

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

LOVE FIELD SERVICE
INTERPRETATION PROCEEDING

Docket No. OST-98-4363

REPLY COMMENTS OF THE CITY OF DALLAS

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DALLAS' REPLY TO COMMENTS OF INTERESTED PARTIES

The City of Dallas ("Dallas"), as the owner and operator of the Dallas Love Field Airport ("Love Field"), submits the following reply to the comments submitted by the City of Fort Worth ("Fort Worth"), American Airlines, Inc. ("American"), and the Dallas-Fort Worth International Airport Board ("DFW Board") (collectively referred to as the "Fort Worth Parties")¹ pursuant to DOT Order 98-8-29 (August 25, 1998) instituting the above-captioned proceeding, and DOT Procedural Order 98-9-5 (September 3, 1998).

Lest there be any doubts about its agenda, Dallas reiterates that its goals are clarity and finality, not a specific result concerning the scope of services at Love Field. Neither of these goals can be achieved without the active involvement of the U.S. Department of Transportation. Dallas also does not want to be subject to inconsistent obligations. Dallas respectfully requests the Department to act promptly, and not wait until after the pending state litigation has run its course without the benefit of the Department's expertise. Moreover, clarity requires that the decision be based on an understanding of all the relevant facts and precedential rulings (both administrative and judicial), not just a selectively screened subset of those facts and rulings.

¹ This collective designation is used for convenience in this Reply. Dallas recognizes that these parties do not assert identical positions on all issues in this proceeding.

Dallas will not attempt to reply to every argument made by the Fort Worth parties; most of the pertinent issues are addressed in Dallas' initial Comments. Instead, this Reply will focus on a few factual and legal errors or omissions by the Fort Worth parties that warrant specific treatment.

SUMMARY OF REPLY

The Fort Worth Parties contest the Department's jurisdiction to conduct this proceeding and urge the Department to dismiss it. Here, the Department's jurisdiction derives from the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978 and the International Air Transportation Competition Act of 1979. Moreover, the pending state litigation does not divest the Department of its jurisdiction. Neither the Anti-Injunction Act nor general principles of federalism requires the Department to refrain from conducting a proceeding, on its own motion, to clarify the rights and obligations of federally-regulated airports and airlines under federal law. Finally, arguments about whether the present dispute falls within the Department's primary jurisdiction or whether the Department's statutory interpretations ought to be accorded judicial deference are addressed to the wrong forum.

Turning to the merits, these Reply Comments clarify certain material facts regarding Love Field's unique history. While Dallas generally does not quarrel with the factual background presented by other parties, Dallas does note that the Fort Worth Parties have given short shrift to several key aspects of that history—namely, the marathon *Southwest* litigation, the adoption of the Wright Amendment, the *Continental* litigation, and the enactment of the Shelby Amendment. Dallas also refutes the suggestion that the political compromise embodied in the Wright Amendment can be considered some sort of independently enforceable agreement, requiring Dallas to impose limitations more stringent than the terms of the statute as amended.

Dallas also refutes the false premise that it may impose a perimeter rule because it is a “multi-airport proprietor” by virtue of its representation on the DFW Board. Even if Dallas were a proprietor of DFW, the question whether Dallas could exercise proprietor’s rights to limit the use of Love Field, beyond the limits contained in the Love Field Amendment, cannot be resolved without reference to previous judicial and administrative decisions interpreting that statute.

I. THIS PROCEEDING IS AN APPROPRIATE EXERCISE OF THE DEPARTMENT’S AUTHORITY

A. DOT Has Statutory Authority to Conduct Investigations and Issue Orders Necessary to Interpret and Enforce the Provisions of the Airline Deregulation Act, and the Wright and Shelby Amendments.

The jurisdictional authority to institute proceedings such as the one at hand dates back to the enactment of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 788 (the “Act” or the “Federal Aviation Act”). The Act created the Federal Aviation Agency and continued the existence of the Civil Aeronautics Board. The Act granted certain powers to the FAA Administrator and to the Board, including the jurisdiction to hear cases such as the one at hand. Eventually, Congress transferred these functions to the Secretary of Transportation. Department of Transportation Act § 6(c)(1), Pub. L. No. 89-670, 80 Stat. 931.

As amended by the Department of Transportation Act, the Federal Aviation Act empowers the Secretary (and, with respect to certain functions, the Administrator): “to perform such acts, to conduct such investigations, to issue and amend such orders . . . pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of . . . this Act.” Federal Aviation Act § 313(a). The Federal Aviation Act further empowers the Secretary:

to institute an investigation, on [his] own initiative, in any case and as to any matter or thing . . . concerning which any question may

arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.

