UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

TINICUM TOWNSHIP PRIVILEGE FEE PROCEEDING	:	Docket OST-2007-29341

JOINT COMMENTS OF THE AIR TRANSPORTATION OF AMERICA, INC., THE AIR CARRIER ASSOCIATION OF AMERICA, INC., AND THE REGIONAL AIRLINE ASSOCIATION

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The Air Transportation Association of America, Inc. ("ATA"),[1] the Air Carrier Association of America, Inc. ("ACAA"),[2] and the Regional Airline Association ("RAA"),[3] jointly and on behalf of themselves and their passenger and cargo member airlines, hereby submit the following comments in response to the Department's Instituting Order in this administrative proceeding. As set forth below, the "privilege fee" imposed by the Township of Tinicum, Delaware County, Pennsylvania ("Tinicum" or "Township") on passenger and cargo aircraft landing at Philadelphia International Airport ("PHL" or the "Airport") is preempted and prohibited by the Anti-Head Tax Act, 49 U.S.C. § 40116 ("AHTA"). The fee is also preempted and barred by the Airline Deregulation Act, 49 U.S.C. § 41713(b) ("ADA"), and violates generally recognized principles of international law relating to charges imposed on airlines for use of airports.

SUMMARY

1. The Tinicum privilege fee is a weight-based charge imposed on passenger and cargo airlines – each time they land at the runways at PHL – by a governmental entity (Tinicum) that is not the proprietor of the Airport. As such, the privilege fee

[1]The ATA is the principal trade and service organization for the U.S. scheduled service industry. Members are: ABX Air, Alaska Airlines, American Airlines, ASTAR Air Cargo, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, FedEx Corp., Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Airlines, UPS Airlines, and US Airways. Associate members are Air Canada, Air Jamaica and Mexicana.

[2]ACAA represents low-cost carriers including AirTran Airways, Inc., Frontier Airlines, Inc., Spirit Airlines, and Sun Country Airlines.

[3]RAA represents regional airlines. Its members include Aerolitoral, Air Canada Jazz, Air Wisconsin Airlines Corp., AirNet Systems Inc., Alma de Mexico, American Eagle Airlines, Atlantic Southeast Airlines, Big Sky Airlines, Cape Air, Chautauqua Airlines, Colgan Air, Comair, CommutAir, Compass Airlines, Empire Airlines, Era Aviation, ExpressJet, FedEx, Flight Options, GoJet, Grand Canyon Airlines, Great Lakes Aviation, Gulfstream Int'l Airlines, Horizon Air, IBC Airways, Island Air, Mesa Airlines, Mesaba Aviation, New England Airlines, Piedmont Airlines, Pinnacle Airlines, PSA Airlines, Republic Airlines, Salmon Air, Scenic Airlines, Shuttle America, Skyway Airlines, SkyWest Airlines, Trans States Airlines, Twin Otter International, and US Airways Express.

violates subsection 40116(b) of the Anti-Head Tax Act because it is "a tax, fee, head charge, or other charge on . . . the transportation of an individual traveling in air commerce" or "the sale of air transportation." 49 U.S.C. § 40116(b). The privilege fee is unquestionably a charge on the transportation of individuals traveling or shipping goods in air commerce and/or the sale of air transportation. It is imposed by reason of air carriers "landing" their aircraft on the Airport runways as part of their transportation of passengers and cargo by air. As a landing fee, the Tinicum charge *would* be authorized under 40116(e)(2) *if* the fee was being imposed by the *owner or operator* of the Airport (and was reasonable, not unjustly discriminatory and otherwise lawful). However, since Tinicum does not own or operate the Airport, its fee is unlawful.

Significantly, the prohibition in section 40116(b) encompasses taxes and fees that are both directly and indirectly imposed on air passengers and shippers. Thus, it "prohibits the levying of State or local head taxes, fees, gross receipts, taxes or other such charges whether on passengers or on the carriage of such passengers in interstate commerce." 119 Cong. Rec. 3349 (1973); *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12-13 (1983).[4] Congress intended the AHTA to prevent the undue burden on interstate commerce and the economic harm on airlines, passengers and shippers that would be the natural result if state and local governments were left to their own devices to raise general revenues on the back of commercial aviation. Only under certain enumerated exceptions to the statute's general prohibition may state and local authorities impose and collect such taxes and fees.

[4]This protection applies equally to air cargo because, as set forth *supra*, "air transportation" is defined to include the transportation of cargo. 49 U.S.C. §§ 40102(a)(5), (22), (25).

2. The fee separately violates the non-discrimination provision in subsection 40116(d)(2)(A)(iv) of the Act because it is imposed solely on airlines at PHL, rather than the wider business community in the taxing jurisdiction, and the revenue from the fee will not be "wholly utilized for airport or aeronautical purposes."

There is also no merit to Tinicum's argument that subsection 40116(c) empowers Tinicum to impose the privilege fee. The plain language of subsection (c) demonstrates it is a *limiting* provision rather than an *authorizing* statute. The purpose of subsection (c) is to only permit state taxation in certain circumstances when a flight takes off or lands in a local jurisdiction; even if a tax does not violate subsections (b) or (d), it still may not be imposed on airlines for flights that do not take off or land within the taxing jurisdiction. This provision does not independently authorize a tax not otherwise lawful under the Act.[5]

Even assuming for the sake of argument that there is ambiguity as to the plain meaning of subsection 40116(c), any doubt must be resolved given the language of the predecessor statute: 49 U.S.C. § 1513(f). Subsection 1513(f) provided that "No State . . . or political subdivision thereof shall levy or collect any tax on or with respect to any flight of a commercial aircraft or any activity or service on board such aircraft unless such aircraft takes off or lands in such State or political subdivision as part of such flight." This provision did not imbue state and local governments with some previously non-existing right to tax airlines. When subsection 1513(f) was added to the Anti-Head Tax Act, that Act already *prohibited* certain taxes, and *permitted* certain taxes.

[5]As discussed *infra*, and as Congress acknowledged in 1996, the language in subsection 40116(b) which states "except as provided in subsection (c)" was a drafting error when the AHTA was re-codified in 1994.

Specifically, there could be no "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" unless pursuant to an authorized passenger facility charge. 49 U.S.C. App. § 1513(a). However, as long as the tax was not prohibited by subsection 1513(a) or the prohibitions against discrimination in subsection 1513(d), it could be imposed if it fell within the permissible category of "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services" listed in subsection 1513(b).

What subsection 1513(f) added was a *further prohibition* – in addition to those set forth in subsection 1513(a) and (d) – such that even if the tax was *permitted* by subsection 1513(b) and *not barred* by subsections (a) or (d), it would still be unlawful if imposed on airlines that did not take off or land in the taxing jurisdiction. The language in subsection 1513(f) was changed to the current version of subsection 40116(c) as part of the re-codification of Title 49, U.S. Code, in 1994. But that process was not intended to make any substantive changes to the statute, and Congress has since clarified that the current subsection 40116(c) is to be interpreted as if it is identical to the original subsection 1513(f). In sum, the legislative history is fatal to the Township's effort to rely on subsection 40116(c) to support its privilege fee.[6]

4. Moreover, requiring the airlines at Philadelphia to pay an additional landing fee to the Township would create a dangerous precedent for the airline industry and adversely affect the national air transportation system. It would embolden other

[6]In addition, as its name indicates, the Tinicum "privilege fee" is a fee rather than a tax, and therefore clearly outside the ambit of subsection (c).

municipal governments and political subdivisions throughout the United States that do not own or operate airports, but in which airports are located (either wholly or partially) to seek to impose similar so-called landing fees or other charges. Allowing Tinicum's fee to stand would invite cities, towns, and other political bodies around the country to impose similar fees on airlines, resulting in precisely the type of "hodpodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines" that Congress sought to abolish with the AHTA. 119 Cong. Rec. 3349-50 (1973).

Permitting the Tinicum situation to continue and be mimicked across the country also would impose significant additional costs on air carriers that are already subject to enormous cost pressures from operating costs, labor, fuel, landing fees, terminal rents and other airport charges, and could force airlines to reduce or eliminate service to affected airports. It is not difficult to imagine how quickly a proliferation of taxes, fees and other charges by governmental entities which are not airport proprietors could cripple the national air transportation system.

5. In addition to being preempted and prohibited by the Anti-Head Tax Act, the privilege fee is also preempted and barred by the Airline Deregulation Act, which prohibits states and political subdivisions from enacting or enforcing any law that has the "force and effect" of being "related to a price, route, or service of an air carrier." The privilege fee unquestionably is *related to* airline "prices" and "services." An airline may deem it necessary to pass the Tinicum privilege fee on to the passenger in the ticket price. In addition, airlines are already subject to multiple fees because of their use of airports, including federal excise taxes and segment fees, passenger facility charges, and airport

landing fees and terminal rents. If communities that do not own or operate airports are permitted to impose their own landing fees on top of authorized charges by airport owners, the ability of airlines to serve as many airports as possible with as much frequency as possible will most assuredly be affected.

6. As the International Air Transport Association ("IATA") stated in its October 3, 2007 letter to DOT, the Tinicum privilege fee also violates generally recognized principles of international law with regard to imposition of airport charges on airlines. Airport charges should do no more than recover the cost of "services and functions which are provided for, directly related to, or ultimately beneficial for, ***civil aviation operations***."[7] Tinicum does not provide "civil aviation operations" to the airlines at PHL and, therefore, should not be imposing airport-type charges on those carriers. Furthermore, under international principles, airport charges are "just and reasonable only if they do not exceed by more than a reasonable margin, over a reasonable period of time, the full cost to the competent charging authorities of providing the appropriate airport, air navigation, and aviation security facilities and services ***at the airport or within the airport system***."[8] However, the Tinicum fee seeks to recover costs that go well beyond the full cost to PHL of providing the appropriate airport facilities "at the airport or within the airport system."

