CASE NO. 16-8064
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EAGLEMED LLC, a Delaware limited liability company, et al.	)
Plaintiffs – Appellees,	)
vs.	)
JOHN COX, in his official capacity as Director of the Wyoming Department of Workforce Services, et al.,	)
Defendants – Appellants.	)

On Appeal from the United States District Court For the District of Wyoming
The Honorable Judge Alan B. Johnson
D.C. No. 15-CV-00026-ABJ

APPELLANTS' OPENING BRIEF

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JURISDICTION

The appellee air ambulance companies, EagleMed, LLC, Med-Trans Corporation, Air Methods Corporation, and Rocky Mountain Holdings, LLC, sued the Wyoming Workers' Compensation Division ("Division") in the United States District Court for the District of Wyoming. (Aplt. App. at 16–25). The air ambulance companies later amended their complaint to join appellants John Cox, John Ysebaert, and Pete Simpson as defendants in their official capacities. (*Id.* at 65–77). The air ambulance companies brought the case under Article VI, clause 2 of the United States Constitution, Article 1, Section 8 of the United States Constitution, and the federal Airline Deregulation Act of 1978 (the "Airline Act").[1] The district court held it had subject matter jurisdiction under 28 U.S.C. § 1331 because the suit involved a question of federal law.

The district court granted summary judgment resolving all parties' claims. (*Id.* at 382–416 and Attachment "C" hereto). The court entered judgment on May 19, 2016.[2] (*Id.* at 417–18 and Attachment "A" hereto). Cox, Ysebaert and Simpson timely appealed the judgment on June 15, 2016, in accordance with Rules 3 and 4(a)(1)(A) of the Federal Rules of Appellate Procedure. (*Id.* at 421–23). They also

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[1] The preemption clause of the referenced statute (49 U.S.C. § 41713(b)(1)) is attached as Attachment "E".

[2] The judgment dismissed the Division, although the injunction issued by the district court in fact operates against the Division. (Aplt. App. at 417–18).

filed a motion for stay judgment on July 8, 2016, under Rule 62(c) of the Federal Rules of Appellate Procedure, which allows a district court to suspend, modify, restore or grant an injunction pending appeal of its judgment creating the injunction to preserve the status quo. (*Id.* at 424–27). The district court denied Cox, Ysebaert and Simpsons' motion to stay and amended the judgment on August 16, 2016. (*Id.* at 472–76 and Attachments "B" and "D" hereto). Although the district court did not describe its jurisdiction to amend the original judgment, its decision to do so was based on appellee air ambulance companies' suggestion to amend in their response to the motion to stay. (*Id.* at 474). Cox, Ysebaert and Simpson timely appealed the amended judgment on August 19, 2016. (*Id.* at 480–82). The Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1294(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The Airline Act does not preempt state law or regulations that are not compulsory for air carriers. The air ambulance companies can avoid application of the Wyoming workers' compensation statute and fee schedules by declining to seek payment from the Division and instead collecting directly from the injured worker. Does the Airline Act preempt Wyoming's statute and fee schedule?

II. The Airline Act does not preempt air carriers' voluntary contractual obligations. The Wyoming workers' compensation statute and fee schedules represent an offer to pay for air ambulance services that air ambulance companies accept by billing the Division and taking medical benefits as payment. Does the Airline Act preempt Wyoming's ability to contract with private parties and compel the Division to pay medical benefits in whatever amounts air ambulance companies request?

III. The Airline Act does not preempt state laws that have an indirect and insignificant impact on air carrier prices, routes or services. The district court held the Wyoming workers' compensation statute and fee schedules have a significant, adverse impact on air ambulance prices. This factual finding was made without a sufficient opportunity for discovery and is contested by Appellants Cox, Ysebaert and Simpson. Was summary judgment appropriate given this dispute of material fact?

IV. The *Ex parte Young* exception to Eleventh Amendment immunity does not allow a federal court to issue an injunction against a state official with more than an ancillary effect on the state treasury. The injunctions in this case are direct orders for the Division and appellants Cox, Ysebaert and Simpson to pay state funds to the air ambulance companies. By issuing these injunctions, did the district court exceed its authority under *Ex Parte Young*?

V. A party must be threatened with unlawful and imminent enforcement action to have a cause of action in equity under *Ex parte Young*. Wyoming law does not require air ambulance companies to seek payment through the Division and does not penalize directly billing injured workers. No state enforcement action has been initiated or threatened against the air ambulance companies. Do they have a cause of action in equity to sue appellants Cox, Ysebaert and Simpson?

STATEMENT OF THE CASE

I. Relevant Procedural History

The Wyoming Worker's Compensation Act provides certain medical, hospital and disability benefits to injured workers. *See* Wyo. Stat. Ann. §§ 27-14-101 (b), 401(a)-(g), 403(a)-(b), 405, 406. Wyoming law sets these benefits and injured workers' eligibility to receive them. *See* Wyo. Stat. Ann. §§ 27-14-102(a)(xv), (xvi), (xviii), (xviii), 404, 405, 601(a)-(b). The Wyoming Legislature specifically authorized the Division to pay reasonable charges for covered, necessary air ambulance services.[3] Wyo. Stat. Ann. § 27-14-401 (e). The Director of the Department of Workforce Services must establish fee schedules for such services, and the Legislature has prohibited the Division from paying more than provided under these schedules. *Id.* The Director and Division created the fee schedules for air ambulance transportation through administrative rule-making, codified in Chapter 9, § 8 of the Rules, Regulations and Fee Schedules of the Wyoming Workers' Compensation Division (the "Fee Schedule"). [4]

The appellee air ambulance companies filed suit against the Division. (Aplt. App. at 65–77). They alleged the Airline Act's preemption clause, 49 U.S.C. § 41713(b)(1), preempts Section 401(e) and the Fee Schedule. (*Id.* at 74). They sued

[3] The statute is attached as Attachment "F".
[4] The statute is attached as Attachment "G".

the Division and Cox, Ysebaert and Simpson for a declaratory judgment and injunction barring enforcement of Section 401(e) and the Fee Schedule. (*Id.* at 74–75).

The parties filed cross-motions for summary judgment. (*Id.* at 95–97, 282–84). The Division and Cox, Ysebaert and Simpson argued summary judgment should be denied "if the [District] Court [found] the question of whether there exists a forbidden significant effect [caused by Wyoming Law on air ambulance prices] to be essential to the disposition of Air Ambulances' case." (*Id*. at 3). The district court ruled the Airline Act preempted Section 401(e) and the Fee Schedule "to the extent the statute and regulation set compensation that air ambulances may receive for their services." (*Id*. at 416; Attachment "C" at 35). The court entered a judgment generally granting air ambulance companies' motion for summary judgment and permanently enjoining Cox, Ysebaert and Simpson from "enforcing [Section 401(e) and the Fee Schedule] against ambulance services."[5] (*Id.* at 418; Attachment "A" at 2).

Cox, Ysebaert and Simpson moved to stay the judgment. (*Id.* at 424–27). The district court denied the motion and clarified its original judgment to define the

[5] The judgment also dismissed the Division. (Aplt. App. at 418). However, the injunctions noted below in fact operate against the Division, not state officials Cox, Ysebaert and Simpson.

outcome that its original injunction was intended to achieve. (*Id.* at 473, 476; Attachment "D" at 2, 5). The court amended the judgment as follows:

> [T]he named state officials and their employees and agents are permanently enjoined from enforcing Wyoming Statute Section 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the Wyoming Workers' Compensation Division **to the extent the statute and regulation regulate air ambulance rates**.
>
> **[T]he named state officials and their employees and agents are required to compensate air ambulance entities the full amount charged for air ambulance services**.

(*Id.* at 478; Attachment "B" at 2) (new language shown in bold).

The air ambulance companies originally sought to enjoin the Worker's Compensation Act's prohibition against balance billing. (*Id.* at 74–75). Balance billing is the collection of additional medical expenses from an injured worker for a specific service **after** directly billing the Division for that same service and accepting benefits issued as payment. Wyo. Stat. Ann. § 27-14-501(a).[6] However, the air ambulance companies later withdrew this request. (Aplt. App. at 498). The district court therefore denied relief with respect to Section 501(a). (Aplt. App. at 478). The air ambulance companies did not appeal this ruling.

[6] The statute is attached as Attachment "H".

II. Relevant Facts

In Wyoming, workers' compensation is a type of industrial insurance originating in the state constitution. Wyo. Const. art 10, § 4. Wyoming has a monopoly system, which is administered by the Division. Wyo. Stat. Ann. § 27-14-101(b). The system is intended to quickly and efficiently deliver indemnity and medical benefits to injured and disabled workers at a reasonable cost to employers. *Id*. These benefits provide needed medical and hospital care for workplace injuries to Wyoming workers and grant relief from the sudden loss of income caused by unexpected injury.[7] All benefits are paid from the Workers' Compensation Account, which is organized by the Wyoming Constitution under the state treasury. Wyo. Stat. Ann. § 27-14-701(a)-(c); Wyo. Const. art. 10, § 4(c). This fund remains self-supporting through premiums collected from employers and paid into the Account, with premium levels readjusted annually. Wyo. Stat. Ann. §§ 27-14-201(a), 701(a).