Federal Aviation Act § 1002(b). Congress explicitly provided that the Secretary has the same power to proceed with an investigation on his own motion as he has to proceed with an investigation initiated by complaint. *Id.*²

These provisions give the Secretary authority to interpret and enforce the Wright and Shelby Amendments (collectively the “Love Field Amendments”) and the Airline Deregulation Act. Both statutes are amendments to the Federal Aviation Act.³

The Department has previously exercised its authority to interpret and enforce both the Love Field Amendments and the preemption provision of the ADA. *See, e.g., Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) (“*Continental II*”) (reviewing DOT order interpreting the Wright Amendment); *New England Legal Found. v. Massachusetts Port Authority*, 883 F.2d 157, 171 (1st Cir. 1989) (reviewing DOT’s determination that Massport’s fees were unreasonable, not a valid exercise of proprietor’s rights, and hence preempted). The Department’s power to conduct this proceeding is not subject to reasonable dispute.

² *See* 49 U.S.C. §§ 40113(a) (“The Secretary of Transportation ... may take action the Secretary ... considers necessary to carry out this part, including conducting investigations ... and issuing orders”).

³ The Wright Amendment was enacted as part of the International Air Transportation Competition Act of 1979 (“IATCA”), Pub. L. 96-192, 94 Stat. 35, which was in itself an act “to amend the Federal Aviation Act of 1958.” IATCA preamble, 94 Stat. 35. Accordingly, the jurisdictional authority granted by the Federal Aviation Act gives the Secretary the power to conduct this proceeding and issue a declaratory order. 5 U.S.C. § 554(e); 49 U.S.C. § 46102(a).

B. Pending State Litigation Does Not Divest the Department of Jurisdiction to Interpret and Enforce Federal Aviation Laws.

As discussed in Dallas' initial Comments, the Fort Worth Parties' heavy reliance on *Texas Employers Insurance Association v. Jackson*, 862 F.2d 491, 504-508 (5th Cir. 1988) ("*Texas Employers*") is misplaced.⁴ *Texas Employers* deals with the issue whether a private party, in seeking a declaratory judgment under the particular circumstances present in that case, violated the Anti-Injunction Act. *Texas Employers* did not even get close to addressing the issue presented here: Is the Department prevented by the Anti-Injunction Act from exercising the duties it was expressly given under federal law? The answer is: "Of course not."⁵

Not only may the Department conduct this proceeding, it can seek to enjoin a state court action if it decides it is necessary to protect federal interests. The Supreme Court has repeatedly held that federal administrative agencies may seek to enjoin pending state litigation. *Mitchum v. Foster*, 407 U.S. 225, 235-36 (1972) (permitting a federal court to enjoin state litigation "when the plaintiff in the federal court is ... a federal agency asserting 'superior federal interests'"); *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957). In particular, federal administrative agencies may enjoin a suit "claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an

⁴ American Airlines also quotes an opinion by Chief Justice Rehnquist arguing that federalism concerns should preclude action by federal administrative agencies just as surely as action by federal courts; but, as American admits, Chief Justice Rehnquist was dissenting. In fact, neither the Anti-Injunction Act nor principles of federalism require a federal administrative agency to stay its hand because of pending state litigation. *National Labor Relations Bd. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). *See infra*.

⁵ In addition, note that the rule stated by the Fifth Circuit in *Texas Employers* is not universally accepted. *See Employers Resource Management Co. v. Shannon*, 65 F.3d 1126, 1132 (4th Cir. 1995) *cert. denied* 516 U.S. 1094 (1996) (discussing Circuit split).

objective that is illegal under federal law.” *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 737 n.5 (1983). Accordingly, “[i]t is abundantly clear that this action is not barred by the Anti-Injunction Act.” *United States v. Composite State Board of Medical Examiners*, 656 F.2d 131, 134 (5th Cir. 1981).

The reason for the different treatment of federal administrative agencies and private parties is clear: Federal administrative agencies are guardians of the public interest and are unlikely to seek to enjoin state litigation in order to achieve a narrow strategic advantage either for themselves or for a private party. *See Nash-Finch Co.*, 404 U.S. at 144 (“The Board as a public agency acting in the public interest, not any private person or group, ... is chosen as the instrument to ... remove obstructions to interstate commerce.”). As the Supreme Court observed:

The purpose of [the Anti-Injunction Act] was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights. We can no more conclude here than in *Leiter* that a general statute, limiting the power of federal courts to issue injunctions, had as its purpose the frustration of federal systems of regulation.

Nash-Finch, 404 U.S. at 146. Indeed, the observation that the Anti-Injunction Act was not intended to frustrate federal systems of regulation is particularly apt where, as here, the Department is not asking a federal court to enjoin state proceedings but simply exercising its own regulatory powers.⁶

⁶ Other federal administrative agencies have issued declaratory orders despite the pendency of state litigation on the same issue. *E.g.*, *El Paso Natural Gas Co.*, 41 F.E.R.C. ¶ 61,352 (1987) (issuing declaratory order because state injunction “interfere[d] with our administration of the [Natural Gas Act] and our responsibilities under that Act”); *Florida Power & Light Co.*, 40 F.E.R.C. ¶ 61,045 (1987).