[7]ICAO's Policies on Charges for Airports and Air Navigation Services, Doc. No. 9082/7 (7th Ed. 2004) ("ICAO Principles"), § 8(i) (emphasis added).

[8]"Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Airport User Charges, Further Amending the Agreement for Air Services Done at Bermuda on 23 July 1977 ("Bermuda II") (11 March 1994)," Art. 10 (emphasis added). It should be emphasized that there are circumstances in which federal restrictions on airport charges are stricter than those set forth in international principles and, where that occurs with regard to charges imposed in the United States, federal law controls.

7. Finally, allowing a non-airport proprietor to impose a landing fee surcharge on airlines that utilize that airport is anathema to Congress' purpose in enacting 49 U.S.C. § 47129, which required the Department to implement an expedited procedure for resolving carrier complaints that airport-imposed rates and charges are unreasonable. It strains credulity to believe that landing fees imposed by airports are subject to these regulatory constraints, while non-airport entities are free to impose purported "landing fees" however they desire.

STATEMENT OF FACTS

1. Philadelphia International Airport.

PHL has four operating runways, all exclusively owned, operated, maintained, inspected and patrolled by the City of Philadelphia.[9] Two runways are situated on land either completely (RW 8-26) or mostly (RW 17-35) within the geographical boundaries of the City, and two others (RW 9 and 27) are situated on land within the borders of Tinicum.[10] However, even the two runways within the Tinicum borders are exclusively owned and operated, maintained, inspected and patrolled by the City of Philadelphia.[11] Approximately 65% of aircraft landings occur on PHL Airport runways (RW 9 and 27) within Tinicum, with the remainder occurring on runways located fully or substantially within the City's borders.[12]

[9] "Brief of Defendant the City of Philadelphia in Support of the Motion for Intervention as of Right Pursuant to Rule 24(A)(2)" (Sept. 21, 2007), in *Township of Tinicum v. Frontier Airlines*, Civil Action No. 07-CV-03409 ("City Br."), at 5.

[10] *Id.*

[11] *Id.*

[12] *Id.*

2. <u>The Tinicum Privilege Fee</u>.

On June 18, 2007, Tinicum enacted Ordinance No. 2007-809 (the "Ordinance"). It requires "aircraft users"[13] at the Airport to pay a "privilege fee for use of" Airport runways "located within Tinicum Township" (*i.e.*, the "Landing Fees"). Article III, § 2-4(A). The Ordinance specifically states:

> A. Privilege Fee: For the privilege of doing business within the area that comprises Tinicum Township, there shall be imposed upon all aircraft users a privilege fee under this section.
>
> 1. The privilege fee for use of property located within Tinicum Township for landing of aircraft shall be $.03 per one thousand (1,000) pounds or part thereof of approved maximum landed weight. Fees will be determined by weight listed in the Federal Aviation Administration type certificate data sheet. (Article III, § 2-4(A)).[14]

In addition, Article VI, Section 2-8, entitled "Violations and Penalties," provides that "Any user who shall fail, neglect or refuse to comply with any of the terms or provisions of this Ordinance or of any regulations or requirement pursuant thereto, and authorized hereby, shall be subject to a fine not to exceed Six Hundred ($600.00) Dollars for each such offense. Every day in which a user shall be in violation of this Ordinance shall constitute a separate offense subject to the penalties provided herein."

[13]The ordinary use of the term "aircraft users" would suggest the Ordinance should apply to airline passengers – those who use aircraft for transportation – rather than those who own and operate aircraft.

[14]Pursuant to a settlement agreement reached in 1998 but which expired at the end of May 2007, the City was paying $700,000 per year (for the last three years) to the Township, Delaware County and the Interboro School District (which they allocated amongst themselves) in settlement of claims for property taxes by those entities. Tinicum received a portion of that payment. However, to date, the City and Tinicum have been unable this year to reach an agreement for the renewal or replacement of that Agreement.

3. Tinicum's Lawsuit to Require Passenger and Cargo Airlines at PHL to Pay the Privilege Fee.

Tinicum has sued AirTran Airways, American Airlines, America West Airlines (now part of US Airways), Continental Airlines, Delta Air Lines, DHL Express (U.S.), Inc., Federal Express, Frontier Airlines, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Air Lines, United Parcel Service, and US Airways, claiming that these carriers have violated their Ordinance by refusing to pay the privilege fee. *Township of Tinicum, Delaware County, PA v. Frontier Airlines, Inc.*, Civil Action No. 2:07-CV-3409 (LP). These carriers have moved to dismiss the action or, alternatively, for a stay pending the outcome of this administrative proceeding before the Department.

4. The Origins of the Anti-Head Tax Act.

The Anti-Head Tax Act, Pub. L. No. 93-44, 87 Stat. 88, was passed by Congress in 1973 as a reaction to a 1972 U.S. Supreme Court decision that upheld a locally imposed "head" tax on airline passengers. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 709 (1972). Following *Evansville-Vanderburgh*, "Committees in both Houses of Congress held hearings on local taxation of air transportation." *Aloha Airlines, supra,* 464 U.S. at 9.[15] "Both Committees concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers." *Id.* To deal with these problems, Congress passed § 7(a) of the Airport Development

[15]*See* Hearings on S. 2397 et al. before the Subcommittee on Aviation of the Senate Committee on Commerce, 92d Cong., 2d Sess., 129-198 (1972); Hearings on H.R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (1972).

Acceleration Act of 1973, which became known as the Anti-Head Tax Act.[16] Congress intended the AHTA to "ensure . . . that local 'head' taxes will not be permitted to inhibit the flow of interstate commerce." *See id.*; S. Rep. No. 93-12, p. 4, 1973 U.S.C.C.A.N. 1434 (1973). In the legislative history of the Act, Congress stated:

> Recent experience with [a] Philadelphia tax is indicative of the chaos which . . . local taxation works on the national air transportation system. The head tax brings on confusion, delay, anger, and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes.

Id.,1973 U.S.C.C.A.N. at 1446; *see also id.* at 1455 ("local taxation on passengers or on the carriage of passengers . . . [is] inimical to the development of a national system funded in large part by uniform Federal taxes"). In addition, the Senate pronounced:

> The bill prohibits any government agency other than the United States from ***establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that*** passengers ***and air carriers will be taxed at a uniform rate – by the United States*** – and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

S. Rep. 93-12, 1973 U.S.C.C.A.N. 1434, 1435 (Feb. 1, 1973) (emphasis added). The Senate stated:

> In accepting a greater Federal role and responsibility in airport development ***the Committee has also acted to prohibit local taxation on passengers or on the carriage of passengers***. We believe such taxation to be inimical to the development of a national system funded in large part by uniform Federal Taxes. . . .
>
> We believe that if the prohibition on local head taxes was not a part of the total new program, there would be need to re-evaluate the increased

[16]The Act was originally codified at 49 U.S.C. app. § 1513. The original statute was eventually superseded by 49 U.S.C. § 40116, which retained essentially the same language as the original statute, save that the "directly or indirectly" language was deleted "as surplus." Historical and Statutory Notes, 49 U.S.C. § 40116(b) (2000).

> Federal funding for airport development projects called for in S. 38 [the basis for the Act]. ***If local taxes on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program.*** If local head taxes become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and a diminution of Federal participation in airport development projects.
>
> Therefore, ***by prohibiting state taxation on passengers or on air transportation***, the Committee has accepted greater responsibility for U.S. assistance, believing that the two actions must be viewed together and that neither should stand alone without the other.

Id. at 1454-55 (emphasis added). Further, one of the two managers of Senate Bill 38, stated:

> Presently, at least 31 different government jurisdictions have levied head taxes and many other communities are in the process of doing so or are seriously considering it. We believe this proliferation of local taxes can and will undermine a sound national transportation system by causing confusion, delay, inequities, and discrimination in air transportation and must be prohibited before it gets any further out of hand. There is no need for two systems of user taxation; . . . .

119 Cong. Rec. 3349-50 (Cannon). The other manager of the Bill emphasized:

> If more than 500 localities – or even a significant portion of this number – were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce. ***The national system of air service upon which 180 million airline passengers depend annually would become a hodgepodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines***. . . . .

Id. (Pearson) (emphasis added); *see also Indianapolis Airport Auth. v. American Airlines*, 733 F.2d 1262 (7th Cir. 1984) (Anti-Head Tax Act was passed in order to prevent placing of unreasonable burdens on interstate air transportation); *Salem Transp. Co. v. Port Authority of New York & New Jersey*, 611 F. Supp. 254, 257 (S.D.N.Y. 1985) (in enacting the Act, Congress was concerned with ensuring that air travelers would not be

subject to double taxation resulting from state and local head taxes as well as national user charges).

5. The Anti-Head Tax Act as Originally Enacted in 1973.

An understanding of the Anti-Head Tax prior to its re-codification in 1994 is important because, as set forth below, the re-codification was not intended to substantively change the Act. The Act, as enacted in 1973, contained both a general prohibition against taxes and fees on airlines and passengers, and specific, narrowly defined exceptions to the prohibition. Subsection (a) of the Act, as originally enacted in 1973, 49 U.S.C. App. § 1513, contained the following prohibition:

> No state (or political subdivision therefore . . .) shall levy or collect 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 . . . .

Pub. L. 93-44, 87 Stat. 88 (June 18, 1973).