Fee schedules for benefit payments ensure the workers' compensation program remains actuarially sound. *See* Wyo. Stat. Ann. § 27-14-201(a), (c). The Worker's Compensation Act requires the Division abide by fee schedules when paying medical benefits for medical and hospital care, artificial dental replacement,

[7] Workers' compensation benefits do not cover all medical treatments. For example, medical benefits are not allowed for alternative medicine or experimental care. *Rules Wyo. Dep't of Workforce Servs., Workers' Comp. Div.*, ch. 10, §§ 3, 10.

pre-authorized hospitalization, surgery or specific medical care, and more. Wyo. Stat. Ann. §§ 27-14-402, 601(o), 802(a). *See generally Rules Wyo. Dep't of Workforce Servs., Workers' Comp. Div.*, ch. 9 (codifying all fee schedules). These fee schedules are established by the Director through administrative rule-making, with careful consideration given to employer premium rates to ensure the Account is adequately funded for the workers it supports. Wyo. Stat. Ann. §§ 27-14-802(d), 201(c). The Division cannot allow medical or hospital care fees "without first reviewing [them] for appropriateness and reasonableness in accordance with its adopted fee schedules." Wyo. Stat. Ann. § 27-14-401(b).

Wyoming Statutes § 27-14-401(e) prescribes how and when the Division can pay medical benefits to cover charges for necessary air and ground ambulance transportation. It provides the Division shall allow a reasonable charge for necessary ambulance transportation "at a rate not in excess of the rate schedule established by the director[.]" Section 401(e) further provides that payment will be made "under the procedure set forth for payment of medical and hospital care." Wyo. Stat. Ann. § 27-14-401(e).

By operation of Section 401(e), the Fee Schedule limits medical benefits the Division may pay for necessary air ambulance transportation. Total payment depends on distance traveled and type of air craft, in addition to fees allowed for advance life support, basic life support, and specialty care transport:

Code	Short Descriptor	Maximum Allowable
A0430	Air, Fixed Wing	$3,350.00
A0431	Air, Rotary Wing	$3,900.66
A0435	Mileage, Air, Fixed Wing	$10.30 per statute mile
A-436	Mileage, Air, Rotary Wing	$27.47 per statute mile

Rules Wyo. Dep't of Workforce Servs., Workers' Comp. Div., ch. 9, § 8.

Appellee air ambulance companies are for-profit companies with principal places of business outside Wyoming. (Aplt. App. at 66). They have transported injured workers covered by Wyoming workers' compensation. (*Id.* at 72–73). The air ambulance companies objected to the level of payment authorized by the Fee Schedule in an administrative proceeding, which is stayed pending judicial resolution of the preemption issue. (*Id.* at 73, 435–36).

Appellee air ambulance companies asserted in briefing to the district court that application of Section 401(e) and the balance billing prohibition render providers unable to recoup the cost of providing medical services to injured workers covered by workers' compensation. (*Id.* at 130). However, this factual allegation was not supported with an accounting of operations costs or other evidence. The air ambulance companies did not even provide a calculation of costs the Fee Schedule failed to cover for the specific flights identified on pages 8 and 9 of their amended complaint. (*Id.* at 72–73). The only information in the record before the district court

about actual operation costs for air ambulance companies is a citation to a May 5, 2015, New York Times article reporting the cost of an average air ambulance flight to be between $9,000 to $10,000. (Aplt. App. at 325). The air ambulance companies also do not allege that payment under the Fee Schedule is less than they collect in the market from injured parties or private insurance companies.

SUMMARY OF THE ARGUMENT

The district court's injunctions impose a limitless, unchecked liability on the State of Wyoming's Workers' Compensation Division and the Workers' Compensation Account. They create an entitlement for all air ambulance companies operating in Wyoming to be paid whatever amount they wish. Although Cox, Ysebaert and Simpson identify five questions for this court to help structure the legal analysis, the sweeping injunctions at issue raise two underlying questions: (1) does the federal Airline Act require the Division pay whatever charge air ambulance companies choose to charge; and (2) does the Eleventh Amendment permit a federal court to order the Division make such payments?

The answer to both questions is "no." The Airline Act does not preempt Section 401(e) and the Fee Schedule because these provisions impose no compulsory obligations upon air ambulance companies. Air ambulance companies are free to decide to seek payment outside of the workers' compensation program. If they bill the Division and accept medical benefits as payment, it is by choice and with knowledge that payment will be made according to a published fee schedule.

Similarly, the Airline Act does not preempt the challenged statute and rule because payment by the Division is best understood as a contract voluntarily entered into by the air ambulance companies. The Airline Act does not preempt the voluntary undertakings of an air carrier.

On a related issue, the district court reached out to make factual conclusions without the benefit of a factual record. To the extent the district court's summary judgment was based on finding that Section 401(e) and Fee Schedule have a significant and adverse effect on air ambulance prices, it must be reversed as without any factual foundation.

Finally, the district court's efforts to clarify the effect of its first injunction exceeded its authority. A federal court cannot grant injunctive relief that has a direct and primary—not ancillary—effect on a State treasury. In this case, the injunctions directly and expressly command expenditure of State money and create an ongoing liability to private entities, in an unlimited amount, for the Division to pay with state funds.

The district court also lacked authority to issue an injunction when no enforcement action is imminent or threatened by state officials. Wyoming workers compensation statutes do not prohibit or discourage air ambulance companies from directly billing their passengers—including injured workers—in any amount. It also does not prohibit bills to the Division that exceed what Section 401(e) and the Fee Schedule allow the Division to pay with medical benefits. Moreover, the air ambulance companies cannot show a state enforcement action has ever been threatened under these provisions.

For the above reasons, the summary judgment and injunction should be reversed and the case remanded for entry of judgment in favor of appellants Cox, Ysebaert and Simpson.

ARGUMENT

I. The Airline Act does not preempt Section 401(e) and the Fee Schedule.

Implicit in the district court's judgments is the conclusion that air ambulances must exclusively seek payment through the Division for transportation of injured workers covered by workers' compensation. This conclusion has no basis in Wyoming law. Air ambulances voluntarily choose to bill the Division if they wish to receive payment from the Division for medical benefits allowed by statute for an eligible injured worker. Nothing prohibits an air ambulance from directly billing an injured worker instead. The only restriction under Wyoming law is that a provider cannot do both. Section 401(e) and Fee Schedule therefore regulate the Division, not air ambulances. Just as a State employee traveling for work might be told he cannot purchase a first class airline ticket because it would exceed what the State will pay, Section 401(e) limits the Division's authority to pay medical benefits for necessary air ambulance charges. The Airline Act does not preempt State law regulating only what a State agency itself is willing to purchase.

For the appellee air ambulance companies, the Fee Schedule operates as a publicly-published offer for compensation should the companies choose to seek

reimbursement from the Division for the costs of transporting a covered injured worker. The Fee Schedule is analogous to a menu a restaurant might post outside so potential patrons can decide whether to eat there or somewhere else. The Airline Act does not preempt the challenged statute and rule because they are terms of a contract voluntarily entered into by the air ambulance companies. The Airline Act does not preempt an air carrier's voluntary undertakings.

a. The standard of review is *de novo*.

A district court's ruling on preemption is reviewed *de novo. Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1185 (10th Cir. 2011).

As instructed by the United States Supreme Court, courts should not "'assume[] lightly that Congress has derogated state regulation, but instead ... address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law.'" *Remund v. State Farm Fire & Cas. Co.*, 483 F. App'x 403, 408 (10th Cir. 2012) (brackets in original) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)). The Court should address "'claims of preemption with the starting presumption that Congress does not intend to supplant state law.'" *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 366 (3d Cir. 1999) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans*, 514 U.S. at 654; *see also Altria Grp. v. Good*, 555 U.S. 70 (2008) (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)) ("When the text of a

pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption."). For this reason, preemption cases all "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Sikkelee*, 822 F.3d at 687 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

This presumption is particularly important concerning federal legislation threatening to "trench on the States' arrangements for conducting their own governments[.]" *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). Such federal legislation should be "read in a way that preserves a State's chosen disposition of its own power[.]" Id.

b. The Airline Act does not preempt Section 401(e) and the Fee Schedule because they are not compulsory for air ambulance companies.

Congress enacted the Airline Act to deregulate the domestic commercial airline industry and promote greater efficiency, innovation, and low prices "through 'maximum reliance on competitive market forces and on actual and potential competition.'" *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995); *Nw., Inc. v. Ginsberg*, – U.S. –, 134 S. Ct. 1422, 1428 (2014) (quoting 49 U.S.C. §§ 40101(a)(6), (12)(A)). Congress included a preemption clause in the Airline Act "[t]o ensure that the States would not undo federal deregulation with regulation of their own,"

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992). The clause reads in relevant part: "[A] State … 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[.]" 49 U.S.C. § 41713(b)(1).

The United States Supreme Court has interpreted the preemption clause in three cases: *Morales*, 504 U.S. 374*; American Airlines v. Wolens*, 513 U.S. 219 (1995); and *Northwest, Inc. v. Ginsberg*, – U.S. –, 134 S. Ct. 1422 (2014). State law "relates to" air carrier prices, routes, or services if it either directly regulates prices, routes, or services or has a significant effect on the same. *Wolens*, 513 U.S. at 223 (citing *Morales*, 504 U.S. at 384).