C. The Possibility of Future Enforcement Action by DOT against Dallas Justifies the Current Declaratory Order Proceeding.

Until the Department passes judgment on the issues presented in this proceeding, Dallas is concerned that it is at risk of an enforcement action by the Department (or the FAA) if it were to take the actions suggested by American Airlines, Fort Worth and DFW. Dallas, as the recipient of federal grants for the development of Love Field, is mindful of its obligations under the grant agreements and the Department's authority to undertake an enforcement action against Dallas if the Department comes to believe that the city's actions regarding Love Field violate the city's grant assurances or certain other applicable federal statutes.⁷ 49 U.S.C. §§ 40113(a), 46106 and 47122(a); 14 C.F.R. §§ 16.1(a), 16.29 (investigation of complaints), and 16.101 (agency action on its own motion).

If a state court condones or even orders Dallas' restriction of air service at Love Field, will that protect Dallas if the Department later decides that the restriction is illegal? *See* Director's Determination, *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, Docket Nos. 16-98-05, 13-94-25 and 13-95-03, at 3 (Aug. 24, 1998). Dallas would

⁷ Indeed, the Department of Transportation brief that American cites for the proposition that proprietors' rights issues must be left to the courts goes on to negate that very proposition. Immediately following the passage quoted by American, the Department's brief says:

[O]perational enforcement of the limitations on a proprietor's power must be through either a judicial challenge ... or through section 308(a) of the Act, which is administered by the FAA. This subsection provides that:

There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

Under this subsection, it is clear that the FAA has ample authority to take appropriate action to prevent discriminatory uses of airports, including Love Field.

Ex. 2 to American Comments at 16.

note that it has long been the Department's published position that "[i]n all cases the FAA will make the final determination of the reasonableness of the airport owner's restrictions which denied or restricted use of the airport." FAA Order 5190.6A, ¶ 4-8a(2) (October 2, 1989).

In order to avoid subjecting Dallas to conflicting obligations—or at least to minimize the harm arising from conflicting state and federal decisions—the Department's opinion must be heard now. Perhaps the state court and the Department will reach the same conclusion independently about the extent of Dallas' powers. Or perhaps the state court will reverse course and defer to the Department's expertise, as Dallas believes it should.

If the state court insists on contradicting the Department, then -- and only then -- will it be time to argue over the proper relationship between the conflicting state and federal administrative decisions. But if there is to be a conflict between the Department's position and the state court's position, it is better for the conflict to be confronted and resolved sooner rather than later—preferably before Dallas is required to take any affirmative action. Dallas strongly wishes to avoid a situation in which it is first forced to comply with a state court judgment directing it to impose a perimeter rule and later found by the Department to be violating its grant assurances or federal law by imposing that same rule.

D. Arguments about the Effects of DOT's Order or about its Relationship to a Contrary State Judgment are Unripe and Addressed to the Wrong Forum.

Many of Fort Worth's argument for dismissal of this proceeding focus not on the Department's authority to conduct it but on whether the Department's decision should trump a contrary state judgment. In particular, Fort Worth argues that the state court is not required to stay its hand and enable a referral to the Department to exercise its primary jurisdiction. *Fort Worth Comments* at 14. Fort Worth also argues that the Department's decision would not be

entitled to judicial deference under *Chevron, U.S.A., Inc v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Fort Worth Comments* at 18-19.

Dallas submits that neither argument is addressed to the proper forum. As the cases cited by Fort Worth indicate, the doctrine of primary jurisdiction is a doctrine that allows (and may compel) a court to refer a case to the Department so that the Department may pass first on a question within its primary jurisdiction. *Fort Worth Comments* at 13 (citing *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993)). *See also New England Legal Found.*, 883 F.2d at 171. Accordingly, the fora which should address arguments about primary jurisdiction are, first, the court from which the case would be referred and, second, any appellate courts reviewing the lower court's decision. Since the state court has refused to refer the case to the Department, this is not an instance in which it is appropriate or necessary to seek to dissuade the Department from exercising its primary jurisdiction.

Similarly, the question of whether the Department's statutory construction will be entitled to deference is a matter for a Federal Court of Appeals to decide upon *review* of the Department's order. The District of Columbia Circuit has already decided that the Department's interpretation of the Love Field Amendments is entitled to judicial deference if the interpretation is reasonable or permissible. *Continental II*, 843 F.2d at 1449. *See also New England Legal Found.*, 883 F.2d at 173 (deferring under *Chevron* to Secretary's determination that Massport's fees were unreasonable, not valid exercises of its proprietor's rights, and hence preempted by the ADA.)