Subsection (b) of the Act set forth the limited circumstances in which a state or political subdivision could impose taxes or fees on airlines:

> Nothing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Pub. L. 93-44, 87 Stat. 88 (June 18, 1973).

Thus, even under the Act, states and political subdivisions could impose "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sales of goods or

services" on airlines, as long as such taxes were not prohibited by subsection (a). In addition, an airport owner/operator could subject air carriers to "reasonable rental charges, landing fees, and other service charges . . . for the use of airport facilities."

Congressional intent and Supreme Court precedent demonstrate that the Anti-Head Tax Act applies even if the subject charges are on the airline rather than the passengers. *See Aloha Airlines, supra,* 464 U.S. at 12-13. In the legislative history behind the Anti-Head Tax Act, Congress made it clear that the "legislation prohibits the levying of State or local head taxes, fees, or charges either on passengers ***or on the carrier of such passengers in interstate commerce.***" Senate Report No. 93-12, at 1446 (emphasis added). Congress further recognized that "Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel." *Id.* at 1451.

6. <u>The Addition of the Non-Discrimination Provisions in Subsection (d)</u>.

In 1982, Congress added subsection (d) to the Act, which prohibited taxes or fees that otherwise did not violate 49 U.S.C. App. § 1513(a) because they would "unreasonably burden and discriminate against interstate commerce":

> **SEC. 532. STATE TAXATION.**
>
> (a) Section 1113(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1513(b)) is amended by striking out "Nothing" and inserting in lieu thereof "Except as provided in subsection (d) of this section, nothing".
>
> (b) Section 1113 of such Act is further amended by adding at the end thereof the following new subsection:
>
> "(d)(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

> "(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
>
> "(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or
>
> "(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction."

Pub. L. 97-248, 96 Stat. 324 (Sept. 3, 1982).

7. <u>Congress Adds the Prohibition Against Taxes on "Overflights</u>."

In 1990, Congress added subsection 1513(f) to the Anti-Head Tax Act. The new provision stated as follows:

> **(f) Flight takeoff or landing requirement for State taxation**
>
> No State . . . or political subdivision thereof shall levy or collect any tax on or with respect to any flight of a commercial aircraft or any activity or service on board such aircraft unless such aircraft takes off or lands in such State or political subdivision as part of such flight.

Subsection 1513(f) did not imbue state and local governments with some previously non-existing right to tax airlines. When subsection 1513(f) was added to the Anti-Head Tax Act, that Act already *prohibited* certain taxes, and *permitted* certain taxes. Specifically, there could be no "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" unless pursuant to an authorized passenger facility charge. 49 U.S.C. App. § 1513(a). However, as long as the tax was not prohibited by subsection 1513(a) or the

prohibitions against discrimination in subsection 1513(d), it could be imposed if it fell within the permissible category of "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services" listed in subsection 1513(b). What subsection 1513(f) added was a *further prohibition* – in addition to those set forth in subsection 1513(a) and (d) – such that even if the tax was *permitted* by subsection 1513(b) and *not barred* by subsections (a) or (d), it would still be unlawful if imposed on airlines that did not take off or land in the taxing jurisdiction.

This intention behind subsection 1513(f) is further demonstrated by the Congressional Conference Report, which stated as follows with regard to subsection 1513(f) when it was added to the AHTA in 1990:

> "**21. STATE TAXING AUTHORITY**
>
> **House bill**
>
> No similar provision.
>
> **Senate amendment**
>
> *State may not tax aircraft flights which do not take off or land in state.*
>
> **Conference substitute**
>
> Senate amendment."

H.R. Conf. Rep. 101-964, 1990 U.S.C.C.A.N. 2374, 2714 (October 27, 1990) (emphasis added), Ex. 4 to Frontier Reply Br. Clearly this demonstrates Congress' intent for subsection 1513(f) to prohibit certain conduct by states and local governments, rather than to authorize imposition of a tax previously not allowed.

The intent behind the language in subsection 1513(f) (and later subsection 40116(c)) was to ensure that any tax on air transportation, which is otherwise not

prohibited by the Anti-Head Tax Act or other applicable law, is not imposed in a manner that fails to comport with due process. Prior to Congress enacting this language, the Supreme Court had ruled that federal "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 344-45 (1954). The Court also had held that the dormant Commerce Clause required that a tax be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). The language in subsection 1513(f) [and 40116(c)] reflects Congress' objective of ensuring that the mere fact of an aircraft flying over the taxing jurisdiction (*i.e.,* an "overflight") would not be sufficient "nexus" with the jurisdiction to support a tax that otherwise complied with the Anti-Head Tax Act or other federal law.

8. <u>Re-Codification of the Anti-Head Tax Act in 1994</u>.

In 1994, Congress re-codified 49 U.S.C relating to "Transportation," including the Anti-Head Tax Act. None of the changes made in 1994 to the Anti-Head Tax Act which resulted in subsection 1513 becoming subsection 40116 was intended to be substantive in nature. Pub. L. 103-272, 108 Stat. 745 (July 5, 1994), was described as "An Act to revise, codify, and enact ***without substantive change*** certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, 'Transportation,' and to make other technical improvements in the Code." (Emphasis added). Senate Report No. 103-265 stated: "The purpose of H.R. 1758 is to restate in comprehensive form, ***without substantive change***, certain general and permanent laws related to transportation and to enact those laws as subtitles II, III, and V-X of title 49, United States Code, and to make other technical improvements to the Code." (1994 WL

261999) (Leg. Hist.) (emphasis added). Congress stated:

> ***Substantive change not made.*** As in other codification bills enacting titles of the United States Code into positive law, ***this bill makes no substantive change in the law.*** It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation when it can be inferred that a change of language is intended to change substance. ***In a codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged.***

H.R. Rep. No. 180, 103d Cong., 1st Sess. (1993), *reprinted in* 1994 U.S.C.C.A.N. at 822 (1994) (emphasis added); cited in *Bower v. Federal Express Corp.*, 96 F.3d 200, 205 (6th Cir. 1996); *see also* S. Rep. 103-265, 1994 WL 261999 (Leg.Hist.), May 19, 1994, at p. 4 (same language).

9. <u>Congress Adds Subsection (d)(2)(A)(iv) to the Act</u>.

Also in 1994, Congress added section 40116(d)(2)(A)(iv) to the AHTA in 1994, as Section 112 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305. Section 112 was entitled "Additional Enforcement Against Illegal Diversion of Airport Revenue." House Conference Report No. 103-677, 1994 U.S.C.C.A.N. 1715. The Conference Report stated:

> The Conference Substitute also adds a prohibition, effective after date of enactment, against a State or subdivision collecting a new tax, fee, or charge ***which is imposed exclusively upon any business located at an airport or operating as a permittee of the airport, other than a tax, fee, or charge utilized for airport or aeronautical purposes***. This prohibition applies only to new taxes imposed exclusively on businesses located at airports or permittees. It does not apply to general taxes on all businesses, although ***a state or subdivision would be prohibited from imposing a general tax that purports to apply to all businesses when in reality it applies only to airport businesses***. (*Id.* at *67; emphasis added)

10. The Current Provisions of the Anti-Head Tax Act.

As currently codified, the Anti-Head Tax Act continues to contain general prohibitions and narrow exceptions relating to taxes and fees on airlines and their passengers.

a. Subsection 40116(b).

Subsection 40116(b) sets forth the general prohibitions in the Act. It states as follows:

> **(b) Prohibitions.** -- Except as provided in subsection (c) of this section and section 40117 of this title [relating to passenger facility charges], a State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title, may not levy or collect a tax, fee, head charge, or other charge on--
>
> **(1)** an individual traveling in air commerce;
>
> **(2)** the transportation of an individual traveling in air commerce;
>
> **(3)** the sale of air transportation; or
>
> **(4)** the gross receipts from that air commerce or transportation.

Thus, the re-codified Act retained the same general prohibition against "a tax, fee, head charge, or other charge on-- (1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation." 49 U.S.C. § 40116(b).

As discussed below, the phrase "[e]xcept as provided in subsection (c)" included within subsection 40116(b) was a drafting error inserted in 1994 as part of the non-substantive re-codification of Title 49, U.S. Code.

b. Subsection 40116(d).

Subsection 40116(d) sets forth additional prohibitions, to ensure that taxes and fees imposed on airlines do not discriminate against them:

> **(d) Unreasonable burdens and discrimination against interstate commerce.—**
>
> *** * ***
>
> **(2)(A)** ***A State, political subdivision of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce***:
>
> **(i)** assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> **(ii)** levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph.
>
> **(iii)** levy or collect an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> **(iv)** ***levy or collect a tax, fee, or charg***e, first taking effect after August 23, 1994, ***exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.***
>
> **(B)** Subparagraph (A) of this paragraph does not apply to an in lieu tax completely used for airport and aeronautical purposes.

(Emphasis added.)

c. Subsection 40116(e).

Subsection 40116(e) provides guidance as to the circumstances in which taxes or fees may be imposed on airlines by state or political subdivisions. It states:

> Except as provided in subsection (d) of this section, a State or political subdivision of a State may levy or collect--
>
> **(1)** taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and
>
> **(2)** reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.[17]

Thus, subsection (e) is essentially a savings clause to permit taxes specified therein unless otherwise prohibited in paragraphs (b) and (d), and to allow airport owners or operators to charge landing fees that are reasonable, not unjustly discriminatory, and otherwise lawful. This language evidences Congress' clear intention that airport "landing fees" must be tied to the carriers' "use" of "airport facilities of an airport owned or operated by" the State or subdivision that is charging the fees.

d. Subsection 40116(c).

