaves airports free to impose other charges, subject to the restrictions of the dormant Commerce Clause. Because the Act does not apply to the fees at issue in this case, I would remand for consideration of petitioners' Commerce Clause claim. Accordingly, I respectfully dissent.

As the Court recognizes, *ante*, at 6, Congress passed the AHTA in response to this Court's decision in *Evansville-Vanderburgh Airport Authority Dist*. v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972), which upheld against Commerce Clause challenge the imposition of a

per capita ("head") tax on air travelers. The Act was designed primarily to deal with the proliferation of local head taxes in the wake of the *Evansville* decision. *Aloha Airlines, Inc.* v. *Director of Taxation of Haw.*, 464 U. S. 7, 9, 13 (1983).

Two AHTA provisions are relevant here. Section 1513(a) prohibits state and local governments from imposing "a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." Section 1513(b), however, states that "nothing in [the Act]" prohibits the imposition of "taxes other than those enumerated in subsection (a)," including, among other things, property and net income taxes, and that the Act does not prohibit "reasonable rental charges, landing fees, and other service charges" collected from "aircraft operators for the use of airport facilities."

In the Court's view, §1513(a) prohibits virtually all airport user fees, *ante*, at 8–9 ("[l]anding fees, terminal charges, and other airport user fees of the sort here challenged fit §1513(a)'s description"), and §1513(b) "saves" those fees that are "reasonable." *Ante*, at 9, n. 9 ("user fees are covered by §1513(a), but may be saved by §1513(b)"). The Court supports its broad reading of §1513(a) in part by noting that the section prohibits not only head taxes but also taxes on gross receipts. *Ante*, at 9 (citing *Aloha Airlines, supra*, at 12–13). That, however, merely states the obvious. Section 1513(a) expressly prohibits taxes "on the gross receipts derived" from the sale of air transportation. The mere fact that the Act is not strictly limited to head taxes, which were the Act's primary target, *Aloha Airlines, supra*, at 13, but also encompasses taxes on gross receipts from the sale of air transportation, in no way suggests that the Act should be read to encompass all airport "user

fees."

To be sure, the Act's apparently broad ban on any fees, taxes, or charges imposed "directly or *indirectly*, on persons traveling in air commerce," etc., superficially supports the Court's interpretation. Any cost an airline bears is in some sense an "indirect" charge "on persons traveling in air commerce," because the airline ultimately will pass that cost on to consumers in the form of higher ticket prices. But if §1513(a) covers all charges indirectly imposed on air travelers, as the Court apparently believes, see *ante*, at 8–9, it should logically encompass all taxes imposed on airlines as well, including property taxes, net income taxes, franchise taxes, and sales and use taxes on the sale of goods and services. Yet §1513(b) instructs that such taxes are not covered by §1513(a) —that they are "taxes *other than those enumerated in subsection (a)*." 49 U. S. C. App. §1513(b) (emphasis added). Significantly, §1513(b) is not phrased as an exemption for taxes otherwise within §1513(a)'s prohibition, but rather as a clarification of the reach of §1513(a). It makes clear that the language of §1513(a) defining the prohibition does not extend by its own force to the taxes enumerated in §1513(b). Under the Court's broad construction of §1513(a)'s "directly or indirectly" language, however, the two provisions would appear to be in conflict.

Recognizing the significance of §1513(b)'s treatment of taxes, the Court implicitly acknowledges that §1513(a) does not cover the taxes listed in §1513(b). *Ante*, at 9, n. 9. But the Court can only accomplish this reading by assuming that §1513(b) treats the "rental charges, landing fees, and other service charges . . . for the use of airport facilities" listed in that subsection differently from the enumerated taxes. In this understanding, while as to taxes §1513(b) merely clarifies the scope of §1513(a), as to fees it serves the altogether different function of providing an exemption from §1513(a)'s prohibition.

The Court supports this reading on the ground that §1513(b) does not explicitly describe the fees as distinct from ("other than") the fees prohibited in §1513(a). That construction requires a rather unlikely reading of §1513(a), however, because it means that the same language defining the scope of the prohibition in that section inexplicably would have one meaning when applied to fees, and quite a different (and more limited) meaning when applied to taxes. None of the taxes listed in §1513(b), although borne indirectly by airline passengers, would constitute a "tax, fee, . . . or other charge, [levied] directly or indirectly, on persons traveling in air commerce," etc. But a user fee charged to an airline, *because* it is borne indirectly by airline passengers, would constitute a "tax, fee, . . . or other charge, [levied] directly or indirectly, on persons traveling in air commerce," etc. Thus, the prohibition in §1513(a) would not extend to, for example, property taxes, because they are not imposed on one of the bases listed in §1513(a), but would extend to other fees or charges, regardless of the basis upon which they are imposed.