E. Fort Worth's Constitutional Arguments Are Unfounded

Fort Worth claims that a DOT ruling could unconstitutionally impair Fort Worth's contract rights. In essence, Fort Worth seems to be saying that it has a contract and that federal law cannot take away its rights under that contract. That is not the proper question. Dallas never

signed on to a deal that obligated it to violate federal law. Not only would such an obligation be void as against public policy, but the drafters of the 1968 Bond Ordinance were well aware that the cities were not islands unto themselves, but subject to a host of laws and legal obligations. They therefore drafted the Ordinance to state the obvious: that Dallas's obligation was to take "such steps as may be necessary, appropriate *and legally permissible*." Concurrent Bond Ordinance § 9.5A. The issue, therefore, is not whether there has been an unconstitutional impairment of contract rights, but, rather, what guidance does the applicable federal law offer in interpreting those contract rights. There can be no impairment of contract in answering the questions posed in this proceeding.

Fort Worth's "takings" argument is even more off-base. Dallas, not Fort Worth, is the owner and operator of Love Field. Fort Worth does not hold or possess any ownership interest in Love Field, and thus it has no property interest to be "taken."

Unlike the plaintiff in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), Fort Worth is not the landlord here. The "forced occupancy of the airport by associated and indispensable aviation facilities" (*Fort Worth Comments at 23*) would not be imposed upon Fort Worth.⁸ If there would be a permanent physical occupation of real property (evidence of which has not been brought forward by any of the parties to this proceeding), the party affected would be Dallas, and not Fort Worth.

⁸ The other cases cited by Fort Worth, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), may be distinguished under the same grounds -- the parties initiating the action had a real interest in the affected property. Here, Fort Worth cannot claim a property interest in Love Field.

II. THE UNIQUE HISTORY OF LOVE FIELD — CLARIFYING THE MATERIAL FACTS

Most of the facts of this case are matters of public record, and Dallas generally does not quarrel with the factual background presented by the other interested parties. On a few matters, however, the information presented to the Department by the Fort Worth Parties is incomplete and misleading. Essentially, the Fort Worth Parties have highlighted the formation of the Concurrent Bond Ordinance while giving short shrift to many of the key events that form the legal backdrop against which the Bond Ordinance must be viewed today. Dallas refers the Department to the section entitled “Factual Background” in its Comments for several material events that received insufficient attention from the Fort Worth Parties in their respective Comments, particularly the *Southwest* litigation between 1973 and 1982, the adoption of the Wright Amendment in 1980, the *Continental* litigation in 1986-88, and the enactment of the Shelby Amendment in 1997.

Dallas is also concerned with the misleading suggestion by Fort Worth and American that the Wright Amendment was the result of an agreement between the cities and several airlines (including Southwest) to “preclude the CAB from . . . authorizing additional flights at Love Field.” *Fort Worth Comments at 9*. These parties suggest that this “compromise” is somehow enforceable separately from either the 1968 Bond Ordinance or the Wright Amendment itself. *American Comments at 37* (claiming that Dallas, rather than Congress, “has restricted scheduled passenger traffic at Love Field to Texas and the contiguous states”). To the extent this is any party’s position, it is incorrect. The Wright Amendment was a political compromise between the House and Senate conferees and between several competing interests.

Fort Worth has submitted affidavits (Petersen [Tab 10], Wright [Tab 11] and Williams [Tab 13]) describing the process by which the complex *political* compromise reflected in the Wright Amendment became federal law, but there is no evidence of any separate, independently enforceable agreement by Dallas to adopt the terms of the Wright Amendment as a municipal regulation. In fact, there was no separate agreement that Dallas would (or could) enforce any portion of the Wright Amendment as a municipal regulation if the federal law were subsequently amended. Nor was there any agreement at the time that Dallas could (or would) impose limits on services at Love Field that were more restrictive than the terms of the statute. In fact, the Dallas City Council took no formal action (by ordinance or resolution) in connection with the compromise text of the Wright Amendment. The evidence, including Fort Worth's affidavits, simply describes a part of the complex political and legislative process that resulted in the Wright Amendment's becoming federal law; it does not support the existence of some other phantom agreement. It goes without saying that Fort Worth's intent in approving the terms of the Wright Amendment is irrelevant to the construction of that law. The only possible source of any obligation Dallas could have to Fort Worth to restrict flights from Love Field would be the 1968 Concurrent Bond Ordinance, which does not contain any "four state perimeter rule," has not been amended, and must be construed in light of the developments in federal aviation law over the past 30 years. Moreover, the Bond Ordinance is for the primary benefit of the bondholders, not the City of Fort Worth.