> Subsection 40116(c) is the re-codification of 49 U.S.C. App. § 1513(f). It provides:
>
> **(c) Aircraft taking off or landing in State.** -- A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft ***only if the aircraft takes off or lands in the State or political subdivision as part of the flight***. (Emphasis added)

This language continues in place the limiting provision in the prior subsection 1513(f), *i.e.*, even if a state or local tax does not violate subsection (b) or (d) – such as a property tax that is charged on airlines and non-airlines alike, it still is unlawful if the airlines do not have a sufficient nexus to the taxing jurisdiction by reason of the fact that they do not

[17]This is similar to the language in subsection 1513(b) in the version of the Act prior to re-codification in 1994.

take off or land in the jurisdiction.

ARGUMENT

I. THE TINICUM PRIVILEGE FEE VIOLATES SUBSECTIONS (b) AND (d) OF THE ANTI-HEAD TAX ACT.

A. The Tinicum Fee Violates Subsection 40116(b) of the Act.

The Tinicum privilege fee violates subsection 40116(b) because it is an improper tax or fee on "the transportation of an individual traveling in air commerce" and/or "the sale of air transportation." A landing fee surcharge such as the Tinicum privilege fee violates the Act regardless of whether it is imposed directly or indirectly on air passengers. The Act "prohibits the levying of State or local head taxes, fees, gross receipts, taxes or other such charges ***whether on passengers or on the carriage of such passengers in interstate commerce***." 119 Cong. Rec. 3349 (1973) (emphasis added); *Aloha Airlines, supra*, 464 U.S. at 12-13.

In *Aloha Airlines, supra,* a Hawaii statute "levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business," that was imposed as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value . . . ." 464 U.S. at 10-11 (citing Hawaii statute). The state supreme court ruled that the tax was not subject to the Anti-Head Tax Act because it was "imposed on air carriers as opposed to air travelers." *Id*. at 11-12. In reversing, the U.S. Supreme Court stated:

> We cannot agree with the Hawaii Supreme Court's analysis. First, when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted. Thus, the Hawaii Supreme Court erred in failing to give effect to the plain meaning

of § 1513(a).

> Second, even if the absence of an express proscription made it necessary to go beyond the plain language of § 1513(a), ***nothing in the legislative history of the ADAA suggests that Congress intended to limit § 1513(a)'s preemptive effect to taxes on airline passengers or to save gross receipts taxes like [the Hawaii law]***. Although Congress passed § 1513(a) to deal primarily with local head taxes on airline passengers, the legislative history abounds with references to the fact that § 1513(a) also preempts state taxes on the gross receipts of airlines. For example, Senator Cannon, one of the ADAA's sponsors, clearly stated in floor debate: "The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce." 119 Cong. Rec. 3349 (1973).
>
> Finally, we are unpersuaded by Appellee's contention that, because the Hawaii legislature styled [the tax law] as a property tax measured by gross receipts rather than a straight-forward gross receipts tax, the provision should escape preemption under § 1513(b)'s exemption for property taxes. The manner in which the state legislature has described and categorized [its tax law] cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines. *Id.* at 12-14 (emphasis added).

Similarly here, the fact that the Tinicum privilege fee is applied directly to air carriers rather than to passengers is of no significance. The fee is owed each time the airline lands at PHL. The carrier is charged the fee as a direct result of its engaging in "the transportation of an individual traveling in air commerce" and/or "the sale of air transportation." Stated differently, if the airline were not transporting passengers in commerce or selling air transportation, it would not be subject to the fee. The fee is precisely the type of "head tax or use tax on the carriage of persons in air transportation" that Congress barred when it passed the AHTA.[18]

[18]S. Rep. 93-12, 1973 U.S.C.C.A.N. 1434, 1435 (Feb. 1, 1973).

B. The Tinicum Fee Also Violates Subsection 40116(d)(2)(A)(iv).

In addition to violating subsection 40116(b), the Tinicum privilege fee also is unlawful under subsection (d)(2)(A)(iv) because it improperly discriminates against airlines: (1) it is charged "exclusively upon" airlines and not the wider business community; and (2) revenues from the fee are not "wholly utilized for airport or aeronautical purposes." Under the plain language of the statute, airlines operating at an airport fall within the coverage of subsection (d)(2)(A)(iv) because they are unquestionably a "business" located at that airport and/or are "operating as a permittee of such an airport." The fact that the term "business" encompasses more than airlines most certainly does not mean that airlines should be excluded from the protections of subsection 40116(d)(2)(A)(iv). If Congress had intended to exclude airlines within (d)(2)(A)(iv), it could have done so. Clearly it chose not to. The statutory language is not ambiguous. Thus, the revenues derived from any tax, fee or charge that is imposed exclusively on an air carrier operating at an airport must be "wholly utilized" for that airport or aeronautical purposes relating thereto.[19]

The only way for the privilege fee to be sustained despite its discriminatory nature[20] is for the revenues from the fee to be "wholly utilized for airport or aeronautical

[19]In *Northwest Airlines, Inc. v. Wisconsin Dep't of Revenue*, *supra*, 293 Wis. 2d 202, 717 N.W.2d 280, the court recognized that sections 40116(b) and (d) reflect Congress' intention to "prevent unfair methods of taxation." *Id*. at 230, 717 N.W.2d at 294. However, the tax at issue in *Northwest Airlines* – which exempted carriers that maintained airport hubs within the state – was not deemed to violate subsection 40116(d) because the alleged discrimination was between airlines, and not between airlines and non-transportation commercial businesses, which is what subsection (d) prohibits. *See Id.* at 225, 717 N.W.2d at 291.

[20]Assuming, *arguendo*, the Fee is a tax, it is discriminatory because it applies only to airlines operating at PHL; it does not apply to all businesses in the Township. Such discrimination against airlines is unlawful. *Western Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 131-32 (1987).

purposes." 49 U.S.C. § 40116(d)(2)(A)(iv). However, this is not the case. The Airport, and not Tinicum, is responsible for maintaining, patrolling and inspecting the terminals and runways.

The Township contends that it "must respond to crimes and other emergencies arising at PHL when summoned."[21] This argument is illusory. Tinicum does not assert, much less provide, evidence that the Tinicum Police have ever entered the terminals or runways to respond to a crime or make an arrest. On the other hand, according to the City of Philadelphia, the City's police department maintains a separate police unit at the Airport, with a total of 152 officers stationed there.[22]

The Township further asserts that it "owns and maintains major roadways and arteries that encircle the Airport as well as those that allow access to the Airport . . . ." Tinicum Br. at 4. But Tinicum nowhere contends (much less establishes) that such roadways are *dedicated* to accessing the Airport. Because the fee may be applied to maintain roadways that "encircle" and "access" the Airport and are used not only by airport patrons – but also other non-Airport related drivers proceeding through the Township – the fee is clearly not being "wholly utilized for airport or aeronautical purposes," as the statute mandates. There also is no language in the Ordinance that restricts how the revenues from the privilege fee are to be utilized. For all these reasons,

[21]Tinicum brief in opposition to Frontier Airlines' motion to dismiss or stay, September 13, 2007 ("Tinicum Br."), at 3.

[22]The City of Philadelphia maintains that, by agreeing in a "Mutual Aid Agreement" with the City to provide police response to crimes or emergencies at PHL when requested by the City and at no cost to the City, "Tinicum has waived, discharged, released or relinquished any right or power to levy, assess and collect any tax or assess, impose or collect any fee or other charge for purpose of covering or defraying costs of police response by Tinicum. City Br. at 15. Tinicum "cannot attempt a back-door charge or tax to cover cost of any potential response when summoned, when it explicitly agreed to provide such police 'standby' services at no cost." *Id.* *See also* "Affirmative Defenses" 10 and 11 in the City's "Proposed Answer and Affirmative Defenses of Defendant the City of Philadelphia (If Intervention Granted)."

the privilege fee violates subsection 40116(d)(2)(A)(iv).

C. Subsection 40116(e) of the Act Does Not Authorize the Tinicum Fee.

Nothing in subsection 40116(e) authorizes the Tinicum privilege fee. Subsection (e)(1) permits states and local subdivisions to impose taxes that are *not* enumerated in subsection (b), and which also do not violate the non-discriminatory provisions in subsection (d). This provision does not authorize the privilege fee because it is covered by subsection (b) in that it is a "tax, fee, head charge, or other charge on . . . the transportation of an individual traveling in air commerce" and/or "the sale of air transportation." The fee is also not a property tax, net income tax, franchise tax, or sale or use tax on the sale of goods or services. It is equally clear that the fee is not authorized by subsection (e)(2). Although the fee is properly classified as a "landing fee," it is not being imposed by a state or political subdivision that owns or operates the airport in question.

D. Subsection 40116(c) Does Not Authorize the Tinicum Fee.

1. The Plain Meaning of Subsection 40116(c) Demonstrates That it Does Not Authorize the Tinicum Fee.

Subsection 40116(c) does not grant state and local governments additional rights to impose a tax on airlines not otherwise permissible under subsections (b), (d) or (e). Rather, it sets forth an additional limiting provision. This is clear from the plain language of subsection 40116(c). The plain language of subsection 40116(c) *does not* in and of itself grant local governments power to impose taxes on air carriers. Subsection 40116(c) expressly limits any otherwise existing rights that states or local governments have to impose taxes on airlines to flights which have a sufficient nexus to the taxing jurisdiction

by landing or taking off in the jurisdiction. *See Northwest Airlines, Inc. v. Wisconsin Dep't of Revenue, supra,* 293 Wis. 2d at 221 n. 13, 717 N.W.2d at 289, n. 13 ("49 U.S.C. § 40116(c) constitutes another prohibition on state and local taxation"); *id*. at 223 n. 16, 717 N.W.2d at 290 n. 16 (2006) ("subsection (c) . . . constrains the ability of states to tax air carriers").

