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Vectors: Immunity in Commercial Aviation

Timothy M. Ravich

VECTORS: IMMUNITY IN COMMERCIAL AVIATION

TIMOTHY M. RAVICH*

ABSTRACT

COVID-19 nearly wiped out demand for commercial air travel in 2020, driving down passenger traffic by a jaw-dropping 94.3% from the previous year. The airline industry thus understandably lobbied for a government bailout to manage what was nothing short of an existential crisis, with losses exceeding $35 billion. Less worthy of sympathy, however, were the ad hoc policies airlines unhelpfully put in the path of their customers even while securing for themselves $25 billion in payroll grants together with a similar sum in low-interest loans. For example, carriers refused to provide refunds or liquidate travel credits in a straightforward way for those whose travel was impacted during the pandemic. These consumer practices spawned a number of class action "refund cases" around the nation—nearly all of which were doomed to fail at the earliest stages of litigation under the terms of the Airline Deregulation Act of 1978, which expressly requires courts to dismiss lawsuits related to airline prices, routes, and services.

But should the law recognize a pandemic exception and allow consumer tort claims to proceed against airlines arising from the transmission of infectious diseases? For that matter, could or should airlines be liable for crew-to-passenger or passenger-to-passenger transmission of infectious diseases? This Article argues no even if the risk of epidemics and pandemics are happening more regularly over the last few decades. Notwithstanding numerous examples of despicable and infuriating airline policies and practices related to the pandemic that would be remediable by operation of law if undertaken by other businesses, the exceptional legal immunity airlines have with respect to general consumer torts promote important and stabilizing economic policies that should not be undone by courts.

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* Associate Professor, University of Central Florida, Department of Legal Studies.

What is more, courts should bar negligence suits against airlines arising from the alleged transmission of infectious diseases lest they become immersed in hopeless evidentiary and administrative problems.

In all, as a normative and practical matter, courts should have a minimal role in the enforcement of consumer protection issues under the explicit terms of the Airline Deregulation Act. And, when presented with controversies implicating airline deregulation, courts should construe existing national and international aviation service and safety laws as preempting lawsuits against airlines for consumer claims and torts connected to the transmission of infectious microorganisms on commercial aircraft. To be clear, while this Article bemoans undesirable consequences of the Airline Deregulation Act relative to passenger claims arising from public health crises now and in the future, it argues that any policy changes that should or might occur must do so by lawmakers alone.

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INTRODUCTION

Something was in the air—literally, the COVID-19 virus—when Ellen Schiller called her airline to cancel a March 8, 2020, Boston to Rome trip because Italy was closing down.[1] The airline talked her out of it, recommending instead that she should wait until her flight was officially cancelled because that was the only event that would qualify her for a refund of her tickets, totaling more than $3,000 for her family of five.[2] As it turned out, the flight departed as scheduled—without the Schiller family; Italy imposed a national quarantine the very next day.[3] The airline did not officially cancel the flight, and on that basis, considered the Schiller family "no-shows."[4] Consequently, the airline claimed that the passengers forfeited any right to a refund because they did not earlier rebook their flight to a random later date with the hope that it would be cancelled.[5] Over time the airline relaxed its position, offering the Schillers a voucher based on an "updated" policy.[6] But the experience was a bad one for the Schillers, and many other airline passengers had similar inconvenient dealings with airlines.[7] "The runaround we got was insane," Mrs. Schiller recounted.[8] The airline "was 'intentionally evasive, difficult, and clearly trying to avoid providing a refund or a credit. I believe they were counting on my giving up hope.'"[9] Indeed, as the Wall Street Journal's travel column put it, "[t]he Alitalia example shows how airlines have essentially been making up their own rules to hold on to customer cash" during the pandemic.[10]

To be fair, that airlines struggled to accommodate their customers at the start of a once-in-a-century scourge is unremarkable in that the spread of the novel coronavirus shocked the airline