III. DALLAS IS THE PROPRIETOR OF LOVE FIELD, BUT NOT OF DFW AIRPORT

Fort Worth, American, and the DFW Board insist that Dallas has the proprietary power to impose a perimeter rule at Love Field, relying heavily on the premise that Dallas is a "multi-airport

proprietor” — specifically, that it is the proprietor of both Love Field and DFW Airport.⁹ As explained in Dallas’ initial Comments to the Department in this matter (*Dallas Comments at 23-28*), whether a particular regulation is an appropriate exercise of proprietary powers depends on the purpose of the regulation: proprietary powers exist to allow local airport proprietors to address local problems such as noise and congestion. *See National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2nd Cir. 1998). Even a multi-airport proprietor must therefore establish that the particular regulations it seeks to impose are justified as reasonable, non-discriminatory means to address specific local concerns. *Id.* at 90-91.

Under this analysis, whether Dallas is a multi-airport proprietor is not a critical issue. However, if the Department determines that the issue is material in resolving the questions posed in this proceeding, Dallas urges the Department to answer the question raised by the assertions of Fort Worth, American, and the DFW Board: whether Dallas is a proprietor of both airports -- DFW and Love Field -- for purposes of the Federal Aviation Act.

On an obvious and practical level, it is clear that Dallas is not in control of DFW; if it were, the DFW Board would be supportive of Dallas in the current controversy, rather than siding with Fort Worth and American. On a legal level, the definition of airport proprietor is a federal question, although it may be informed by the status of the parties under state and local law. *See San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). That court found that the Port Authority, and not the State of California, was the proprietor of San Diego’s Lindbergh Field. The court based its holding on the fact that

⁹There is, of course, no dispute that Dallas is the proprietor of Love Field and of the much smaller Redbird Airport in south Dallas. The question is whether it is also the proprietor of DFW for

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the Port Authority had been granted the authority to “operate and promote an air terminal, . . . govern itself, . . . sue and be sued, . . . hold real property and make contracts, . . . condemn private property for public uses, . . . as well as tax property for Port District purposes.” *Id.* at 1317. The court explained, “These criteria (ownership, operation, promotion, and the ability to acquire necessary approach easements) comprise a federal definition of proprietors for preemption purposes.” *Id.*; *see also Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 982 (9th Cir. 1992) (applying same definition); *Air Cal, Inc. v. City and County of San Francisco*, 865 F.2d 1112, 1117-19 (9th Cir. 1989) (San Francisco delegated “responsibility for managing and operating the airport” to Airports Commission, and thus could not exercise proprietary powers); *Pirola v. City of Clearwater*, 711 F.2d 1006, 1010 (11th Cir. 1983) (city “contracted away the [proprietary] right to impose the desired restrictions”). The Ninth Circuit in *San Diego* rejected the State’s argument that its “inherent power over its political subdivisions” made it a proprietor of the airport in addition to the Port Authority. 651 F.2d at 1318. An amicus brief by the federal government indicated that, for purposes of the airport certification process, each airport has a single proprietor. *Id.* at 1318 n. 32.

According to the Fort Worth Parties, Dallas is a proprietor of DFW Airport solely because it “owns” 7/11 of the airport and appoints seven of the eleven board members. *American Comments at 23, Fort Worth Comments at 31, DFW Board Comments at 16.* American acknowledges that the DFW Board “operates” the airport, but does not analyze the effect of this operation on its premise that Dallas is DFW’s proprietor. Apparently, the argument is that DFW

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purposes of the ADA’s “proprietary powers” exception to federal preemption.

airport has at least three proprietors: the DFW Board, Dallas, and Fort Worth. Dallas is aware of no authority identifying three different entities as proprietors of a single airport.

The broad powers and duties delegated to the DFW Board by the cities of Dallas and Fort Worth are enumerated in the 1968 Contract. Among other things, the Board is authorized to “plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police” DFW Airport. Contract ¶ 8(B). The Board is also authorized to enter into contracts, leases, and “other arrangements” as may be necessary in its operation of the Airport. *Id.* ¶ 8(C), (D), (H). The DFW Board was created pursuant to § 22.074 of the Texas Transportation Code, which authorizes the creation of joint boards to “plan, acquire, establish, construct, improve, equip, maintain, operate, regulate, protect, and police an airport.” TEX. TRANSP. CODE § 22.074. The statute also invests the Board with limited powers of eminent domain, acting under the authority of the two cities. *Id.* § 22.074(c); *see City of Euless v. Dallas/Fort Worth Int’l Airport Bd.*, 936 S.W.2d 699, 703 (Tex. App. -- Dallas 1996, writ denied); *City of Irving v. Dallas/Fort Worth Int’l Airport Bd.*, 894 S.W.2d 456, 470 (Tex. App. -- Fort Worth 1995, writ denied). Although the Board acts as the agent of the two cities, which approve its budget and are ultimately responsible for its actions, some of the function delegated to the Board are “exclusively the power of the Board.” TEX. TRANSP. CODE § 22.074(d).