The Airline Act preempts as direct regulation state laws explicitly referring to air carrier prices, routes or services and coercively regulating air carriers' permissible conduct such as how they might advertise fares or operate a mobile phone application to force air carriers to adopt or change prices, routes or service. *Buck v. Am. Airlines, Inc*., 476 F.3d 29, 34–35 (1st Cir. 2007) (citing *United Parcel Serv., Inc. v. Flores–Galarza*, 318 F.3d 323, 335 (1st Cir. 2003); *Morales*, 504 U.S. at 388; *People ex rel. Harris v. Delta Air Lines, Inc.*, 202 Cal. Rptr. 3d 395, 409 (2016). The Airline Act also preempts state law "'impos[ing] obligations that would have a significant impact upon … the fares airlines charge[,]'" or their routes and services, and therefore sufficiently relate to air carrier prices as to warrant

preemption. *Wolens*, 513 U.S. at 224 (internal brackets omitted) (quoting *Morales*, 504 U.S. at 390).

In *Morales*, the Court considered advertising guidelines promulgated by an association of attorneys general. Several attorneys general threatened to sue airlines for alleged violations of the guidelines. *Morales*, 504 U.S. at 379–81. The airlines filed suit alleging the Airline Act preempted enforcement of the guidelines. *Id.* at 380. The Supreme Court agreed and affirmed an injunction against their enforcement. *Id.* at 391. The Supreme Court "emphasized that the challenged guidelines set 'binding requirements as to how airline tickets may be marketed.'" *Wolens*, 513 U.S. at 224 (quoting *Morales*, 504 U.S. at 388). Notably, "*Morales* also left room for state actions 'too tenuous, remote, or peripheral … to have pre-emptive effect[]'" on air carrier prices, routes or services. *Id.* (quoting *Morales*, 504 U.S. at 390). For example, state laws prohibiting gambling or prostitution will survive Airline Act preemption despite regulating the services an air carrier might offer. *Morales*, 504 U.S. at 390. In the Court's opinion, such state laws do not have a tangible or significant effect on air carrier prices, routes or services and would not be preempted.

In *Wolens*, the participants in a frequent flyer program sued an airline for breach of contract and violations of a state Consumer Fraud Act. *Wolens*, 513 U.S. at 224–26. The Supreme Court held the Airline Act preempted the contractual claim

based on the state Consumer Fraud Act but not the contract claim for those obligations the air carrier chose to enter. *Id.* at 228. The Court held the preemption clause does not "shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed obligations." *Id*.

Ginsberg also involved a claim by a participant in a frequent flyer program. Plaintiff sued an airline after it terminated his membership, alleging a violation of the implied covenant of good faith under Minnesota law. *Ginsberg*, 134 S. Ct. at 1427. The airline argued that the Airline Act preempted the claim. *Id*. A federal district court agreed with the airline, but the court of appeals reversed. *Id*. at 1427–28.

The Supreme Court stated the issue as "whether respondent's implied covenant claim is based on a state-imposed obligation or simply one that the parties voluntarily undertook." *Id.* at 1431. The Court held the covenant **in that case** was a state-imposed obligation because Minnesota law does not allow parties to exclude the covenant from their contracts. *Id.* at 1432 (emphasis added). However, if state law has permitted the parties to exclude the covenant, claims based thereon are not preempted. *Id.* at 1433. The Court stated:

> A State's implied covenant rules will escape pre-emption only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement, and if an airline's agreement is governed by the law of such a State, the airline can specify

> that the agreement does not incorporate the covenant. While the inclusion of such a provision may impose transaction costs and presumably would not enhance the attractiveness of the program, an airline can decide whether the benefits of such a provision are worth the potential costs.

Id.

In light of *Morales*, *Wolens*, and *Ginsberg*, the Airline Act preempts a state law, regulation, or provision that directly or indirectly "'*binds* carriers to a particular price, route or service and thereby interferes with the competitive market forces within the industry.'" *See Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015) (quotation omitted, italics in original). Section 401(e) and the Fee Schedule apply only if and when an air ambulance company decides to seek and accept payment under the Wyoming workers' compensation program for an ambulance trip it has already chosen to provide. *See* Wyo. Stat. Ann. §§ 27-14-401(e), 501; *Rules Wyo. Dep't of Workforce Servs., Workers' Comp. Div.*, ch. 7, § 3(a)(iii), ch. 5, § 4(a). Wyoming law does not require an air ambulance company to seek this payment at all or to do so first before billing the transported party. *Id.* Furthermore, Section 401(e) and the Fee Schedule regulate only what the Division can do after an air ambulance company voluntarily chooses to bill the Division. The application of these state laws create non-optional obligations and restrictions for the Division, but air ambulance companies are free to act as they wish.

In arguing the contrary, the air ambulance companies have pointed to Wyoming Statutes § 27-14-501(a) and (d). Appellees' Joint Resp. to Mot. for Emergency Stay at 21, *EagleMed, LLC, et al. v. Cox, et al.*, No. 16-8064 (10th Cir. Sept. 1, 2016), Doc. No. 01019681977 (hereinafter "Appellees' Joint Resp.") (citing to Sections 501(a) and (d) as statutory language belying Cox, Ysebaert and Simpson's argument "that Plaintiffs could seek payment from injured employees instead of submitting Workers' Compensation claims"). However, the air ambulance companies have distorted the meaning of this section. Section 501(a) prescribes procedures a health care provider must follow to be paid after treatment through an injured worker's medical benefits.[8] If payment by benefits is issued and accepted for a given service, then the provider cannot also bill the injured worker for that same service. Section 501(d) creates a timeliness requirement for bills and benefit claims. A claimant must file a bill or claim within a certain amount of time after services are provided or risk denial of payment through benefits. *See Rules Wyo. Dep't of Workforce Servs., Workers' Comp. Div.*, ch. 5, § 4; *see also Daiss v. Div. of Workers' Safety & Comp.*, 965 P.2d 692, 695 (Wyo. 1998) (holding the Workers' Compensation Act presumes claims for expenses are made after service is rendered).

[8] Air ambulances are not health care providers. (Aplt. App. at 405–06; Attachment "C" at 24–25); Wyo. Stat. Ann. § 27-14-102(x). However, Section 401(e) provides ambulance charges will be paid according to "the procedure set forth for payment of medical and hospital care." Section 501(a) provides this procedure.

Timeliness is important because the Division cannot determine whether medical benefits should be paid until after a claim is filed. *See Daiss*, 965 P.2d at 695. The thirty-day deadlines in Sections 501(a) and (d) do not command air ambulance providers exclusively bill the Division for transport of an injured worker. If an air ambulance company decides it would rather seek payment from the Division than its passenger, it must do so in a timely manner so the Division can determine coverage and issue benefits.

Furthermore, Wyoming law does not prohibit an air ambulance company from billing its passenger—the injured worker—in the first instance. Indeed, if an air ambulance company chooses to directly bill an injured worker instead of the Division, the Division's rules ensure injured workers are not denied medical benefits. An injured worker can seek reimbursement for expenses "paid out-of-pocket for medical service(s) deemed reasonable, necessary and directly related to his work-related injury on a form provided by the Division." *Rules Wyo. Dep't of Workforce Servs., Workers' Comp. Div.*, ch. 7, § 3(a)(iii). *See also Rules Wyo. Dep't of Workforce Servs., Workers' Comp. Div.*, ch. 5, § 4(a). This is analogous to a State employee traveling for work paying the full cost of a first-class plane ticket and the State later reimbursing that employee according to State policies for travel expenses.

In short, the air ambulance companies can avoid the challenged statute and rule by opting to do what Delta Airlines or Northwest Airlines does when selling

commercial airfare: directly bill the passenger instead of the Division. The injured worker can still access medical benefits to which he is entitled through reimbursement and the air ambulance companies' freedom of choice for billing deprives the Airline Act of preemptive effect. As a result, the Airline Act does not preempt Section 401(e) and the Fee Schedule and the summary judgment and injunction entered by the district court should be reversed.

c. By voluntarily choosing to seek payment through medical benefits issued by the Division, as allowed by Section 401(e) and the Fee Schedule, air ambulance companies enter a unilateral contract with the Division and this voluntary agreement is not preempted by the Airline Act.

The basic elements of a contract in Wyoming law are an offer, acceptance and consideration. *Shaw Constr., LLC v. Rocky Mountain Hardware, Inc.*, 275 P.3d 1238, 1242 (Wyo. 2012); *Prudential Preferred Props. v. J & J Ventures, Inc.*, 859 P.2d 1267, 1272 (Wyo. 1993).[9] "An unconditional, timely acceptance of an offer, properly communicated to the offeror, constitutes a meeting of the minds of the parties and establishes a contract." *Wyo. Sawmills, Inc. v. Morris*, 756 P.2d 774, 775 (Wyo. 1988) (internal citations omitted). Neither negotiation nor mutuality of

[9] "[I]n a contract action, the applicable law is that of the forum in which performance was to occur or where the contract was made." *Dobbs v. Chevron U.S.A., Inc.*, 39 F.3d 1064, 1068 (10th Cir. 1994). Cox, Ysebaert and Simpson believe air ambulance companies enter into a unilateral contract with the Division when they seek and accept payment from the State of Wyoming, so Wyoming contract law controls.

obligation between parties is necessary under Wyoming law for purposes of a unilateral contract. *Brodie v. Gen. Chem. Corp.*, 934 P.2d 1263, 1265 (Wyo. 1997). Unilateral contract principles require the offer be accepted and consideration exchanged before the parties are bound by an enforceable contract. *See Id.* at 1266.