Adherence to the plain language of §1513(a) avoids these problems. In my view, when the statute prohibits a tax or charge "on persons traveling in air commerce," "on the carriage of" such persons, "on the sale of air transportation," or "on the gross receipts derived therefrom," it defines the prohibition in terms of the prohibited *basis* of the tax or charge. That is, §1513(a) prohibits the levy or collection of a tax or fee "on" certain subjects. A head tax, for example, is a charge "on persons traveling in air commerce" in that it is imposed on a per passenger basis. A landing fee, by contrast, is not—rather, it is a charge on an aircraft's landing at an airport, without regard to the number of passengers it carries.[1]

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[1]Of course, as the Court notes, *ante,* at 9, n. 9, user fees such as landing fees are not *per se* excluded

Section 1513(b) confirms that §1513(a) is concerned with the basis on which the tax or charge is calculated. Property taxes, net income taxes, and franchise taxes are not imposed on one of the bases prohibited in §1513(a), and as explained above, are not included in §1513(a). Because the same language in §1513(a) restricts taxes as well as fees and other charges, it seems logical that the fees referred to in §1513(b), which also are not generally calculated on the bases listed in §1513(a), are similarly beyond §1513(a)'s prohibition.

Section §1513(b)'s reference to "reasonable" charges, then, does not impose a requirement that all airport user fees be "reasonable." Instead, it simply makes clear that state and local governments remain free to impose charges other than those proscribed by §1513(a). Cf. *Aloha Airlines*, 464 U. S., at 12, n. 6 ("Section 1513(a) pre-empts a limited number of state taxes, ... [and] [s]ection 1513(b) clarifies Congress' view that the States are still free to impose

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from the Act. An airport could not, for example, simply replace a head tax, which is clearly forbidden by the Act, with a "landing fee" calculated according to the number of passengers on an airplane. Such a thinly disguised substitute for a head tax no doubt is a charge on the carriage of passengers traveling in air commerce within the meaning of §1513(a). A landing fee is not such a prohibited charge where it is based merely on the weight of an airplane, as here. See App. 194 (Plaintiffs' Trial Exh. 6: Fees for the Use of Public Aircraft Facilities and Rental for Passenger Terminal Premises, Kent County International Airport, Three Years Beginning Jan. 1, 1987 (Dec. 31, 1986)). Similarly, neither a rental fee based on square footage, see *ibid.*, nor a carrying charge based on the depreciation of an asset, see App. 68–70 (Trial testimony of Richard K. Dompke), is such a prohibited charge.

on airlines and air carriers `taxes other than those enumerated in subsection (a)'"). That is not to say that the term "reasonable" is superfluous. Had the Act made unqualified reference to landing fees and other user fees, it might have been read as an indication of congressional intent to authorize fees or charges that would otherwise be invalid under the dormant Commerce Clause. See *Maine* v. *Taylor*, 477 U. S. 131, 139 (1986). An unqualified reference might have also been understood to permit landing fees and other fees calculated on one of the bases prohibited by §1513(a). See n. 1, *supra*. By including the term "reasonable," Congress ensured that the Act would not be understood to displace the dormant Commerce Clause or to exempt user fees on aircraft operators *per se* from §1513(a). In short, §1513(b) merely clarifies that fees, taxes and other charges not encompassed within §1513(a) may be imposed if consistent with our dormant Commerce Clause jurisprudence.[2]

The considerable difficulty the Court has in finding content for the term "reasonable" should signal that Congress did not intend the Act to impose a comprehensive new regulation on airport fees. As the Court admits, the Act itself sets no standards for reasonableness. *Ante*, at 9. Finding no other source for a definition, the Court uses *Evansville* as its test of reasonableness, apparently for want of anything better. See *ante*, at 11. The Court seems to recognize that this is not a perfect fit (but "will suffice for the purpose at hand," *ante,* at 12), and with good reason. Reasonableness was only one of several factors considered in *Evansville*; nondiscrimination

[2]Other statutory restrictions might also apply to the fees at issue here, see, *e. g.*, 49 U. S. C. App. §2210, but their applicability is not before us.

against interstate commerce is a separate concern and is of at least equal importance. See 405 U. S., at 716–717. Moreover, as the Court acknowledges, Congress enacted the Act precisely because it found the result in *Evansville* "unsatisfactory." *Ante,* at 11.