The general ability of a state or local government to impose "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services" under 49 U.S.C. § 40116(e)(1), is subject to the limitation in subsection (c) that the taxes must be on flights that took off or landed in the jurisdiction, as well as the limitations set forth in subsections (b) and (d).[23] This is the plain language of subsection 40116(c). It is not, as Tinicum contends, a "savings clause" which gives state and local governments unbridled power to impose any manner of taxes not specifically prohibited in another provision of the AHTA.

2. Subsections 40116(b) and 40116(c) May Not Be Construed In a Manner Inconsistent with the Version of the Anti-Head Tax Act Which Existed Prior to the Re-Codification in 1994.

Even assuming that there was a legitimate issue as to the meaning of the language in subsection 40116(c), this question is definitively answered by the legislative history behind this provision, which demonstrates that neither subsection (c) nor its predecessor (49 U.S.C. App. § 1513(f)) was ever intended to *authorize* a tax not otherwise provided

[23]*See, e.g., Delta Air Lines, Inc. v. Forst*, At Law No. 93-1238 (Cir. Ct. Arlington Cty, Va. January 27, 1998) (in case involving application of state income taxes to certain flight activity, the court stated that "[t]he Due Process Clause requires that there be some definite link, or minimum connection, between the taxing jurisdiction and the person, property, or transaction it seeks to tax. Delta's overflights have no contact, no definitive link, no minimum connection with Virginia, and accordingly, the Defendants' application of Virginia tax law violates the Due Process Clause") (available at *http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf*).

for in law.

Subsection 1513(f) clearly did not authorize states or local governments to impose a tax otherwise unlawful under subsections (a) and (d) of 49 U.S.C. § 1513. It provided that "No State . . . or political subdivision thereof shall levy or collect any tax . . . ***unless such aircraft*** takes off or lands in such State or political subdivision . . . " (Emphasis added). It was thus clearly prohibitory in nature. In addition, nothing in subsection (a) – which generally prohibited taxes, fees, head charges and other charges on, *inter alia*, "the carriage of persons traveling in air commerce or on the carriage of persons traveling in air commerce" stated that such prohibition was "except as provided in subsection (f)."

The language of the 1994 re-codification law, and the contemporaneous and subsequent legislative history, compellingly demonstrate that Congress never intended for the re-codification of the Act to substantively amend the Act. This is important because the language in the prior version of the Act – which was codified at 49 U.S.C. App. 1513 prior to 1994 – did not contain the language in subsections 40116(b) or (c) that Tinicum now relies on for its privilege fee: specifically the phrase "except as provided in subsection (c)" which exists in the current subsection (b), and the use of "may" in subsection (c).

"Under established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect ***unless such intention is clearly expressed***." *Finley v. United States*, 490 U.S. 545, 554 (1989) (emphasis added) (citation and internal quotation marks omitted). There is no evidence of a clearly expressed intention on the part of Congress to substantively amend 49 U.S.C. App. § 1513 when it was re-codified as 49 U.S.C. § 40116. To the contrary, there is

overwhelming evidence that Congress did not intend for its re-codification of the Anti-Head Tax Act in 1994 to substantively change any provisions of the statute including, without limitation, 49 U.S.C. App. § 1513.

The 1994 re-codification statute expressly described itself as "An Act to revise, codify, and enact ***without substantive change*** . . . " Pub. L.103-272, 108 Stat. 745 (July 5, 1994) (emphasis added); *see also* Senate Report No. 103-265 ("The purpose of H.R. 1758 is to restate in comprehensive form, ***without substantive change***, certain general and permanent laws"); H.R. Rep. No. 180, 103d Cong., 1st Sess. (1993), *reprinted in* 1994 U.S.C.C.A.N. at 822 (1994) ("***Substantive change not made.*** As in other codification bills enacting titles of the United States Code into positive law, ***this bill makes no substantive change in the law***") (emphasis added).

In addition, the Supreme Court and other federal courts have recognized that the 1994 re-codification to Title 49 was not intended to effect any substantive change to the statutes therein. In *American Airlines v. Wolens*, 513 U.S. 219, 222-23, n. 1 (1995), the Supreme Court stated that "Reenacting Title 49 of the U.S. Code in 1994 . . . Congress intended the revision to make no substantive change." *See also Zukas v. Hinson*, 124 F.3d 1407, 1411 (11th Cir. 1997) ("The purpose of this recodification was to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation"); *Bower v. Federal Express Corp.*, *supra*, 96 F.3d at 203 (Public Law 103-272 "represented a revision without substantive change of certain general and permanent laws related to transportation"); *United States v. Ryan Int'l Airlines, Inc.*, 361 F. Supp. 2d 1211, 1214 (D. Hawaii 2005) ("The 1994 recodification made no substantive change in the law").

In *Newton v. FAA*, 457 F.3d 1133 (10th Cir. 2006), the court refused to interpret statutory language that was changed as part of the same re-codification of Title 49 U.S.C. at issue in this case in a manner that was inconsistent with how the statute read prior to re-codification. The court acknowledged that the new statutory language *could* be construed to make a substantive change to the law, namely that the FAA Administrator could amend, modify, suspend or revoke all FAA-authorized certificates, and not merely those enumerated in section 44702(a). *Id.* at 1143. However, in choosing not to interpret the new statute so as to substantively change the prior law, the court explained that such a reading "is foreclosed by the statutory purpose stated in the title to the revision: 'An Act to revise codify, and enact *without substantive change* certain general and permanent laws, related to transportation, . . . and to make other technical improvements in the Code.'" *Id.* (citing to Pub.L. 103-272, 108 Stat. 745, 1190 (1994)).

Just as the above-referenced courts cases recognized Public Law 103-272 did not substantively amend the federal aviation statute at issue in that case, it is equally true here that the re-codification of the Anti-Head Tax Act in Public Law 103-272 did not substantively revise the original 49 U.S.C. App. § 1513 when it was converted into what is today subsection 40116.

As set forth above, Congress was very clear when it enacted the 1994 re-codification law that it intended to make no substantive change to the existing laws, including the Anti-Head Tax Act. But just to drive the point home even more, two years later members of Congress made additional unequivocal statements that the 1994 changes were not intended to modify the Act, and that any possible view to the contrary was based on a drafting error at the time of the 1994 re-codification of section 1513 into

section 40116(c).

In 1996, the House of Representatives proposed language for the Federal Aviation Reauthorization Act of 1996, P.L. 104-264 (the "1996 Act"), which would have made a "technical correction" to amend subsection (b) to remove the reference to subsection (c), as follows:

> **SEC. 402. TECHNICAL CORRECTION RELATING TO STATE TAXATION.**
>
> Section 40116(b) is amended by striking "subsection (c) of this section and".

H.R. Rep. 104-714(I), 1996 U.S.C.C.A.N. 3658, 3685 (July 26, 1996) (relevant language at Ex. 7 hereto, at 15). The accompanying House Report stated:

> **Section 402. Technical correction related to State taxation**
>
> ***This section corrects a mistake that was made when section 1113 of the Federal Aviation Act of 1958 (49 U.S.C. 1513) was recodified as section 40116 of Title 49.*** As recodified, the section seems to permit a State or political subdivision to impose any type of tax, fee, or head charge as long as the airline's aircraft lands or takes off in the State or political subdivision. ***In fact, this is broader than old section 1113 [49 U.S.C. 1513] ever allowed.*** That section prohibited States and political subdivisions from imposing a tax, fee, or head charge, except the PFC in section 40117, even if where [sic] the aircraft lands or takes off there. ***This technical correction is designed to conform new section 40116 to old section 1113 in this respect and return the issue of State taxation to the status quo as it existed before the recodification.***

Id. at 3696, Ex. 7 at p. 48 (emphasis added).

The Senate Report issued the same day described the proposed amendment as follows:

> **Section 402. Technical correction of title 49 codification**

> Section 402 ***corrects a mistake related to state taxation that was made when title 49 was recodified***. As the statute currently reads, states arguably could tax certain aviation-related activities ***contrary to the intent of Congress***.

Senate Report 104-333 (July 26, 1996), 1996 WL 431987 (Leg. Hist.), at *28, Ex. 8 hereto, at 22 (emphasis added). The Report further stated:

> State Taxing Authority. The bill contains a provision intended as a technical correction to the section of Title 49 establishing the authority of states to levy certain aviation-related taxes. ***When that section of the United States Code was recodified, it appeared to broaden the power of states to tax airlines. The correction is intended to return the issue of state taxation to the status quo as it existed before the recodification***.
>
> The impact of this provision, however, is unclear. A simple correction would impose no new mandates. ***There is concern among some tax experts, however, that the proposed change goes beyond the intended fix and would impose new preemptions on states' taxing authority***. A number of state tax officials assert that the proposed correction would increase the ambiguities in the statute and could lead to an interpretation of the law that would prohibit states from imposing aviation-related property, net income, and other taxes. Under such an interpretation, the provision would constitute a mandate on state governments as defined by Public Law 104-4. Because some states raise significant amounts of revenues through these types of taxes, it is possible that the direct costs to states could exceed the $50 million annual threshold established in the mandates law.
>
> CBO is continuing to review this issue and will include its analysis in the final intergovernmental mandates statement.