The Division does not choose whether an air ambulance company will provide emergency air ambulance services to transport an injured worker. It does not choose which company will provide this service. The parties—the Division and a given air ambulance provider—cannot negotiate a price before transport. Instead, Section 401(e) and the Fee Schedule represent a post-transport offer by the Division of a price it will pay should an air ambulance choose to seek payment through workers' compensation. The air ambulance company may decide whether to accept the offer or instead seek direct recovery from the injured worker. A request for payment under the Workers' Compensation Act and the receipt of payment through the Workers' Compensation Account create a contract between the Division and the air ambulance company.

Under *Wolens*, the Airline Act does not apply to a voluntary contractual obligation undertaken by an air carrier. *Wolens* at 228–29, 232–33. The "terms and conditions airlines offer and passengers accept are privately ordered obligations and thus do not amount to a State's enactment or enforcement of any law, rule, regulation, standard or other provision having the force and effect of law within the

meaning of [the Airline Act]." *Wolens*, 513 U.S. at 228–29 (internal quotation omitted).

The district court erred when it failed to apply *Wolens* in this case. The district court found it did "not have evidence of a contractual relationship between the parties[]" because "[t]he plaintiffs are not receiving an offer of the fee schedule price before picking up an injured worker and agreeing to it by doing so." (Aplt. App. at 414; Attachment "C" at 33). However, Cox, Ysebaert and Simpson do not argue a contract is created between the Division and an air ambulance company by transportation of an injured worker covered by workers' compensation. The contract arises when an air ambulance company chooses to bill the Division instead of directly billing or balance billing an injured worker. *Id.* at 329). The air ambulance company accepts this arrangement by performance: submission of bill to the Division according to the procedure provided by Wyoming law. Consideration is the actual payment of medical benefits, with the certainty of the state treasury, to the air ambulance company. *Miller v. Miller*, 664 P.2d 39, 41 (Wyo. 1983) ("Absent some indicia of actual consideration, a contract will be held invalid by the courts.").

Section 401(e) and the Fee Schedule do not regulate the air ambulance companies. These provisions are an offer of payment for air ambulance services. A contract arises not based on the offer, but through acceptance by an air ambulance company manifested by billing the Division and the receipt of medical benefits as

consideration. The only distinction between *Wolens* and this case is that the Division —not the air ambulance company—makes the offer. *Wolens* ties preemption to whether the air carrier can avoid application of a given contract provision, not the identity of that provision's offeror.

The district court's injunctions will create a mandatory contract and impose this contract on only one party—the Division. Air ambulance companies will remain free to provide transportation, or not, and can seek any amount they wish from their passengers. The State of Wyoming, however, will have to pay their full charges without the ability to withdraw from the market. This directly undermines one of Congress's stated purposes in enacting the Airline Act: to prevent conditions "that would tend to allow one or more air carriers unreasonably to increase prices." 49 U.S.C. § 40101(a)(10). The summary judgment and injunction should be reversed and the case remanded for entry of judgment for Cox, Ysebaert and Simpson.

II. Summary judgment was inappropriate because a genuine issue of disputed material fact exists as to whether Section 401(e) and the Fee Schedule have a significant impact on air ambulance companies' prices.

The Airline Act preempts state law with a "'significant' and adverse 'impact' in respect to the [Airline Act's] ability to achieve its pre-emption-related objectives." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371–72 (2008) (quoting *Morales*, 504 U.S. at 390). The district court concluded that Section 401(e) and the Fee Schedule are preempted as "directly related to air carrier prices[]" and then stated

"[t]he fee schedule creates a loss that the carrier must recover from other members of the public who have the misfortune of needing air ambulance service." (Aplt. App. at 411). The district court further held that air ambulance companies' "[r]educed compensation received for air ambulance service provided to Wyoming's injured workers has had a significant and adverse impact upon the ability of the plaintiffs to receive compensation that reflects the losses sustained for unpaid costs[.]" *Id.* To the extent the district court's summary judgment relies on this factual analysis, its judgment should be reversed.[10] There is a genuine dispute of material fact whether Section 401(e), and the Fee Schedule in particular, have any discernable effect on air ambulance prices in Wyoming.

a. The standard of review is *de novo*.

The Court reviews "the district court's grant of summary judgment de novo, applying the same standards that the district court should have applied." *Forney Indus., Inc. v. Daco of Mo., Inc.*, No. 15-1226, 2016 WL 4501941, at *7 (10th Cir. August 29, 2016) (quotation omitted). The Court "examine[s] the

[10] The district court's analysis makes it unclear how important its finding a significant, adverse impact on air ambulance price was to holding Section 401(e) and the Fee Schedule preempted by the Airline Act. The order denying Cox, Ysebaert and Simpson's motion to stay states "the Court enjoined enforcement of the statute and regulation because the defendants were illegally regulating air ambulance rates." (Aplt. App. at 473). However, the district court found a factual, causal effect between the Workers' Compensation Act and air ambulance prices and it remains true this finding was unsupported by evidence.

record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Id*. (internal quotation marks omitted). Summary judgment is affirmed "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is "material" if it might affect the outcome of the case and a factual dispute is "genuine" if a reasonable fact-finder is able to return a verdict in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

For an award of summary judgment, "the moving party must meet its 'initial responsibility' of demonstrating that no genuine issue of material fact exists and that it is entitled to summary judgment as a matter of law." *Reed v. Bennett*, 312 F.3d 1190, 1194 (10th Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "As explained by the Supreme Court in [*Adickes v. S.H. Kress & Co*., 398 U.S. 144, 160–61(1970)], the burden on the nonmovant to respond arises only if the summary judgment motion is properly 'supported' as required by Rule 56(c)." *Reed*, 312 F.3d 1194. The movant's "burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment." *Celotex Corp.*, 477 U.S. at 331 (citation omitted).

As the moving party, the appellee air ambulance companies "had the burden of showing the absence of a genuine issue as to any material fact, and for these

purposes the material it lodged must be viewed in the light most favorable to" Cox, Ysebaert and Simpson. *Adickes*, 398 U.S. at 157. Even if Cox, Ysebaert and Simpson had not filed a response to appellee air ambulance companies' motion for summary judgment, the district court should have made findings whether appellee air ambulance companies satisfied their initial responsibility of producing evidence showing the absence of a genuine issue of all material fact necessary to prove their case. *See Celotex Corp.*, 477 U.S. at 325. If Cox, Ysebaert and Simpson raised by pleadings a genuine issue of material fact, and the air ambulance companies' evidence in support of its motion for summary judgment does not establish the absence of this issue, then summary judgment should be denied. *See Adickes*, 398 U.S. at 144.

b. The district court's conclusion that the Workers' Compensation Act and Fee Schedule have a significant and adverse effect on Wyoming air ambulance prices was made without sufficient discovery and is therefore unsupported by the record, such as it exists.

As mentioned above, the Airline Act preempts state law with a "'significant' and adverse 'impact' in respect to the [Airline Act's] ability to achieve its pre-emption-related objectives[,]" namely the deregulation of the commercial airline industry to promote better prices and quality through competition. *Id.* However, the Airline Act does not pre-empt state law and regulations "that affect [air carrier] fares in only a 'tenuous, remote, or peripheral … manner[.]" *Rowe*, 552 U.S. 364, 371

(2008) (quoting *Morales*, 504 U.S. at 390). The Supreme Court declined to specify where the line is drawn between state law with a sufficiently significant impact on air carrier prices, routes or services to warrant preemption and state law with an effect too tenuous or remote to be preempted. *Morales*, 504 U.S. at 390. However, state regulation is not simply "preempted wherever it imposes costs on airlines and therefore affects fares because costs must be made up elsewhere, i.e., other prices raised or charges imposed." *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 89 (1st Cir. 2011) (internal quotation omitted). To hold otherwise would effectively exempt airlines from all state taxes, state lawsuits of many kinds, and other state regulation of any consequence. *Id. See, i.e., People ex rel. Harris v. Pac Anchor Transp., Inc.*, 329 P.3d 180, 190 (2014), *cert. denied sub nom. PAC Anchor Transp., Inc. v. California ex rel. Harris*, – U.S. –, 135 S. Ct. 1400 (2015).

Appellee air ambulance companies' analysis as to why the challenged Section 401(e) and Fee Schedule have a significant effect on their prices centered on their conclusion that the challenged provisions of the Wyoming law "explicitly refer to—indeed, directly determine—the maximum amount that Plaintiffs are permitted to receive for air ambulance transportation services of an injured worker in the State of Wyoming." (Aplt. App. at 123). For the reasons described above and below, this interpretation of the Workers' Compensation Act is fundamentally wrong. Section 401(e) and the Fee Schedule explicitly refer to and directly determine the **Division's**

authority to issue medical benefits; they do not regulate air ambulances. An air ambulance company is free to bill the Division and accept payment issued according to Wyoming law. Alternatively, it may choose to pursue normal collections directly against the injured worker.