Nevertheless, the Court reads the *Evansville* standard into the statute for no reason other than that the parties invite us to do so and that this Court (after enactment of the AHTA) occasionally has applied *Evansville* to test reasonableness in other contexts. *Ibid.* That the parties agree on a standard, however, does not mean that it is the correct one. Moreover, it seems somewhat odd to import into the Act the very standard that created the problem Congress ostensibly intended the Act to "correct." Indeed, read as the Court construes it, the Act would fail to prohibit precisely the sort of fees §1513(a) most clearly forbids. A head tax itself was held to be a "reasonable" user fee in *Evansville* (assuming, as the Court does, that *Evansville* applied a "reasonableness" standard). Under the Court's interpretation of the AHTA, there is nothing to prevent an airport from imposing a modest per passenger fee on airlines as a service charge for use of airport facilities.[3] Such a fee would pass muster under *Evansville*, and therefore would be "saved" by §1513(b) as a "reasonable" fee, even though it is clearly a charge "on the carriage of persons traveling in air commerce." 49 U. S. C. App. §1513(a).[4] It is doubtful

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[3]Presumably, under the Court's analysis, §1513(b) would not save head taxes exacted directly from passengers because it refers only to user fees collected "from aircraft operators."

[4]It is no answer to say, as the Court does, *ante*, at 11, n. 13. that "head charges" are prohibited by §1513(a). In the Court's view, "user fees are [also] covered by §1513(a)." *Ante,* at 9, n. 9. As the Court construes the Act, charges covered by §1513(a) are

that Congress intended the Anti-Head Tax Act to prohibit "unreasonable" landing fees, whatever they might be, while permitting "*Evansville*–reasonable" per capita user fees on aircraft operators. If, as the Court implies, Congress disapproved of the result but not the analysis in *Evansville*, it seems far more likely that it would have left the Commerce Clause analysis undisturbed while prohibiting head taxes and similar fees. In my view, that is precisely what §1513 does.

Having applied a construction of "reasonable" that it admits is not compelled by the Act, the Court invites the Secretary of Transportation to devise a different, presumably better, interpretation of the term, to which the Court will defer if it is a permissible construction of the Act.[5] *Ante,* at 12, n. 14. Given that the Act sets no standards for "reasonableness," *ante*, at 9, it is difficult to imagine how the Secretary's interpretation could be an

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permitted only if they are "saved" by §1513(b). *Ibid.* It is not clear why §1513(b) would save reasonable "fee[s]" and "other charge[s]" covered by §1513(a) but not reasonable "head charge[s]" covered by §1513(a). Head charges certainly may constitute "reasonable . . . service charges from aircraft operators for the use of airport facilities," §1513(b), if *Evansville* is the standard of reasonableness. See *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U. S. 707, 710, 714 (1972) (upholding a $1 per passenger "service charge" collected from air carriers for "use of runways and other airport facilities").

[5]The Secretary of Transportation has not so far promulgated any regulatory standards for judging reasonableness under the Act. Although that fact is not directly relevant to our inquiry, it is surprising, if the Act means what the Court thinks it does, that the Secretary has not done so in the 20 years since the AHTA's enactment.

impermissible one. Indeed, although the Court seems to assume that the standard would be at least as rigorous as the one it applies here, presumably the Secretary could, in the exercise of his expertise, devise a more permissive standard. Under the Court's analysis, there is no reason to assume that the *Evansville* standard is a minimum. If the Act imposes the comprehensive regulation of the reasonableness of airport charges that the Court sees, it would certainly constitute a clear expression of Congress' intention to displace the dormant Commerce Clause in this area, see *Maine* v. *Taylor*, *supra*, at 139, in which case the Secretary would be free to regulate either more or less restrictively than would the dormant Commerce Clause. Cf. *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 154 (1982). I simply find nothing in the Anti-Head Tax Act that gives the Secretary such unbridled discretion to regulate all airport user fees.

Because the AHTA does not, in my view, apply to the fees in this case, it does not foreclose petitioners' challenge under the dormant Commerce Clause.[6] The

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[6]Nor, in my view, does the Airport and Airway Improvement Act of 1982 (AAIA), 49 U. S. C. App. §2210, foreclose dormant Commerce Clause analysis here. Although the AAIA places a variety of conditions on federal funding of airports, some of which relate to user fees, it imposes no flat prohibitions, and therefore does not make "`unmistakably clear'" that it is intended to displace the dormant Commerce Clause. *Maine* v. *Taylor*, 477 U. S. 131, 139 (1986). Moreover, this Court in *Evansville* held that the AAIA's predecessor, which was substantially similar to the AAIA, did not preclude dormant Commerce Clause analysis. See 405 U. S., at 721.

courts below, however, held that the Act, as they interpreted it, precluded that claim. 955 F. 2d 1054, 1063–1064 (CA6 1992); No. G88–243 CA (WD Mich., Jan. 19, 1990) (App. to Pet. for Cert. 46a). Because the lower courts should be given the opportunity to consider the merits of petitioners' dormant Commerce Clause challenge in the first instance, I would remand.

I therefore respectfully dissent.