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[1] Scott McCartney, *Airlines Are Withholding Billions in Refunds—That's Billions with a B*, WALL ST. J. (Aug. 13, 2019, 9:13 AM) [hereinafter *Withholding Billions*], https://www.wsj.com/articles/airlines-are-withholding-billions-in-refundsthats-billions-with-a-b-11597238005 [https://perma.cc/HFB4-A9Z7].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

industry perhaps more significantly than it did any other service-oriented firm in the economy worldwide.[11] In fact, COVID-19 overwhelmed airlines everywhere, plunging demand for travel in 2020 and reducing commercial passenger traffic by an astonishing 94.3 percent year on year.[12] Airlines grounded fleets to an extent not seen since September 11, 2001, while aspiring pilots reconsidered their career options and veteran pilots found new work—some as truck drivers.[13] Several carriers, including Chile's Latam, Columbia's Avianca, and the United Kingdom's Virgin Atlantic, filed for bankruptcy reorganization.[14] Traffic remained depressed into the early 2020s as airline executives expected corporate travel to take years to recover.[15] The COVID-19 pandemic thus presented an existential crises to the airline industry, which rationally responded by holding liquidity while lobbying the government for a bailout that, controversially, bordered on nationalization.[16]

But the victimized airline industry also played the role of victimizer, or at least aggravator, by inventing numerous administrative headaches for their passengers before and even after securing

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[11] Xiaoqian Sun et al., *COVID-19 Pandemic and Air Transportation: Successfully Navigating the Paper Hurricane*, 94 J. OF AIR TRANSP. MGMT. 1, 1 (2021).

[12] *Air Passenger Market Analysis*, INT'L AIR TRANSP. ASS'N 1 (Apr. 2020), https://www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-monthly-analysis---apr-20202/ [https://perma.cc/7WEU-YFNM].

[13] *See* Benjamin Katz et al., *From Pilot to Truck Driver—Airline Careers Grounded by Pandemic*, WALL ST. J. (Dec. 7, 2020, 1:52 PM), https://www.wsj.com/articles/from-pilot-to-truck-driverairline-careers-grounded-by-pandemic-11607367164 [https://perma.cc/LCC4-8LY8].

[14] *Withholding Billions*, *supra* note 1.

[15] *See* Alison Sider, *Airlines Lower Expectations for Profits as Business Slows*, WALL ST. J., Sept. 10, 2021, at A1. To stimulate demand, airlines like United Airlines implemented a policy requiring all of its U.S. employees to be vaccinated against COVID-19 or else face termination. *See* Alison Sider, *United Airlines Employees Sue Over Vaccination Order*, WALL. ST. J., Sept. 23, 2021, at B5. Several of the carrier's employees sued, alleging discrimination by the airline against employees who have a religious objection to receiving the vaccine, or who qualify for accommodations on medical grounds. *See id.*

[16] *See Welcome to Uncle Sam Airways*, WALL ST. J. (Apr. 1, 2020, 6:57 PM), https://www.wsj.com/articles/welcome-to-uncle-sam-airways-11585781864 [https://perma.cc/4U7T-Y9JY] ("Helping the airlines weather a 100-year pandemic might be, arguably, within the government's job description. Owning them isn't."); *see also* Roger Lowenstein, Opinion, *Airlines Don't Deserve Another Tax-Payer-Financed Bailout*, L.A. TIMES (Oct. 19, 2020, 4:00 AM), https://www.latimes.com/opinion/story/2020-10-19/airlines-bailout-coronavirus-stimulus-bill [https://perma.cc/7P8E-HGBA].

from taxpayers $25 billion in payroll grants together with a similar sum in low-interest loans.[17] In addition to refusing to issue refunds as in the case of the Schillers,[18] for example, airlines made using airline credits incredibly difficult, too.[19] In one (pre-pandemic) instance a domestic passenger who cancelled a trip because of a family illness rebooked the trip in order to keep a credit from expiring; the airline charged her a predeparture baggage fee again and again, each time she rebooked, even though she never left home.[20] "I'm into this for $250 for luggage that went nowhere," the passenger said.[21] Regrettably, these and other cringeworthy examples of airline passenger conflict are not uncommon—pandemic or no pandemic.[22] But, they are not necessarily illegal either.[23]

Airlines have complete immunity from state consumer laws by operation of the federal law known as the Airline Deregulation Act of 1978.[24] The law explicitly nullifies the enactment or enforcement of any nonfederal "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation."[25] As the Supreme Court recognized, Congress enacted this law to formally substitute a forty year period of government regulation of nearly every economic aspect of an airline's business with "maximum reliance on competitive market forces and on actual and potential competition ... [t]o encourage efficient and well-managed carriers to earn adequate profits and attract capital."[26] As a consequence of

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[17] Government aid to airlines during the pandemic was a worldwide affair. *See, e.g.*, Ruth Bender, *Lufthansa Gets $9.81 Billion in Aid*, WALL ST. J., May 26, 2020, at B1–B2 (discussing potential bailout deal allowing the German government to take a twenty percent stake in Deutsche Lufthansa AG and appoint two supervisory board seats).