The air ambulance companies cited a number of legal opinions from the Office of General Counsel for the United States Department of Transportation. *Id*. at 124, 228–57. However, these legal opinions generally concern issues like state regulation of air ambulance market entry through certificates of public convenience and necessity or certificates of need issued by the state itself. *Id*. They do not concern state action taken "*as a customer*" as distinguished "from action by the State or local government as a *regulator*." *Id*. at 124 n. 4 (italics in original). According to the Department, a State is free to do "by non-regulatory means, e.g., through economic incentives rather than regulatory actions[]" the same things that if mandated by coercive, non-voluntary regulation would be preempted by the Airline Act. *Id.*

Cox, Ysebaert and Simpson argued that it would be premature to grant summary judgment on the basis of a significant effect on air ambulance price because there was a genuine dispute of material fact that could not "be settled solely on the materials [then] in the Court record." *Id*. at 298. Appellee air ambulance companies asserted for the first time in briefing, outside of their pleadings and without supporting evidence, that the Workers' Compensation Act and related fee

schedules rendered "providers unable to recoup their costs[]" of providing medical services to injured workers covered by workers' compensation. *Id.* at 130. Cox, Ysebaert and Simpson argued that "[d]etermining the effect, if any, of the challenged [Worker's Compensation Act] and air ambulance fee schedule on air carrier prices would require extensive factual discovery on the oversaturation of the air ambulance industry, price distortions caused by health insurance and the substantial portion of air ambulance bills outside of the workers' compensation system that are never fully paid[.]" *Id.* at 298. The limited information accessible to Cox, Ysebaert and Simpson when the air ambulance companies moved for summary judgment, "absent the benefit of further discovery[, did] not show that a state workers' compensation system would have any effect, let alone a significant effect, on air ambulance prices." *Id.* at 322.

It certainly seems the Fee Schedule could cover appellee air ambulance companies' costs of operation. Paragraphs 30 and 31 of the *Amended Complaint* list amounts of "den[ied] payment" they suffered after transporting fourteen injured workers covered by workers' compensation, but they omit how much the air ambulance companies did receive from the Division through medical benefits.[11] *Id.*

[11] An affidavit from Rob Hamilton, Chief Operating Officer of Med-Trans Corporation and Interim President of EagleMed, LLC, did provide amounts received for six of the twelve transports identified in the amended complaint, plus a new seventh one. Aplt. App. at 152. However, Mr. Hamilton did not say whether the

at 72–73. The air ambulance companies also omitted the actual cost of these individual flights or their average operation cost. *Id.* According to Rick Sherlock, Chief Executive of the Association of Air Medical Services, an air ambulance trade group, the cost of an average air ambulance flight is only $9,000 to $10,000. *Id*. at 325 (citing Peter Eavis, *Air Ambulances Offer a Lifeline, and Then a Sky-High Bill*, N.Y. Times, May 5, 2015, at B1).[12] If the air ambulance companies are complaining of "den[ied] payment" well in excess of $30,000 for seven of the flights mentioned in the amended complaint, then it is possible they are billing in excess of their actual costs. *Id*. at 72–73. Unfortunately, Cox, Ysebaert and Simpson had no opportunity to discover information necessary to determine the air ambulance companies' actual costs of operation and whether the Fee Schedule had any measurable effect on prices. *Id*. at 322.

The district court found as a matter of fact that the Division's Fee Schedule "creates a loss that [air ambulances] must recover from other members of the public who have the misfortune of needing air ambulance service." *Id*. at 411. As stated

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amounts paid by the Division failed to cover the cost of these transports. Also, the amounts Mr. Hamilton states the Division "owes" for transports on December 7, 2012, and July 31, 2013, are different than the "den[ied]" payments alleged in the amended complaint for those dates. *Id.* at 152, 72.

[12] Available online at: http://www.nytimes.com/2015/05/06/business/rescued-by-an-air-ambulance-but-stunned-at-the-sky-high-bill.html?_r=0 .

above, Wyoming law does not require the air ambulance companies to alter their charges to "operate at a loss."

Moreover, whether such a loss, in fact, exists cannot be known from the record before the district court. The district court concluded that the "denied compensation" reported by the air ambulance companies in their complaint and exhibits attached to their initial brief meant the companies "claimed substantial sums" when billing the Division to compensate "for unpaid costs over the period that they have each provided service in Wyoming." *Id.* However, the district court also acknowledged that the nature of the air ambulance companies' business requires that they assume that they will not be paid for every transportation of an injured person. *Id.* at 411–12 (citing Bernard F. Diederich, *Air Ambulance: Rescuer or Rescuee?* 62 Fed. Law. 71 (July 2015), in Aplt. App. at 193–202). In such a market, it may be that the Fee Schedule pays out more than air ambulance companies usually receive for transporting injured persons. There is no information in the record to indicate otherwise and there is evidence to suggest the air ambulance companies are enjoying increased revenue despite Section 401(e) and the Fee Schedule. *Id.* at 324–25. There is also evidence the air ambulance market is oversaturated and prices have risen at a staggering rate. *Id.* at 323–24.

As the movants, the air ambulance companies have the burden of proof and must prove there is no material dispute whether the challenged Wyoming law has a

sufficiently significant effect on their prices for the Court to grant summary judgment on this basis for Airline Act preemption. *Costello v. BeavEx Inc*., 303 F.R.D. 295, 302 (N.D. Ill. 2014) (citing *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996)). However, they failed to argue in pleadings or offer evidence that Section 401(e) and the Fee Schedule have any effect at all on air ambulance prices, let alone one of sufficiently significant magnitude to show a violation of the Aviation Act preemption provision. The air ambulance companies failed to make a prima facie showing of an absence of a genuine issue of material fact whether Section 401(e) had a forbidden significant impact on air ambulance prices. Their failure to show an entitlement to summary judgment requires denial of summary judgment in their favor.

III. The district court violated Eleventh Amendment state sovereign immunity by entering the injunctions in this case.

a. The standard of review is *de novo.*

The Court reviews a defendant's claim that a suit is barred by the Eleventh Amendment *de novo*. *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1186 (10th Cir. 1998) (applying "plenary review to issues under the Eleventh Amendment.").

b. *Ex parte Young* does not permit the kind of injunctive relief entered by the district court.

The Eleventh Amendment is a jurisdictional bar against private suits against a state or state agency in federal court. *Elephant Butte Irrigation Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602, 607 (10th Cir. 1998) (citing *Hans v. Louisiana*, 134 U.S.

1, 13–15 (1890)).[13] Eleventh Amendment immunity also precludes suits against state officials in their official capacity because such suits are against the officials' office, not the officials individually, and therefore against the state itself. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013).

Ex parte Young creates a narrow exception to Eleventh Amendment immunity. *Elephant Butte Irrigation. Dist. of N.M.*, 160 F.3d at 607. Under *Ex parte Young*, the Eleventh Amendment does not bar suit in federal court against a state official that only seeks to restrain the official "from taking any steps towards the enforcement of an unconstitutional enactment[,]" even if the same suit could not be brought against the State. *Ex parte Young*, 209 U.S. at 159. In such a case, "no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do." *Id.*

While *Ex parte Young* may allow suits for prospective, injunctive relief against a state official to enjoin future violation of federal law, the doctrine does not permit the award of retroactive or compensatory relief from state funds. *See Elephant Butte Irrigation. Dist. of N.M.*, 160 F.3d at 607–08 (citing *Edelman v.*

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[13] Two exceptions to Eleventh Amendment immunity—a state's consent to be sued or Congressional abrogation of immunity—are inapplicable here. *See Elephant Butte Irrigation. Dist. of N.M.*, 160 F.3d at 607.

Jordan, 415 U.S. 651, 666–68 (1974)). To determine whether a lower court's injunctive relief fits the *Ex parte Young* exception to state official immunity, a reviewing court should "look to the substance rather than to the form of the relief sought" and "be guided by the policies underlying the decision in *Ex parte Young*." *Papasan v. Allain*, 478 U.S. 265, 279 (1986) (citing *Edelman*, 415 U.S. at 668).

Prospective "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Id.* at 278. However, this ancillary-effect exception "'is a narrow one.'" *Ernst v. Rising*, 427 F.3d 351, 368 *(6th Cir. 2005)*, (quoting *Kelley v. Metro. Cnty. Bd. of Educ.*, 836 F.2d 986, 992 (6th Cir. 1987)). A prospective injunction that directly and primarily requires payment of state funds is an injunction for affirmative action. *See Kelley*, 836 F.2d 986 (declining to enter prospective injunction requiring the State, as opposed to a local school board, to bear 60% of the costs of a desegregation decree); *see also Ernst*, 427 F.3d at 369–71 ("'The dividing line' between ancillary relief and essentially compensatory relief … 'is whether the money or the non-monetary injunction is the primary thrust of the suit.'") (quoting *Barton v. Summers*, 293 F.3d 944, 949 (6th Cir. 2002)). *Ex parte Young* does not permit equitable, prospective relief that forces defendant state officials "'acting in their official capacities to extract funds from the State's treasury for the ultimate benefit of the plaintiffs.'" *McDonough Assoc., Inc.*

v. Grunloh, 722 F.3d 1043, 1052 (7th Cir. 2013) (citation omitted). *See Cory v. White*, 457 U.S. 85, 91 n.2 (1982) ("*Edelman* recognized the rule 'that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment[.]'") (quoting *Edelman*, 415 U.S. at 663).

i. Expenditure of State funds is the primary—not ancillary –effect of the injunctions and as such the injunctions are actually against the State and are barred by the Eleventh Amendment.