According to the Dallas City Code, the Dallas Aviation Department is responsible for operation and management of Love Field and Redbird Airport. Dallas City Code § 5-1 (1998). Operation of DFW Airport, however, is expressly reserved for the “exclusive management of the [DFW Board].” *Id.* §§ 5-3(b); 5-4(b). Finally, the DFW Board is authorized to enter into Federal grant agreements as the sole sponsor of DFW Airport, and is therefore bound by the federal grant assurances governing that airport, including the obligation to act to extinguish any outstanding

“claims of right of others which would interfere” with the terms of the grant assurances. *Grant Assurance 5(a)*. Dallas, viewing these facts in light of the previous cases defining “proprietor” for federal preemption purposes, doubts that it can appropriately be designated a multi-airport proprietor of both Love Field and DFW Airport.

The United States Department of Justice has previously indicated that Dallas is not a multi-airport proprietor permitted to impose a perimeter rule under *Western Air Lines v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2nd Cir. 1987). In its brief to the Supreme Court in *Delta Air Lines v. Port Authority of New York and New Jersey* successfully opposing the grant of certiorari, the United States as *amicus curiae* wrote:

[R]eview is not warranted because the decision below, which is expressly limited to cases involving “a multi-airport proprietor such as the authority” . . . involves a question of extremely limited applicability. In addition to New York City, only Los Angeles (Los Angeles International Airport and Ontario Airport), Houston (Houston Intercontinental and Hobby Airport), Chicago (Midway Airport and O’Hare International Airport) and Washington (National and Dulles) are served by multiple airport proprietors.

Brief of the United States as *Amicus Curiae*, *Delta Air Lines v. Port Authority of New York and New Jersey*, No. 87-333 at 10 (filed Mar. 29, 1988) (Ex. 9 to American Comments at 14). The Department of Justice did not list Dallas as a multi-airport proprietor, and the relationships among Dallas, Fort Worth, the DFW Board and the relevant airports are substantially the same now as they were then. Dallas requests the Department’s ruling on this issue, if it considers it material to the exercise of proprietary powers.

In any event, the question whether Dallas may exercise proprietary powers as a “multi-airport proprietor” to control operations at both DFW and Love Field cannot be resolved without reference to the several previous cases in which Dallas attempted to exercise such powers to limit services at Love Field in order to protect and benefit DFW. As described in Dallas’ initial

Comments, Dallas (together with Fort Worth and the DFW Board) had on several occasions asserted its authority to restrict the origin and destination of flights at Love Field in order to effectuate the “regional plan” expressed in the 1968 Concurrent Bond Ordinance. *Dallas Comments at 4-12*. Its arguments — the same ones made here by Fort Worth, the DFW Board, and American — were repeatedly rejected by the federal courts and regulatory agencies. *Id.* Indeed, the only successful restrictions on traffic at Love Field have been imposed by the federal government, in the Love Field Amendments. Dallas does not believe that there is any principled way to reconcile these previous judgments, administrative rulings, and Congressional actions with the notion that Dallas has the unrestrained power to control the origin or destination of flights serving Love Field, whether it acts alone or in concert with Fort Worth and the DFW Board. If the Department determines that Dallas has such power, Dallas requests that the Department’s opinion clarify the extent to which it believes Dallas remains bound by those previous judgments.

IV. THE LOVE FIELD AMENDMENTS MUST BE CONSTRUED IN ITS LEGAL AND HISTORICAL CONTEXT

In addition to ignoring events that are critical to properly understanding the Love Field Amendments, the Fort Worth Parties conspicuously avoid referring to previous administrative and judicial interpretations of that statute. *Fort Worth Comments at 31-34; American Comments at 32-37; DFW Board Comments at 22-32*. The doctrines of res judicata, collateral estoppel, and stare decisis preclude such attempts to now write on a “clean slate” in the interpretation and application of the law. *See Astoria Federal Savings and Loan Ass’n v. Solimino*, 501 U.S. 104 (principles of collateral estoppel and res judicata apply to administrative agency decisions); *Hilton v. South Carolina Public Railways Comm.*, 502 U.S. 197, 202 (“Considerations of *stare decisis* have special force in the area of statutory interpretation . . .”). Despite the Fort Worth Parties’