[18] *Withholding Billions*, *supra* note 1.

[19] *Id.*

[20] Scott McCartney, *Airlines Aren't Making It Easy to Use Covid Credits*, WALL ST. J. (Dec. 31, 2020, 11:02 AM) [hereinafter *Airlines Aren't Making It Easy*], https://www.wsj.com/articles/airlines-arent-making-it-easy-to-use-covid-credits-11609171369 [https://perma.cc/N979-NB3T].

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] 49 U.S.C. § 41713(a), (b)(1).

[25] 49 U.S.C. § 41713(b)(1).

[26] 49 U.S.C. § 40101(a)(6); *see also* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. § 1302(a)(4), (a)(9)).

this express legislative intention, state consumer protection laws are all but useless when asserted against airlines, which possess a rare and powerful set of legal defenses (i.e., preemption) that are not usually available to firms in similar commercial cases. Stated otherwise, claims such as deceptive and unfair trade practices, unjust enrichment, or breach of contract routinely proceed and succeed against companies in state and federal court, but regularly fail at the pleading stage on the basis of the Airline Deregulation Act when asserted by airline passengers against airlines.[27]

Indeed, consumer-oriented lawsuits against airlines rarely ever get off the ground—by design.[28] Relatedly, an extensive body of literature exists detailing the inverse relationship between airline service, on the one hand, and customer satisfaction, on the other hand, as a result of deregulation.[29] But while the benefits and drawbacks of airline deregulation are debatable in "normal" circumstances, the potential unfairness for consumers (like the Schillers) arising from the laissez faire regulatory policies underlying the Airline Deregulation Act is particularly apparent in the context of difficult circumstances (e.g., COVID-19) that are relatively less in the control of passengers than of airlines.[30] No

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[27] *See* Paul Dempsey, *Federal Preemption of State Regulation of Airline Pricing, Routes, and Services: The Airline Deregulation Act*, 10 FIU L. REV. 435, 438, 440 (2015); *see also* All World Pro. Travel Servs., Inc. v. Am. Airlines, Inc., 282 F. Supp. 2d 1161, 1169 (C.D. Cal. 2003).

[28] *See, e.g.*, Christopher Elliott, *Refund-Related Lawsuits Against Airlines are Taking Off, but Will They Succeed?*, USA TODAY (May 15, 2020, 7:00 AM) [hereinafter *Refund-Related Lawsuits*], https://www.usatoday.com/story/travel/advice/2020/05/15/coronavirus-want-sue-your-airline-get-refund-read-first/5185753002/ [https://perma.cc/3EHQ-GCVG].

[29] *See, e.g.*, Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. REG. 325, 325 (1990) [hereinafter *Deregulation: Looking Backward*]; *see also* Andrew R. Goetz & Paul Stephen Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927, 943 (1989); Melvin A. Brenner, *Airline Deregulation—A Case Study in Public Policy Failure*, 16 TRANSP. L.J. 179, 192 (1988); Alfred E. Kahn, *Airline Deregulation—A Mixed Bag, but a Clear Success Nevertheless*, 16 TRANSP. L.J. 229, 251 (1988); Michael E. Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 L. & CONTEMP. PROBS. 179, 194 (1981); C. Vincent Olson & John M. Trapani, III, *Who Has Benefited from Regulation of the Airline Industry?*, 24 J.L. & ECON. 75, 76 (1981); WILLIAM A. JORDAN, AIRLINE REGULATION IN AMERICA: EFFECTS AND IMPERFECTIONS 4 (1970).