The injunctions' effect on the Workers' Compensation Account is not ancillary, supplemental or subordinate, but primary and direct. ANCILLARY, Black's Law Dictionary (10th ed. 2014). The district court leaves no doubt that it has ordered the Division to pay more money from the Account through each injunction. (Aplt. App. at 395, 474) ("The Court … elaborated … that the defendants had two options: 'pay the billed rate or seek the Wyoming Legislature's amendment of the statutes[.]'"; *Id.* at 473 ("[B]y … not paying air ambulances for any services, the defendants are again regulating air ambulance rates, only more severely this time around."). The injunctions impose an unchecked, unlimited liability on the Division by affirmatively requiring that the Division use state funds to pay air ambulance companies whatever amounts may be billed in direct violation of constitutional and statutory restrictions on Account expenditures.

The injunctions effectively award future damages base on the district court's flawed conclusion that the Workers' Compensation Act regulates air ambulances and forces them to bill the Division. As discussed above and below, Wyoming law does not require air ambulances to seek compensation from the Division instead of directly billing injured workers. However, the air ambulance companies' "suit by private parties seeking to impose a liability which must be paid from public funds" is barred by sovereign immunity. *Edelman*, 415 U.S. at 663. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 256–57 (2011) ("*Ex parte Young* cannot be used to obtain an injunction requiring the payment of funds from the State's treasury … or an order for specific performance of a State's contract[.]" (internal quotations omitted).

The appellee air ambulance companies might argue that the injunctions require only payment of future bills and therefore satisfy the inquiry put forth by the United States Supreme Court in *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). The Supreme Court held that "[i]n determining whether the doctrine *of Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc.*, 535 U.S. at 645 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997)).

Retrospective damages are disallowed, even if packaged as prospective, "because any such judgment is deemed directed at the state as the real party in interest rather than the nominal officer*." Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1233 (10th Cir. 2010) (citing *Edelman*, 415 U.S. at 664–71)).

Although the injunctions here are not retrospective, they are in substance directed at the State as the real party of interest. Neither injunction can be satisfied except by direct payment of Wyoming state funds from the Workers' Compensation Account. "If a State's constitution and statutory law make the State responsible for funding a certain agency's programs, that reality makes the State potentially responsible for a judgment against that agency[.]" *Ernst*, 427 F.3d at 364. Because only State action with State funds can satisfy the injunctions, they bind the State as the true party to the air ambulance companies' lawsuit. *See Muscogee (Creek) Nation*, 611 F.3d at 1233 (holding the state as the real party of interest, because state treasury would be bound to satisfy the judgment for money damages as directed at judgment). Only the Division is monetarily liable for future compliance with the injunctions.

It is worth noting the amended complaint did not ask the district court to command Cox, Ysebaert and Simpson to take affirmative action and pay more from the Account than prescribed by the fee schedule. (Aplt. App. at 74–75). In briefing to the district court, Cox, Ysebaert and Simpson argued that such relief would not

be permissible under sovereign immunity because a "suit nominally filed against a state official is held to be a suit against the state if the state official would be compelled to carry out an action with the state's funds." *Id.* at 302 (citing *See Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 50 (1944)). The air ambulance companies did not respond to or rebut this argument.

ii. Not only do the injunctions have a non-ancillary effect on state funds, they are in substance injunctions against the state itself because they divest the Wyoming Legislature, the Division and the Director of authority granted by Wyoming Constitution and Wyoming statute.

The district court exceeded the narrow *Ex parte Young* exception to state official immunity by interfering with the Wyoming Legislature's exclusive jurisdiction and forcing Cox, Ysebaert and Simpson and the Division to act in disregard of the unambiguous language of Wyoming law. Injunctive relief that effectively nullifies limits on agency action imposed by a state constitution and statutes is as intrusive as any retroactive levy on a state treasury.

In *Coeur d'Alene Tribe*, the Supreme Court imposed a new requirement for application of *Ex parte Young* and barred federal jurisdiction over lawsuits that implicated special state sovereignty interests. *Elephant Butte Irrigation. Dist. of N.M.*, 160 F.3d at 608-9 (citing *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 281). The Supreme Court held that if Coeur d'Alene Tribe prevailed in a quiet title action for certain lands against the defendant state officials then "Idaho's sovereign interest in

its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 287. Later, in *Verizon Maryland v. Public Service Commission of Maryland*, the Supreme Court simplified the *Ex parte Young* analysis, but did not completely erase the need to look beyond whether the relief sought is described as prospective to consider its actual substance. *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (discussing *Verizon Md.*, 535 U.S. at 635).

The necessary "question posed by *Coeur d'Alene* is not whether a suit implicates a core area of sovereignty, but rather whether the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself." *Goldberg v. Ellett (In re Ellett)*, 254 F.3d 1135, 1143 (9th Cir. 2001). A federal suit that would "dictate which programs the State may choose (or not choose) to fund with revenues from its specialty license plate scheme" is the kind of suit that "calls to mind the sort of literal land grab effort made by the plaintiffs in *Coeur d'Alene* with its consequent significant implications on the state fisc." *Hill v. Kemp*, 478 F.3d at 1260. It is a step too far for a federal court to dictate the level of program funding a State may choose, or not choose, with State money. *Id*.

In addition, traditional notions of equity jurisprudence require that "equitable remedies imposed in consequence of a violation of the law may 'extend no farther

than required by the nature and the extent of that violation.'" *Kelley*, 836 F.2d at 1000 (quoting *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982)). This is "particularly important when it is proposed that the remedial powers of the federal courts be exercised 'to restructure the operation of local and state governmental entities.'" *Kelley*, 836 F.2d 986, 1000 (6th Cir. 1987) (quoting *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976)). The injunctions do not merely enjoin Cox, Ysebaert and Simpson from taking future action the district court concluded they lacked legal right to do. *See Ex parte Young*, 209 U.S. at 159; *Morales*, 504 U.S. at 382–383. Instead the district court's injunctive relief reaches into the Wyoming Legislature's power, and it grants payment for air ambulance services using Wyoming state funds in a manner contrary to the Legislature's unambiguous language in Section 401(e). The district court also divested the Director of his discretion to establish fee schedules that ensure the Workers' Compensation Account's long-term viability. This is a problem for four reasons.

First, the injunctions effectively re-legislate the Wyoming Act, which the Wyoming legislature created under a state constitutional mandate. The Wyoming Constitution was specifically amended to permit the Wyoming workers' compensation scheme and to limit an employer's tort liability to an injured worker. *See* Wyo. Const. art. 10, § 4; *Anderson v. Solvay Minerals, Inc.*, 3 P.3d 236, 238-39 (Wyo. 2000) *overruled on other grounds by Collins v. COP Wyo., LLC*, 2016 WY

18, 366 P.3d 521 (Wyo. 2016) ("Following the adoption of this amendment, the legislature passed a bill … codified as Wyo. Stat. Ann. §§ 27-14-101 through – 27-14-80[6]."). Section 4(c) of the Wyoming Constitution provides:

> As to all extrahazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation as may be fixed by law … The fund or funds shall be accumulated, paid into the state treasury and maintained in such manner as may be provided by law. **Monies in the fund shall be expended only for compensation authorized by this section**.

Wyo. Const. art. 10, § 4 (emphasis added). No money can be paid from the Wyoming workers' compensation fund created under the Wyoming Constitution except as permitted by law passed by the Wyoming Legislature. *See State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 33 P. 125, 131 (1893). (*Contra* Aplt. App. at 395 ("The Court cannot find a "textually demonstrable constitutional commitment" of this issue to a different branch of government")).

Under this constitutional command, the Wyoming Legislature created the Workers' Compensation Account and ordered that the Director set a fee schedule for the Division to obey when paying medical benefits for ambulance charges. *See* Wyo. Stat. Ann. §§ 27-14-701, 27-14-401(e). Through Section 401(e), the Wyoming Legislature requires the Division to follow this fee schedule.

As statutory entities, Wyoming State agencies exercise only those powers delegated by the Wyoming legislature. *State ex rel. Dep't of Workforce Servs. v.*

Clements, 2014 WY 68, ¶ 14, 326 P.3d 177, 181 (Wyo. 2014) (quotation and internal citations omitted). A state "agency is wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority." *Id*. Agency action in excess of statutory authority law "is null and void." *Id.*

Section 401(e) provides the Division **shall** allow a reasonable charge for the necessary "ambulance service at a rate not in excess of the rate schedule established by the director under the procedure set forth for payment of medical and hospital care." A statute is to be interpreted in accordance with its plain meaning, and the term "shall" in Section 401(e) makes the Division's application of Section 401(e) mandatory. *Guy v. Lampert*, 2015 WY 148, ¶ 15, 362 P.3d 331, 336 (Wyo. 2015); *Sinclair v. Sinclair*, 2015 WY 120, ¶ 11, 357 P.3d 1100, 1103 (Wyo. 2015). Section 401(e) grants the Division only conditional authority to pay benefits. It requires the Division to pay air ambulance charges only if those explicit conditions are met. The Division is without authority to pay medical benefits for unreasonable ambulance charges or to pay in excess of the Fee Schedule.