Id. at *21, Ex. 8 at 16 (emphasis added).

Although the correction ultimately was not included in the 1996 Act because of uncertainty whether the proposed change would go beyond the status quo which existed before re-codification of the AHTA in 1994, Congress made clear its intention that all of section 40116 (including subsection 40116(c)) be interpreted and applied as it was when prior to re-codification. The "Joint Explanatory Statement of the Committee of the Conference" stated:

31. TECHNICAL CORRECTION RELATING TO STATE TAXATION

House bill

Section 403: This section corrects a mistake that was made when section 1113 of the Federal Aviation Act of 1958 (49 U.S.C. 1513) was recodified as section 40116 of Title 49.

Senate amendment

No provision.

Conference substitute

No provision. The managers recognize that this technical correction has created confusion. In order to provide more time for review, the provision has not been included in this bill. ***However, the managers continue to believe that the recodification of section 1113 was done incorrectly and***

would expect that the new section 40116 would continue to be interpreted in the same way as former section 1113.

H.R. Conf. Rep. 104-848, 1996 U.S.C.C.A.N. 3703, 3715 (Sept. 26, 1996), 1996 WL 563330 (Leg. Hist.), Ex. 9 hereto, at 82 (emphasis added). Thus, the House and Senate floor managers expressed their mutual recognition that section 40116 (including subsections (b)and (c)) should "continue to be interpreted in the same way as former" subsection 1513 (including subsections (a), (b) and (f)).

The views of the House and Senate Managers – that section 40116 is supposed to "be interpreted in the same way as" the prior subsection 1513 – are entitled to significant weight. In *Martin Oil Service, Inc. v. Koch Refining Co.*, 582 F. Supp. 1061 (N.D. Ill. 1984), the plaintiff sued oil refineries, alleging that they overcharged the plaintiff. The refineries argued that a certain "deemed recovery" rule (whereby they were *deemed* to have recovered their additional expenses through uniform customer charges) was inconsistent with the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751, *et*

seq. ("EPAA"). In rejecting this argument, the court pointed to the fact that "Congress ha[d] explicitly approved the use of the [deemed recovery] rule as being in accord with the statutory requirements of the EPAA," as follows:

> On March 5, 1975 [*i.e.*, two years after the EPAA was enacted], the Senate Committee on Interior and Insular Affairs reported that the intent of Congress, as expressed in the EPAA, was to assure equitable prices for petroleum products. The Committee stated that Congress meant to require that "each class of purchaser is charged a price reflecting the maintenance of customary price differentials within the industry." S. Rep. No. 94-26, 94th Cong., 1st Sess. 37 (1975). The Committee referred to an FEA regulation designed to meet that requirement, apparently the deemed recovery rule, and determined not to recommend passage of a statutory mandate requiring maintenance of price differentials, relying instead on enforcement of the FEA regulation. . . . ***The views of a subsequent congressional committee on the meaning of a statute are entitled to significant weight***.

Id. at 1065 (emphasis added) (citing *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one . . . such views are entitled to significant weight, . . . and particularly so when the precise intent of the enacting Congress is obscure")). *See also Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8 (1980) ("while arguments predicated upon subsequent Congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent"); *Bobsee Corp. v. United States*, 411 F.2d 231, 237, n. 18 (5th Cir. 1969) (legislative statements subsequent to enactment of statute are not part of legislative history but are entitled to some consideration as being secondarily authoritative expression of expert opinion); *Bell v. Hettleman*, 558 F. Supp. 386, 394 n. 12 (D. Md.), *aff'd*, 721 F.2d 131 (3rd Cir. 1983); *cert. denied*, 470 U.S. 1050 (1985) ("'although committee reports commenting on a previously enacted statute are not said to be part of

the legislative history of that statute, they are nevertheless "entitled to some consideration as a secondarily authoritative expression of expert opinion"'") (citing 2A C.D. Sands, STATUTES AND STATUTORY CONSTRUCTION, A REVISION OF THE THIRD EDITION OF SUTHERLAND STATUTORY CONSTRUCTION § 48.06 (4th ed. 1973)).

Moreover, there is absolutely no legislative history to counter-balance this guidance from Congress. In all of the legislative history from 1990, 1994 and 1996, there is no indication whatsoever that Congress ever intended for the original subsection 1513(f) or its successor (40116(c)) to *authorize* states and local governments not owning or operating an airport to tax airlines. All that is left is the obvious: an unintended (and subsequently disavowed) potential confusion was created in the codification of section 1513 into section 40116, and Congress never intended for the change from section 1513 to 40116 to substantively change the law. Rather, Congress has made it clear that the former subsection 1513(f) continues to reflect Congress' intent with regard to the current subsection 40116(c).

Where, as here, there is clear evidence that a mistake was made in drafting of a federal statute, the statute should be applied in a manner consistent with Congress' actual intent. *See, e.g., United States National Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 462 (1993) ("the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design," and therefore the 1916 Act "should be read as if the closing quotation marks do not appear at the end of the paragraph"); *United States v. Colon-Ortiz*, 866 F.2d 6, 10-11 (1st Cir. 1989), *cert. denied*, 490 U.S. 1051 (1989) ("Though a statute should generally be interpreted to give effect to every provision, a provision resulting from

legislative inadvertence or mistake should not be given effect"; accordingly "the correct interpretation of the statute is to disregard the 'or both' language" which was included in the statute pursuant to "an inadvertent drafting error"); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001) (correcting internal cross-reference in the Clean Air Act due to a scrivener's error).

Tinicum's reliance in the federal litigation on *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), for the claim that Congress' mistake in the re-codification of the AHTA should be disregarded, is meritless. There, the Court was dealing with a statute – the Bankruptcy Reform Act of 1994, 108 Stat. 4106 – which made "comprehensive changes" to the preexisting statute. *Id*. at 529. By contrast, as set forth above, Congress did not intend to make any substantive changes to the AHTA when it was re-codified. And, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect ***unless such intention is clearly expressed***'" *Finley*, *supra*, 490 U.S. at 554 (1989) (internal citation and quotation marks omitted). In addition, *Lamie* is not a "scrivener's error" case. Although the Court deemed it unnecessary to rely on the legislative history behind the new statutory language, it found it "instructive that the legislative history creates more confusion than clarity about the congressional intent" because "History and policy considerations len[t] support both to petitioner's interpretation and to the holding" reached by the Court. *Id*. at 539. *See also id.* at 540 ("Amendment 1645, viewed in its entirety, gives further reason to think Congress may have intended the change"); *and see United States v. Rudolph*, 224 F.R.D. 503, 511 n. 23 (N.D. Ala. 2004) ("*Lamie* . . . is not a scrivener's error case. The Court rejected the petitioner's argument that a scrivener's

error obscured Congress' real intent").[24]

Accordingly, the Township's attempt to use the language of subsection 40116(c) to justify its privilege fee must be rejected.

3. Subsection 40116(c) also Cannot Apply Because the Tinicum "Privilege Fee" is a "Fee" Rather than a "Tax."

There is an independent reason why subsection 40116(c) does not authorize the Tinicum privilege fee. Subsection (c) applies only to taxes. It does not encompass fees. *Compare* subsection 40116(c) with 40116(d)(iv) ("tax, fee or charge") and 40116 (e)(2) ("rental charges, landing fees, and other service charges"). Yet as its name demonstrates, the Tinicum "privilege fee" is a "fee" and not a "tax."

The Ordinance does not purport to impose a "**tax**"; instead it imposes a "privilege **fee**" for the use of the Airport's runways. The United States Supreme Court has distinguished between a tax and a user fee, defining a tax as providing revenue for the general support of the government, while defining a user fee as imposing a specific charge for the use of publicly-owned or publicly-provided facilities or services. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-622 (1981). Unlike a tax, the privilege fee is not imposed on the general public; rather, it is confined to "aircraft users" for "use of property located within Tinicum Township for landing of aircraft . . . ." Ordinance § 2-4(A)(1). Moreover, the Ordinance uses the standard methodology for

[24]The concurring opinion of Justice Stevens (joined by Justices Souter and Breyer) in *Lamie* is also instructive: "Whenever there is a plausible basis for believing that a significant change in statutory law resulted from a scrivener's error, I believe we have a duty to examine legislative history. In this case, that history reveals that the National Association of Consumer Bankruptcy Attorneys (NACBA) not only called the assumed drafting error to Congress' attention in a timely fashion, but also deemed to be unworthy of objection." 540 U.S. at 542-43. By contrast, here there is no record that Congress was aware of an error in the re-codification of the ATHA when it was enacted in 1994; nor did interested parties at the time consider such an error "to be unworthy of objection."

deriving an airport landing fee: namely, a charge based on the maximum landed weight of the aircraft.

In *National Cable Television v. United States*, 415 U.S. 336 (1974), the Supreme Court explained the distinction between "taxes" and "fees":

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. ***A fee, however, is incident to a voluntary act***, *e.g.*, a request that a public agency permit an application to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. . . . ***A "fee" connotes a "benefit."***

Id. at 340-41(emphasis added); *see also United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993) ("User fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are 'enforced contributions for the support of government'"), *cert. denied*, 510 U.S. 1109 (1994) (citing *United States v. La Franca*, 282 U.S. 568, 572 (1931); *City of Vanceburg v. FERC*, 571 F.2d 630, 644 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) (charges for use of a dam were "fees" rather than "taxes" because they were "exacted against a license in exchange for a privilege which the licensee has requested or applied for and from which the licensee derives a special benefit").