arguments to the contrary, none of the previous cases interpreting the Love Field Amendments support the interpretation that the statute's sole or primary "purpose" was to prevent the federal government or airlines from interfering with the cities' control of their own airports. *See State of Kansas v. United States*, 16 F.3d 436, 438, 443 (D.C. Cir.), *cert. denied*, 513 U.S. 945 (1994) (Amendment enacted to "protect carriers flying into DFW" and "limit the competitive impact of Love Field," and justified in part by "unique federal interest in regulating air travel"); *Cramer v. Skinner*, 931 F.2d 1020, 1030, 1032 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991) (upholding Congressional decision "to define Love Field's permissible service area by using state borders," which was "incident to its legitimate regulation of interstate airline service"); *Continental II*, 843 F.2d at 1446 (describing Amendment as "designed to except Love Field from the liberalized entry provisions" of the ADA, in order "to protect DFW from competition at Love Field"); *City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d 496, 499 (Tex. App. Dallas 1987) ("*Continental I*") (air carriers "may fly" within the statutory parameters). Nor do any of these cases contain even a hint that Dallas had the power ("proprietary" or otherwise) to prevent services authorized by the statute. Indeed, if the real restrictive power resided in Dallas or the DFW Board rather than Congress or the DOT, much of the discussion in these cases is rather pointless.

Rather than relying on these precedents, the Fort Worth Parties' revisionist interpretation of the Wright Amendment is founded in large part on questionable "legislative history," including statements supporting a bill that did not become law. Specifically, the Fort Worth Parties (*Fort Worth Comments at 33-34; American Comments at 32; DFW Board Comments at 28-29*) quote statements made by former Congressman Jim Wright in support of his original bill, which would have provided that:

notwithstanding any automatic market entry provision of the Airline Deregulation Act of 1978, or any other provision of law, no common carrier operating in interstate commerce may perform regularly scheduled commercial passenger flights in interstate commerce into or from a satellite airport lying within 20 miles of a major regional airport where the major airport is operated under the direction of a regional airport board and where the satellite airport is operated under the direction of a municipality and where the proprietors of such satellite airport and such regional airport board have determined that the public interest and aviation safety of the region are best served by closing said satellite airport to all commercial passenger interstate traffic. The foregoing prohibition does not apply to commuter airline operations.

H.R. REP. NO. 96-716, at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 86 [Dallas Tab 4]. This provision passed the House, but was rejected by the Senate and the Conference Committee, and thus did not become law. *Id.* Wright’s argument in support of the original bill, *Fort Worth Comments 33-34* (citing 125 CONG. REC. 32,149 (1979)),¹⁰ cannot be used to support an interpretation of the very different text that was eventually adopted.¹¹ *Cf. United States v. X-*

¹⁰In the DFW Board’s and Fort Worth’s Comments, Congressman Wright’s comments are incorrectly cited as appearing in “H.R. CONF. REP. NO. 96-602, at 1320 (1979).” Mr. Wright’s comments are not part of the Committee Report.

¹¹ The colloquy concerning the ADA quoted by American and mentioned in the quoted remarks of Congressman Wright provides no support for American’s conclusion that “the Floor Manager of the ADA bill did not believe the ADA would preempt the limitations on Love Field contained in [the Concurrent Bond] Ordinance.” *American Comments at 21*. The quoted discussion, in fact, did not relate to the ADA’s preemption provision, but to one of the “policy statements” concerning satellite airports, section 102(a)(8). Moreover, the concern expressed by Mr. Wright was that CAB certification of interstate service at Love Field would, in effect, override the cities’ “regional plan;” the solution, according to Mr. Wright, was to prevent certification. This exchange does not suggest that the cities could veto any service once it had been authorized by CAB. In any event, this colloquy was considered by ALJ William Kane in his 1979 decision granting Southwest’s certification for flights between Love Field and New Orleans. Judge Kane reviewed the conflicting comments made in the House and the Senate on section 102(a)(8), determined that the language of that section was unambiguous, and concluded, “While it is clear what interpretation Congressman Wright and the others speaking during the House colloquy were attempting to place upon the statute it is just as clear that they failed in the

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Citement Video, Inc., 513 U.S. 64, 77 & n.6 (1994) (legislative history of one bill cannot be used to construe different bill). Nor can Fort Worth rely on Wright’s testimony in 1998, *Fort Worth Comments at 33* (citing Fort Worth Exhibit 12), or any other “post-enactment” statements to interpret a statute enacted in 1980. *See Continental II*, 843 F.2d at 1447 n. 3 (“post-enactment legislative history,” including subsequent “statements by Members of Congress, even highly knowledgeable ones” cannot influence statutory interpretation); *Bread Political Action Committee v. Federal Election Comm’n*, 455 U.S. 577, 582, n. 3 (1982) (“post hoc observations by a single member of Congress” given no “probative weight”); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (“post-passage remarks of legislators, however explicit, . . . represent only the personal views of these legislators”).