The injunctions demand payment for medical benefits beyond what Section 401(e) allows. The district court ordered the Division to pay whatever an air ambulance company charges, and, in so doing, ordered the Division to do something

it cannot do lawfully as a State agency.[14] To comply with the injunctions, the Division must expend money from the Account without authority from the Wyoming Legislature. The district court's injunctions rewrite Section 401(e) and divest the Division of limitations imposed by the Wyoming Legislature.

By re-legislating Section 401(e) to create a sweeping entitlement for air ambulances to receive whatever payment of medical benefits they wish, the injunctions create a new, preferential provision of medical benefits. It is not the federal courts' "function to propose regulatory schemes for the States. That must await their concrete legislative efforts." *Miller v. California*, 413 U.S. 15, 25 (1973). The injunctions exceed any area of judicial expertise and intrude into the operation of the state's workers' compensation program. Just as the Court held that plaintiffs in *Tarrant Regional Water District v. Sevenoaks* could not seek prospective injunctive relief for their water appropriations application to receive preferential treatment compared to instate applications, so too it is inappropriate for the district

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[14] The district court wrote that Cox, Ysebaert and Simpson's argument that enjoining enforcement of Section 401(e) forecloses payment of medical benefits toward air ambulance services to be "novel and newly-raised." (Aplt. App. at 474). It is neither. Cox, Ysebaert and Simpson argued in briefing and during oral argument that declaring section 401(e) void as preempted would not remedy the air ambulance companies' alleged economic injury, because it would result in the Division refusing payment for air ambulance charges based on a lack of statutory authority. *Id.* at 304–307, 515–516, 529. The analysis here is the same: if the Division cannot apply Section 401(e) as written, it lacks legal authority to pay air ambulance charges.

court to give air ambulances a preferential and unchecked right to state funds. *See Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008). The Wyoming Legislature allowed only limited payment of medical benefits for ambulance transportation, just as it allowed only limited benefits for medical services and hospital stays. Prudential considerations would counsel against judicial intervention to expand this coverage and intrude into the Wyoming Legislature's exclusive jurisdiction under the Wyoming Constitution for workers' compensation fund expenditure.

The second problem with the district court's divesture of Director discretion to set fee schedules is that it denies the Wyoming Legislature its ability to control the state workers' compensation program that it alone created. Terms of the injunctions are absolute: the Division must pay for air ambulance services without regard to the existing language of Section 401(e) or any future amendments to Section 401(e). If the Legislature decided to exclude air ambulance services from medical benefits coverage, the injunctions would remain, forcing the Division to pay air ambulance charges.

The district court considered what would be permissible state action following a determination that the Airline Act preempted Section 401(e). That analysis and the district court's sharp criticism of Cox, Ysebaert and Simpson's contrary interpretation leave no doubt that the State of Wyoming has only two options for the

future of its workers' compensation program: either pay whatever air ambulances charge or have the Wyoming Legislature amend Section 501(a) to allow balance billing. (Aplt. App. at 395, 473). The Wyoming Legislature appears to have lost its constitutional authority to amend the law and remove air ambulance services as a permissible expense at all for the Account. Understood this way, the injunctions' absolute terms violate both state sovereignty and the separation of powers.[15]

Third, the injunctions stripped the Director of his discretion under Wyoming Statutes §§ 27-14-401(e) and 802(b) to establish ambulance fee schedules. A federal court's prospective injunction to control a state official's exercise of discretion violates state sovereign immunity. *See Ex parte Young*, 209 U.S. at 158 ("There is no doubt that the court cannot control the exercise of the discretion of an officer."); *Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1875) ("[A] court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter."). The district court relieved the Director of all authority under Section 401(e). Director Cox, his subordinates and the Division will be relegated to merely signing the checks air ambulances companies write themselves from the Account. It is the same as if the injunctions commanded the Director in his

[15] This absurd result exists only because of the injunctions. No party has identified a right to state funds under the Airline Act or other federal statute. Any right to payment under State law, of course, exists at the sufferance of the Wyoming Legislature, which the district court appears to have foreclosed.

official capacity to issue a new fee schedule requiring the Division pay all air ambulance charges in full. "Such relief clearly violates *Edelman* and thus cannot be saved by reliance on *Ex parte Young*." *McDonough Assoc., Inc.*, 722 F.3d at 1052 (holding prospective injunctive relief with the primary effect of paying state funds to private parties to be "tantamount to signing a check made out to plaintiffs" in violation of *Edelman*).

Lastly, the injunctions involve "particular and special circumstances" affecting "special sovereignty interests" and cause "offense to [the state's] sovereign authority," *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 281-82. State workers' compensation programs are a unique exercise of state police powers ceded to the States by Congress. *See* 28 U.S.C. § 1445(c). Congress has repeatedly excluded state workers' compensation from its regulatory ambit—even in its most broadly preemptive legislation, ERISA.[16]

The Supreme Court has recognized that states regulate their workers' compensation systems as an exercise of their police powers. "States possess broad

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[16] *See, e.g.*, ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3)) (ERISA's exclusion of state workers' compensation laws from preemption); *see also* Affordable Care Act, 42 U.S.C. § 300gg-91(c)(1)(D) (defining benefits not subject to requirements). Courts have also applied the presumption to preclude Federal Aviation Act preemption of Texas tort law, "which has long been concerned with securing compensation for [the state's] citizens who sustain injuries by defective product." *Morris v. Cessna Aircraft Co.*, 833 F. Supp. 2d 622, 630 (N.D. Tex. 2011).

authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples." *De Canas v. Bica*, 424 U.S. 351, 356 (1976). Thus, "[c]ourts have found that labor laws, such as a state prevailing wage statute, are not preempted by [the Federal Airlines Deregulation Act]." *Hamilton v. United Airlines, Inc.*, 960 F. Supp. 2d 776, 785 (N.D. Ill. 2012) (citing *Californians for Safe & Competitive Dump Truck Trans. v. Mendonca*, 152 F.3d 1184, 1188 (9th Cir. 1998)). Following the Supreme Court's "cautionary note" to avoid overly broad Airline Act preemption, the Fifth Circuit held the Airline Act did not preempt an American Airlines employee's cause of action for retaliation under the Texas Workers' Compensation Act against the airline after filing a workers' compensation claim. Similarly, no reason exists to interpret the Airline Act so broadly as to displace state workers' compensation medical fee and provider billing regulations. *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 597 (5th Cir. 1993) ("Following the Supreme Court's cautionary note in *Morales*, we can safely conclude that the [Airline] Act does not pre-empt a claim for money damages under article 8307c."); *see Wolens*, 513 U.S. at 233 (holding Congress did not intend to preempt state-level resolution of "the range of contract claims relating to airline rates, routes or services. The [Airline Act] contains no hint of such a role for the federal courts."); *see Morales*, 504 U.S. at

388–89, 390 (1992) ("[W]e do not … set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines[.]").

Also, under the Workers' Compensation Act, employees relinquish rights to certain tort actions in exchange for speedy relief for their injuries through defined benefits. *Herrera v. Phillipps*, 2014 WY 118, ¶ 9, 334 P.3d 1225, 1228 (Wyo. 2014) (citation omitted). "[A state's] interest in fashioning its own rules of tort law is paramount to any discernible federal interest[.]" *Martinez v. California*, 444 U.S. 277, 282 (1980). By ordering Cox, Ysebaert and Simpson to pay all air ambulance bills in full, the district court has restructured the workers' compensation medical benefits allowed by the Wyoming Legislature for ambulance transportation.

iii. The injunctions expose the Account to an unchecked and unlimited liability which compromise the long-term viability of a Wyoming workers' compensation program.

The ability of air ambulances to collect from the Division whatever amounts they choose exposes the Division to unlimited liability. Air ambulance companies get a blank check, payable from the Workers' Compensation Account. Nothing prevents air ambulance companies in Wyoming from exploiting the injunctions to pay themselves whatever millions of dollars they choose to receive. To keep the workers' compensation system self-sustaining, the Division would be forced to raise employer payroll taxes to satisfy this unprecedented, unchecked liability. Wyo. Stat. Ann. § 27-14-201(a). If premiums get so high that Wyoming employers no longer

see benefit in a state workers compensation system, the system as a whole will be compromised.

c. The *Ex parte Young* exception to Eleventh Amendment immunity does not apply because appellee air ambulance companies are not threatened with irreparable harm from an unlawful enforcement action by Appellants Cox, Ysebaert and Simpson.

The air ambulance companies do not have a cause of action to invoke the power of the district court to sue Wyoming state officials Cox, Ysebaert and Simpson. They had no cause of action under either the Supremacy Clause or the Declaratory Judgment Act. *Air Evac EMS, Inc. v. Texas*, No. A-16-CA-060-SS, 2016 WL 4259552, at *5-6 (W.D. Tex. Aug. 11, 2016), *appeal docketed*, No. 16-51023 (5th Cir. January 28, 2016); *Armstrong v. Exceptional Child Ctr., Inc.*, – U.S. –, 135 S. Ct. 1378, 1385 (2015).[17] The Airline Act also did not create a cause of action under which they can sue. *Buck*, 476 F.3d at 33-34 ("[F]or the purpose of implying private rights of action, the Federal Aviation Act (and, hence, the [Airline Act] …) is barren soil.") (parentheses in original); *Air Transp. Ass'n of Am. v. Pub. Util. Comm'n of Cal.*, 833 F.2d 200, 207 (9th Cir. 1987) ("The requisite indicia is lacking in the legislative history of the statute that Congress intended to create a private right

[17] In addition to naming state officials Cox, Ysebaert and Simpson as defendants, the other significant change the air ambulance companies made in their amended complaint was to request injunctive relief. The original request was only for declarative judgment and it could be dismissed without *Ex parte Young* analysis.

of action or remedy under the statute.").[18] Even if state law explicitly disallows an air carrier to operate as an air carrier during certain months of the year—a clear regulation of service—the air carrier cannot sue for relief under the Airline Act alone for lack of a protected federal right or cause of action. *See Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 93, 97-98 (2d Cir. 1986) (citation omitted).