The privilege fee is a "fee" because it is imposed "incident to a voluntary act," *e.g.*, the voluntary act of landing an aircraft on the runway at Philadelphia International Airport. In exchange for the benefit (or "privilege") of being able to land the aircraft, the airline is required to pay a "privilege fee." Indeed, the drafters of the Tinicum Ordinance apparently understood this when they labeled the charge a "privilege fee." Of course,

the Township provides no *benefit* whatsoever to the airlines because it is the Airport, and not Tinicum, that furnishes, maintains and protects the runways. However, the application and amount of the privilege fee is clearly tied to the *voluntary utilization* of the runways by the airlines. In other words the airlines are being charged for a *benefit* they receive each time they use the Airport runways, but the benefit flows from the Airport, not from Tinicum, which is imposing the fee.

Furthermore, charges linked to use of an airport or airport property are typically deemed to be fees rather than taxes. *See, e.g., Ace Rent-A-Car, Inc. v. Indianapolis Airport Auth.*, 612 N.E.2d 1104, 1108 (Ind. App. 1993) (seven percent fee imposed on car rental companies by airport authority was user fee rather than tax even though the fee was based on revenue; "[a] tax is compulsory and not optional; it entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens. . . . On the other hand, a user fee is optional and represents a specific charge for the use of publicly-owned or publicly-provided facilities or services."); *A & E Parking v. Detroit Metropolitan Wayne County Airport Auth.*, 723 N.W.2d 223 (Mich. App. 2006) (fees imposed on airport shuttle service providers for access to airport were fees rather than taxes; shuttle service providers were not being forced to pay the fees but could choose, if they wished to avoid the fees, to attempt to obtain business elsewhere). Because the privilege fee is not a "tax," it is clear that subsection (c) does not apply to them.

E. Allowance of the Tinicum Privilege Fee Would Contravene Congressional Intent Behind the Anti-Head Tax Act.

Subsection 40116(c) cannot be considered in a vacuum, disconnected from the other provisions in, and purpose behind, the Anti-Head Tax Act. It would be impermissible to construe subsection 40116(c) in a manner that essentially ignores the anti-discrimination provisions in subsection (d)(2)(A)(iv) (*see supra*), the restriction on imposition of landing fees set forth in subsection 40116(e) (*see supra*), and the basic prohibition in subsection 40116(b). *See United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 24 (2d Cir. 1989) ("In ascertaining the proper construction of a specific statutory provision [the decision maker must] render it consistent with . . . the statutory scheme of which it is a part"); *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous"); *Acceptance Ins. Co. v. Sloan*, 263 F.3d 278, 283 (3d Cir. 2001) ("sections of statutes are not to be isolated from the context in which they arise such that an individual interpretation is accorded one section which does not take into account the related sections of the same statute. Statutes do not exist sentence by sentence. Their sections and sentences comprise a composite of their stated purpose") (citation omitted).[25]

[25]*See also U.S. v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001) ("The 'whole act' rule of statutory construction exhorts us to read a section of a statute not 'in isolation from the context of the whole Act' but to 'look to the provisions of the whole law, and to its object and policy") (citation and internal quotation marks omitted); 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:5 (7th ed.) ("[S]tatutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme; a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.")

(footnote continued)

It is manifestly contrary to Congress' intent in passing the Anti-Head Tax Act to allow government entities that neither own nor operate an airport to nevertheless impose landing fees on airlines that use the airport's runways, whether through the guise of a "tax" or otherwise. Air carriers and their passengers at the Airport are already subject to: (1) federal excise taxes and segment fees on flights operating to and from the Airport (*see* 26 U.S.C. § 4261); (2) a $4.50 passenger facility charge pursuant to 49 U.S.C.§ 40117 (*see* 71 Fed. Reg. 36,871 (June 28, 2006)); and (3) Airport-imposed landing fees of approximately $45 million per year ($1.77 per 1,000 pounds of approved maximum landed aircraft weight), plus fees for use of terminal areas and other airport facilities. The Township – which does not even own or operate the Airport – cannot be allowed to add yet another layer of fees on the transportation of the air carriers' passengers.

F. If the Tinicum Privilege Fee is Allowed to Exist it Would Establish a Terrible Precedent.

Requiring the airlines at Philadelphia to pay an additional landing fee to the Township would create a dangerous precedent for the airline industry and adversely affect the national air transportation system. It would embolden other municipal governments and political subdivisions throughout the United States that do not own or operate airports, but in which airports are located (either wholly or partially)[26] to seek to impose similar so-called landing fees or other charges. Allowing Tinicum's fee to stand

[26]Examples of other airports which are wholly or partially located in jurisdictions of non-proprietors include, without limitation, Cincinnati, San Diego, Atlanta, San Jose, Monterey Peninsula, Charleston (South Carolina), Des Moines, Detroit, Baltimore-Washington International Thurgood Marshall Airport, Moline and Kent County. Letter from Airports Council International-North America to DOT, September 14, 2007, at 2. "It is very likely that other commercial service airports in the U.S., particularly airport authorities, stand to be affected if ordinances similar to Tinicum's are enacted." *Id.*

would invite cities, towns, and other political bodies around the country to impose similar fees on airlines, resulting in precisely the type of "hodpodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines" that Congress sought to prohibit with the AHTA. 119 Cong. Rec. 3349-50 (1973); *see also Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 9 (1983); *Salem Transp., supra,* 611 F. Supp. at 257 (referencing Congress' intent that air travelers no longer be subject to double taxation resulting from state and local head taxes as well as national user charges).

Allowing the Tinicum situation to continue and be copied throughout the United States also would impose significant additional costs on air carriers that are already subject to enormous cost pressures from operating costs, labor, fuel, landing fees, terminal rents and other airport charges, and could force airlines to reduce or eliminate service to affected airports. It is not difficult to imagine how quickly a proliferation of taxes, fees and other charges by governmental entities which are not airport proprietors could cripple the national air transportation system. This would be a disaster and it must be stopped here and now.

II. IMPOSITION OF THE PRIVILEGE FEE ON CARGO CARRIERS ALSO VIOLATES THE ANTI-HEAD TAX ACT.

For all the reasons set forth in Part I as to why the Tinicum privilege fee violates the Anti-Head Tax Act when applied to passenger airlines at PHL, imposition of the fee on cargo carriers at the Airport also violates the Act. The Act prohibits, among other things, a "tax, fee, head charge, or other charge on," *inter alia*, "the sale of air transportation," 49 U.S.C. § 40116(b). Title 49, U.S.C., defines "air transportation" to include the transportation of cargo. *See* 49 U.S.C. §§ 40102(a)(5) ("air transportation"

means "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft"); 40102(a)(22) ("foreign air commerce" means the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft"); 40102(a)(25) ("interstate air transportation" means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft"). Therefore, the AHTA prohibits the imposition of the privilege fee on cargo carriers at PHL.

III. THE PRIVILEGE FEE IS PREEMPTED BY THE AIRLINE DEREGULATION ACT BECAUSE IT RELATES TO AIRLINE PRICES AND SERVICES.

In addition to being preempted and prohibited by the Anti-Head Tax Act, the privilege fee is also preempted and barred by the express preemption provision of the Airline Deregulation Act ("ADA"), currently codified at 49 U.S.C. § 41713(b). Congress enacted the ADA in 1978 to deregulate the airline industry. *See* 49 U.S.C. § 40101(a)(6), (a)(12)(A) (formerly codified at 49 U.S.C. § 1302(a)(4), (a)(9)); *Gary v. The Air Group, Inc.*, 397 F.3d 183, 186 (3rd Cir. 2005). In enacting the ADA, Congress determined 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." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 378 (1992) (citation and internal quotation marks omitted). Congress included an express preemption provision in the ADA "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.*; *see also Taj Mahal Travel, Inc. v. Delta Airlines, Inc.,* 164 F.3d 186, 194 (3rd Cir. 1998) (Congress enacted the ADA to "prevent the states from re-regulating airline operations so that competitive market forces could function."); *Gary,* 397 F.3d at

186.

The ADA provides, in relevant part:

> **(b) Preemption.**
>
> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States ***may not enact or enforce a law***, regulation, or other provision ***having the force and effect of law related to a price, route, or service of an air carrier…***
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States ***that owns or operates an airport served by an air carrier*** holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

49 U.S.C. § 41713(b)(1), (3) (emphasis added). Thus Congress recognized that governmental entities that own or operate airports must continue to exercise limited rights reserved to them as proprietors of airports, such as charging landing fees.[27] The Township falls outside the "proprietor" exception to ADA preemption for several reasons, not the least of which is that it is not the owner or operator of Philadelphia International Airport.

Furthermore, the phrase "related to a price, route, or service of an air carrier" is to be broadly construed. In *Morales, supra*, the Supreme Court examined whether the ADA preempted enforcement of state guidelines concerning regulation of air fare advertising.

[27] *See, e.g., National Helicopter Corp. v. New York*, 137 F.3d 81 (2d Cir. 1998) (city which owned heliport could impose noise-related curfew on heliport operations pursuant to proprietor exception to ADA preemption).

The Court focused on the preemption clause's "relating to"[28] language. *Id*. at 383-86. Relying on its ERISA line of cases and the ordinary meaning of the statutory language, the Court construed the phrase "relating to" broadly to preempt "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or services.'" *Id*. at 384. The Court stated:

> For purposes of the present case, the key phrase, obviously, is "relating to". The ordinary meaning of these words is a broad one – "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979) – and the words thus express a broad pre-emptive purpose. We have repeatedly recognized that in addressing the similarly worded pre-emption provision of [ERISA], 29 U.S.C. § 1144(a), which pre-empts all state laws "insofar as they . . . relate to any employee benefit plan." We have said, for example, that the "breadth of [that provision's] preemptive reach is apparent from [its] language," . . . that it has a "broad scope," . . . and an "expansive sweep," . . . and that it is "broadly worded," . . . "deliberately expansive," . . . and "conspicuous for its breadth." . . . Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: ***State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted*** under [the ADA].