To further support their revisionist interpretation of the Wright Amendment, Fort Worth (at 33), American (at 34-35), and the DFW Board (at 27) seize on a single sentence in the Conference Report, which merely indicates that both the preemption and proprietary rights provisions of the Federal Aviation Act “apply to the authority to serve Love Field on interstate flights authorized by the amendment.” H.R. CONF. REP. NO. 96-716, at 26. Although Fort Worth insists that the “importance of this comment cannot be overstated” (*Fort Worth Comments at 33*), the Fort Worth Parties do just that, by arguing that the mere reservation of Dallas’ proprietary rights means Congress intended to allow local authorities to overrule the amendment and prevent the very “flights authorized by the amendment.” *Cf. American Hospital Ass’n v. NLRB*, 499 U.S. 606, 616 (1991) (statements in House and Senate Committee Reports do not

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attempt.” 83 C.A.B. 644, 674 (1979).

have “the force of law”). Neither the statute itself nor the cases construing the “extremely limited” proprietary powers to regulate local concerns justify such a result. *See Dallas Comments at 21-28.*

The D.C. Circuit, in *Continental II*, warned against the type of “revisionist alterations of the final results of the legislative process” practiced by the Fort Worth Parties in this proceeding. 843 F.2d at 1451.

It . . . will not do, when interpreting a statute embodying conflicting demands, for courts grandly to resort to a single “broad purpose” of a statute and then employ a judicially idealized “goal” to drive the interpretive process. To do so may represent not only revisionist interpretations of a specific legislative measure but . . . it portends a judicial supplanting of a key actor in the drama, namely the [DOT] itself, present on stage at Congress’ express direction.¹²

* * *

The upshot of “purpose-driven” interpretive methodologies is that carefully wrought compromises on Capitol Hill may be torn asunder in federal courthouses. Losers in the Congress (or more precisely, partial winners who may view themselves as losers) may find themselves ultimate victors by eschewing the democratic process and instead entering the litigation arena.

Id. at 1450-51.

Since it does not suit their purpose, Fort Worth and American simply ignore the legislative history and obvious intent of Congress in the Shelby Amendment in 1997. *Fort Worth Comments*

¹² The Court affirmed the DOT’s interpretation of the Love Field Amendment over the objections of the “DFW parties,” emphasizing the primacy of the agency over the courts in the interpretation of the statute. *Id.* at 1454 (separation of powers means “judiciary is duty bound to respect the original choice of the political branches in vesting authority in an agency to interpret and enforce a statute”). The Dallas Court of Appeals had previously confirmed that the DFW parties were bound by the DOT’s interpretive ruling pending its appeal to the federal appellate court. *Continental I*, 735 S.W.2d at 500.

at 6-11; *American Comments* at 33-38; *DFW Board Comments* at 23-29.¹³ As previously discussed, the Conference Committee responsible for the final version of the law deleted a provision that would have given the Dallas City Council a limited “veto” power over the expansion of interstate service at Love Field. *Dallas Comments* at 31 (citing S.1048, 105th Cong. § 332(b) (1997); H.R. CONF. REP. NO. 105-313, at 45 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1991, 2005)). Congress went even further to clarify its intention to invoke federal jurisdiction over Love Field, by adopting an additional provision:

(c) SAFETY ASSURANCE.—The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.

PUB.L. 105-66 § 337(c), 111 Stat. 1425, 1447 (1997) Finally, the Conference Report explained the Committee’s expectation that the FAA would be responsible for monitoring the impact of expanded traffic that might result from the new law:

Upon a 25 percent increase in total flight operations from the levels existing as of the date of enactment of this Act at either Dallas Love Field or Dallas-Fort Worth International Airport, the Administrator of the Federal Aviation Administration shall initiate a review of air traffic management within the Dallas-Fort Worth metroplex and report to the House and Senate Committees on Appropriations and the Senate Committee on Commerce, Science, and Transportation within 180 days. This review shall include an analysis of congestion and delays in the metroplex airspace, the impact on Love Field or Dallas-Fort Worth International Airport, and air traffic management constraints in the region. Upon a 50 percent increase in total flight operations from the levels existing on the date of enactment of this Act at either of the airports mentioned in this section, the Administrator

¹³Fort Worth (*Fort Worth Comments* at 10) emphasizes that the statute was enacted “without the agreement of Dallas, Fort Worth, or the DFW Board,” which has no material significance to the law. Congress’ power to amend its own enactments cannot be questioned.

shall report to the House and Senate Committees on Appropriations and the Senate Committee on Commerce, Science, and Transportation within 30 days describing what actions, if any, are recommended to ensure the efficient and safe operation of Dallas-Fort Worth metroplex airspace.

H.R. CONF. REP. NO. 105-313, at 45. Congress thus addressed many of the same concerns raised by Fort Worth and American in this proceeding, and clearly expressed its intention that these concerns be addressed and resolved by the federal agency generally responsible for aviation. Dallas cannot, in the face of this clear congressional intent, enforce a “perimeter rule” purportedly based on a municipal ordinance to prevent air carrier services authorized by this legislation.

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