Without a cause of action under the Supremacy Clause, Declaratory Judgment Act or the Airline Act, the air ambulance companies can bring only a cause of action against Cox, Ysebaert and Simpson in equity under *Ex parte Young*. In *Morales* and similar cases, the suing air carriers' cause of action arose in equity and the lawsuits had to comply with the equitable principles of the *Ex parte Young* doctrine. *See Morales*, 504 U.S. at 381 (stating need to follow basic doctrines of equity jurisprudence as a court of equity).

Lawsuits in equity under *Ex parte Young* require that a plaintiff show either an existing enforcement action under state law alleged to violate federal law or the imminent threat of such enforcement. *Armstrong*, 135 S. Ct. at 1384; *Air Evac EMS, Inc.*, No. A-16-CA-060-SS, 2016 WL 4259552, at *7. An enforcement action means that state officers have at least threatened to imminently "commence proceedings,

[18] The air ambulance companies asked the district court to recognize a "right under federal law to be free from State regulation of their prices, routes, and services." (Aplt. App. at 145, 369). Such a right does not exist under the Airline Act. The amended judgment should be reversed if it acknowledges such a right.

either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Morales*, 504 U.S. at 381 (quoting *Ex parte Young*, 209 U.S. at 145–147, 163–165). "When [such] enforcement actions are imminent—and at least when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses—there is no adequate remedy at law." *Id.* (citing *Ex parte Young*, 209 U.S. at 145–147). "Any other rule … would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable." *Id.* at 382–83.

In *Morales*, application of this rule meant the Supreme Court had to amend that district court's injunction against the defendant-petitioner state official from prohibiting "'initiating any enforcement action ... which would seek to regulate or restrict any aspect of the ... plaintiff airlines' air fare advertising or the operations involving their rates, routes, and/or services.'" *Morales*, 504 U.S. at 382. Defendant-petitioner had only threatened to enforce obligations in the challenged guidelines regarding fare advertising; the portion of the injunction restraining operation of state law on other matters was vacated. *Id.* at 382-83.

The air ambulance companies have argued that Cox, Ysebaert and Simpson enforced Section 401(e) against them "by considering and denying [their] claims for

full reimbursement[.]"Appellees' Joint Resp. at 11. However, this is not the kind of state action that *Ex parte Young* concerns. Enforcement actions under the *Ex parte Young* Doctrine are fines, penalties and lawsuits filed by the state which cause irreparable damage for plaintiffs who lack proper opportunity for review by state courts. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 273–74 (citations omitted). When these kinds of enforcement action are imminent, and the affected party has no realistic opportunity of violating the law once and then raising federal law defenses, the affected party may proceed in equity against the state officials threatening or commencing enforcement. *See Morales*, 504 U.S. at 381 (citing *Ex parte Young*, 209 U.S. at 145–147).

Wyoming law does not prescribe criminal penalties as might allow the State to undertake enforcement actions as conceived by *Ex parte Young*.[19] Wyoming law does not create fines or penalties to punish air ambulances who choose to directly collect from injured workers instead of the Division or choose to bill the Division in excess of the Fee Schedule. There is no action an air ambulance could take that

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[19] Wyoming Statutes § 27-14-510 makes it a felony or misdemeanor for persons and employers to knowingly make false representations to the Division to receive money, increased benefits, or reduced premiums. An employer who willfully or by gross negligence fails to file an injury report, or a nonresident employer in covered employment who willfully fails to give required security, commits a misdemeanor punishable by fine. Wyo. Stat. Ann. §§ 27-14-506(c), 307. The Division can collect delinquent employer premiums and other liabilities through civil suit. Wyo. Stat. Ann. § 27-14-203.

would violate Section 401(e) and lead to an enforcement action. If the Division pays medical benefits in an amount less than billed, this is not punishment for air ambulances charging in excess of what is reasonable or allowed by the Fee Schedule. The Division pays what it does, because Section 401(e) regulates and limits what the *Division* is authorized to pay. Therefore, because there is no threat of state enforcement action, the air ambulance companies lack the necessary cause of action in equity to challenge Section 401(e).

Although the decision was not available to district court, the analysis of Wyoming's law should mirror the analysis of the U.S. District Court in Texas in *Air Evac EMS, Inc.* There, the challenged Texas law (Tex. Labor Code § 413.011(a)) "controls medical costs in the workers' compensation setting by requiring the Texas Workers' Compensation Commission 'to establish fee guidelines for reimbursements to health care providers who treat injured workers.'" *Air Evac EMS, Inc.*, No. A-16-CA-060-SS, 2016 WL 4259552, at *2 (quoting *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 647 (Tex. 2004)). The district court held there was no threat of enforcement against the plaintiff air ambulance, because Texas law did not prescribe air ambulance conduct. *Air Evac EMS, Inc.*, No. A-16-CA-060-SS, 2016 WL 4259552, at *8. Air ambulances in Texas are free to set any price desired without fear they might violate the Texas law and the state would enforce the law against them. *Id.* The Texas law only regulated

the insurance companies issuing workers' compensation benefits by requiring they pay air ambulances in accordance with reimbursement guidelines adopted by the Texas Workers' Compensation Commission. *Id.* Similarly, Section 401(e) only conditions the Division's ability to issue medical benefits for ambulance charges.

As discussed above, the Air Ambulance companies argue they have no choice "whether to submit claims through the Workers' Compensation program or to seek payment directly from employees" under the authority of Wyoming Statutes §§ 27-14-501(a) and (d). Appellees' Joint Resp. at 15. Leaving aside the potential that this statement is a statement of fact nowhere proven on the record, neither the Division nor appellants Cox, Ysebaert and Simpson have ever threatened to use any part of Section 501 in an enforcement action against the air ambulance companies for billing injured workers directly. As a matter of law, there is no statutory or regulatory authority for enforcement that the Division or Cox, Ysebaert and Simpson could use against air ambulances. As explained above, the Air Ambulance companies must comply with Section 501(a) only when they voluntarily choose to seek compensation from the Division according to its rules and statutes.[20]

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[20] The Division and Cox, Ysebaert and Simpson also never threatened to use any part of Section 501 in an enforcement action against air ambulances for choosing to balance bill injured workers. The air ambulance companies lack a cause of action in equity to sue for preemption of Section 501(a), because they cannot show an imminent threat of enforcement action. *See Air Evac EMS, Inc.*, No. A-16-CA-060-SS, 2016 WL 4259552, at *8.

The Division and Cox, Ysebaert and Simpson also never threatened to use any part of Section 501 in an enforcement action against Air Ambulances for choosing to balance bill injured workers. As in *Air Evac EMS, Inc.*, the Air Ambulance companies lack a cause of action in equity to sue for preemption of Section 501(a) in district court, because they cannot show any imminent threat of enforcement action under its authority. *See Air Evac EMS, Inc.*, No. A-16-CA-060-SS, 2016 WL 4259552, at *8.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is set for 9:00 a.m. on November 14, 2016.

CONCLUSION

For the reasons set forth above, Appellants John Cox, John Ysebaert, and Pete Simpson, in their official capacities, respectfully request that this Honorable Court issue determine that the Workers' Compensation Act does not regulate Air Ambulance prices and the Airline Act does not preempt the Workers' Compensation Act, Wyoming Statute § 27-14-401(e) and the Fee Schedule. Appellants also respectfully request that this Honorable Court reverse the district court's *First Amended Judgment* to the extent it: grants Air Ambulances' *Motion for Summary Judgment*; holds state officials Cox, Ysebaert and Simpson not immune under the

Eleventh Amendment of the Constitution of the United States; enjoins Cox, Ysebaert and Simpson and their employees and agents from "enforcing Wyoming Statute Section 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the Wyoming Workers' Compensation Division"; and requires Cox, Ysebaert and Simpson and their employees and agents "to compensate air ambulance entities the full amount charged for air ambulance services."

DATED this 4th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,999 words. I relied on my word processor to obtain the count and it is Word Version 2013.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

By. /s/ Charlotte M. Powers
Assistant Attorney General

CERTIFICATE OF PRIVACY REDACTIONS, DIGITAL SUBMISSION & VIRUS SCAN

I hereby certify that the digital submission of the Appellees' Brief is an exact copy of the written document filed with the clerk and it has been scanned for viruses with the most recent version of Malwarebytes Anti-Maleware Version v2016.09.02.07, on October 4, 2016 and, according to that program is free of viruses. In addition, I certify all required privacy redactions have been made.

/s/ Charlotte M. Powers
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' OPENING BRIEF** was furnished through (ECF) electronic service to the following on the 4th day of October, 2016:

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