Id. at 383-84 (emphasis added). Based on this "broad preemptive purpose," the Court rejected contentions that the ADA only preempted states from actually prescribing rates, routes, or services, and that only state laws specifically aimed at the airline industry were preempted. *Id.* at 384-86. The Court held that the state law guidelines had the

[28]The prior version of what is now 49 U.S.C. § 41713(b)(1) – 49 U.S.C. § 1305(a)(1) – preempted States from enacting or enforcing laws "*relating* to rates, routes, or services of any air carrier . . . ." (emphasis added). Congress intended the revision to make no substantive change. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 221 n. 1 (1995) (citing Pub. L. 103-272, § 1(a), 108 Stat. 745); *see also Taj Mahal Travel*, 164 F.3d at 191 n.3 ("the legislative history of these changes shows that Congress intended no substantive change to the meaning of the preemption section") (citing H.R. Rep. No. 103-180 at 305, *reprinted in* 1994 U.S.C.C.A.N. 818, 1122; H.R. Rep. No. 103-677 at 83, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755).

"forbidden significant effect" on the airlines' rates, routes and services, primarily because they restricted fare advertising, which "relates to" price. *Id.* at 388-89; *see also Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984) ("[ADA] preemption is not limited to those state laws or regulations that **conflict** with federal law. It preempts state laws and regulations '**relating** to rates, routes, or services.'") (emphasis in original); *Witty*, 366 F.3d at 383 (ADA not only "preempts the direct regulation of prices by states, but also preempts indirect regulation 'relating to' prices that have 'the forbidden significant effect' on such prices").

In the situation presented here, the privilege fee clearly has a "connection with" airline prices, and/or services, and thus the "forbidden significant impact" described by the Court as prohibited by the ADA. Indeed, as set forth above, the airlines are already subject to multiple fees because of their use of airports, including federal excise taxes and segment fees, passenger facility charges, and airport landing fees and terminal rents. If communities that do not own or operate airports are permitted to impose their own landing fees on top of authorized charges by airport owners, the ability of airlines to serve as many airports as possible with as much frequency as possible will most assuredly be affected.

The domestic airline industry is highly cost sensitive and fiercely competitive. The imposition of a landing fee by a municipality that does not even own or operate the airport within its jurisdiction will have a clear impact on airline prices, services, and routes. To preserve their already small margins, airlines will be pressured either to pass through to customers the increased cost of doing business at the airport, to reduce their level service at the airport or otherwise alter their routes, or both. The amount of the

current privilege fee is not determinative; rather, it is the relationship to airline prices, routes and services that is of primary significance.

A similar situation was presented in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003), in which the First Circuit invalidated a statutory scheme prohibiting interstate carriers from making deliveries without paying an excise tax (or pre-paying it on recipient's behalf). The court held that the scheme was preempted by the ADA, reasoning that such scheme "directly and significantly affects [plaintiff's] routes and services … [and] [t]he costs of [the] scheme necessarily have a negative effect on [plaintiff's] prices." *United Parcel Service, Inc.*, 318 F.3d at 335-36; *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995) (ADA preempted claim challenging American Airlines' application of its frequent flyer program under the Illinois consumer fraud statute).

IV. THE TINICUM PRIVILEGE FEE VIOLATES GENERALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO AIRPORT CHARGES.

Tinicum's privilege fee also violates generally recognized principles of international law relating to charges imposed on airlines for use of airports. The ICAO Council has expressed "concern[] over the proliferation of charges on air traffic and notes that the imposition of charges in one jurisdiction can lead to the introduction of charges in another jurisdiction." ICAO Principles § 9. Accordingly, the Council "recommends that States . . . Permit the imposition of charges only for services and functions which are provided for, directly related to, or ultimately beneficial for, civil aviation operations." Principles § 8(i). Tinicum does not provide "civil aviation operations" to the airlines at PHL and, therefore, should not be imposing airport-type charges on those carriers.

Furthermore, airport users should be charged only the cost of providing the airport. Principles § 21. "In general, aircraft operators and other airport users should not be charged for facilities and services they do not use, other than those provided for and implemented under the Regional Air Navigation Plan." *Id.* 22(ii). *See also* Exchange of Notes Between the Government of the United Kingdom etc. and the United States, Further Amending "Bermuda II" (11 March 1994), at Art. 10 (airport user charges "are just and reasonable only if they do not exceed by more than a reasonable margin, over a reasonable period of time, the full cost to the competent charging authorities of providing the appropriate airport, air navigation, and aviation security facilities and services at the airport or within the airport system"). However, Tinicum does not incur any costs for the operation of PHL and, therefore, should not be imposing fees on airlines at that airport.

Governments also should engage in substantive consultation with end users before new charges are imposed for use of an airport. The ICAO Principles state:

> When a revision of charges or the imposition of new charges is contemplated by an airport operator or other competent entity, appropriate notice should normally be given to users or their representative bodes at least four months in advance, in accordance with the regulations applicable in each State. . . . In any such revision of charges or imposition of new charges, the users should be given the opportunity to submit their views and consult with the airport operator or competent entity. . . . For this purpose the users should be provided with transparent and adequate financial, operational and other information to allow them to make informed comments.

Principles § 31(i) and (ii). Here, Tinicum engaged in no substantive consultation process with the airlines at PHL before unilaterally imposing the new privilege fee.

V. ALLOWING NON-AIRPORT PROPRIETORS TO IMPOSE AIRPORT LANDING FEES IS CONTRARY TO THE PURPOSE BEHIND 49 U.S.C. § 47129.

The Instituting Order asks for comments regarding whether provisions of federal aviation law – in addition to the AHTA and ADA – prohibit the privilege fee. In fact, the ability of a governmental entity that neither owns nor operates an airport to impose landing fees is anathema to the statute passed by Congress in 1994 to enable airlines to obtain an expedited resolution of a dispute over the amount of landing fees imposed at an airport: 49 U.S.C. § 47129.

Congress was sufficiently concerned about airports complying with the Anti-Head Tax Act that it passed legislation to require the DOT to resolve disputes over airport-imposed fees within 120 days after a complaint is filed. Section 113 of the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 47129. Congress mandated that "Under these procedures, the Secretary must issue a final order within 120 days of the filing of a complaint. The case must be assigned to an ALJ, or dismissed, 30 days after it is filed. The ALJ must issue a decision 90 days after the filing of the complaint." "Joint Explanatory Statement of the Committee of Conference," House Conf. Rep. No. 103-677, P.L. 103-305 (August 5, 1994), at *69. *See, e.g.,* Final Decision, *Alaska Airlines, Inc. et al., v. Los Angeles World Airports,* et al., Docket No. OST-2007-27331 (Order No. 2007-6-8) (June 15, 2007). The same statute also required DOT to publish guidelines for determining whether an airport charge is reasonable, resulting in the DOT's Policy on Airport Rates and Charges, 61 Fed. Reg. 31994 (June 12, 1996). The DOT Policy includes the requirement that "Revenues from fees imposed for use of the airfield . . . may not exceed the costs to the airport proprietor of providing

airfield services and airfield assets currently in aeronautical use unless otherwise agreed to by the affected aeronautical users." Policy § 2.2, 61 Fed. Reg. at 32019. It makes no sense to assume that Congress would require that airport rates and charges be "reasonable" and impose an expedited "rocket docket" procedure for resolution of disputes over such airport-imposed charges, but then allow non-airport-proprietors to impose landing fee surcharges at the airport with none of the protections in place afforded airlines when the airport is the entity imposing the fee.

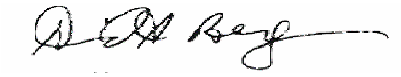
CONCLUSION

For the reasons set forth above, ATA, ACAA and RAA, on behalf of their member airlines, respectfully request that the DOT grant their Petition for Declaratory Order and rule that the Tinicum privilege fee is preempted and prohibited by federal law.

Landing fees are the prerogative of airport sponsors. A political subdivision that neither owns nor operates an airport cannot require carriers to pay money to the town in order to land aircraft at that airport, even if part of the airport lies within its borders. The Anti-Head Tax Act allows states and towns to levy only certain taxes on carriers to the extent not contrary to other provisions in the Act and federal law. *See* 49 U.S.C. § 40116(e)(1) ("property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services"). But nothing in the Act – including the limitation provision of subsection 40116(c) – authorizes a municipal government that neither owns nor operates an airport from imposing a landing fee on an airline, at least where, as here, the revenue is not "wholly utilized for airport or aeronautical purposes." 49 U.S.C. 40116(d)(2)(A)(iv).

There is no precedent for what Tinicum is attempting to do to the airlines at Philadelphia International Airport. If Tinicum is successful and allowed to impose its "privilege fee," it will create a model for cities and towns across the United States to raise revenue on the backs of airlines and their customers. There is no telling how much financial damage will be inflicted on airlines, but the precedent it would set would be disastrous. If permitted to stand, Tinicum's privilege fee, and others that will surely follow at other airports around the country, will irreparably harm the national air transportation system and impede the free flow of interstate commerce. The Department should act quickly and forcefully exercise its pre-eminent authority to ensure that these unacceptable consequences never occur.

Respectfully submitted:



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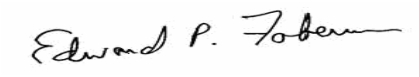

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