[30] *See* Goetz & Dempsey, *supra* note 29, at 962.

company wants to refund monies or cancel contracts, of course, let alone during a period in which the firm's very existence is at stake. At the same time, however, a legal regime such as the Airline Deregulation Act that affords consumers little to no leverage when bargaining with powerful firms is problematic.[31] For that matter, many other companies severely impacted by the COVID-19 pandemic, including leisure and travel companies like cruise lines, refunded monies to passengers whose travel was impacted by the pandemic.[32] As such, whether the law as a general matter should tolerate consumer practices by airlines during a global emergency that would be illegal if undertaken by nonairline firms that are suffering as much if not more than air carriers (e.g., childcare facilities, restaurants, retailers, etc.) is an open question.[33] Indeed, at what time more than a global calamity should the law protect consumers from corporate misconduct and unfair bargaining power?[34]

This Article posits that a series of global health menaces over the last two decades that involve commercial air travel—from SARS to Ebola to Zika to West Nile virus to COVID-19—invites a reexamination of the preemption provision of the Airline Deregulation Act as applied to passenger consumer law claims. This is especially so because, unfortunately, the most recent pandemic is unlikely to be the last that will disrupt public air travel.[35] Clarifying the scope of the law now will thus avoid uncertainty and frustration for airlines and consumers going forward, not to

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[31] *See Deregulation: Looking Backward*, *supra* note 29, at 334.

[32] *See, e.g.*, Morgan Hines, *My Cruise Was Canceled Due to Coronavirus. Here's How Experts Say You Should Navigate Refunds, Credits*, USA TODAY (Apr. 15, 2020, 7:00 AM), https://www.usatoday.com/story/travel/cruises/2020/04/15/coronavirus-canceled-my-cruise-heres-how-get-refund-credit/5077401002/ [https://perma.cc/3PUR-VBKU].

[33] For example, at the peak of the COVID-19 pandemic, airlines were booking "phantom flights," locking consumers into "no-refund policies for canceled flights." Tamara Thiessen, *Flight Refunds: US Airlines Using People As Piggy Banks During Covid-19*, FORBES (June 3, 2020), https://www.forbes.com/sites/tamarathiessen/2020/06/03/flight-refunds-us-airlines-chinese-piggy-banks-covid-19/?sh=34ddac343e8e [https://perma.cc/NU5L-5EA4].

[34] For example, after national emergencies caused by natural disasters, like hurricanes, state attorney generals are equipped with antiprice gouging and other laws to protect consumers. *See, e.g.*, FLA. STAT. § 501.160(1)(b)(2) (2021).

[35] *See* Stefan Gössling et al., *Pandemics, Tourism, and Global Change: A Rapid Assessment of COVID-19*, 29 J. SUSTAINABLE TOURISM 1, 4–5 (2021).

mention futile lawsuits centered on issues best resolved at airport ticket counters not in courthouses. In this context, this Article argues that issues of health, safety, and public welfare fall within the phrase "prices, routes, or services" in the preemption clause of the Airline Deregulation Act as applied to consumer actions against airlines, and claims related to these matters should be disposed of at the motion to dismiss stage.[36] Furthermore, this Article argues that, as a normative and practical matter, courts should construe existing aviation service and safety laws to preempt claims against airlines connected to the transmission of infectious microorganisms on commercial aircraft.[37]

To advance these arguments, this Article makes two empirical claims about airline customer service during and after the pandemic period, one descriptive and one interpretive. The descriptive claim is that application of the Airline Deregulation Act's preemption provision to consumer tort claims arising from the transmission of infectious diseases during commercial air travel is less automatic than may be obvious under existing precedent applying that provision. To support this contention, this Article presents an empirical study, qualitatively analyzing how courts construe the Airline Deregulation Act's preemption provision, quantitatively assessing a split among the federal circuit courts of appeal, and hypothesizing how courts may resolve such claims under the framework for adjudicating claims under the Airline Deregulation Act as either expressly or impliedly (field) preempted.[38]

Next, the Article's interpretive claim is that the provision of a healthful aircraft cabin is *not* a "service" as the majority of federal appellate courts have defined that term under the Airline Deregulation Act.[39] As such, the Airline Deregulation Act does not preempt negligence based claims arising from an airline's failure to take steps to mitigate or eliminate the risk of transmission of infectious diseases aboard their aircraft.[40] However, providing a healthful aircraft environment should be construed as a matter of safety primarily, and as such, courts should dismiss passenger tort claims arising from the transmission of infectious disease under

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[36] 49 U.S.C. § 41713(b)(1); *see infra* Part III.

[37] *See infra* Section III.C.

[38] *See infra* Part I.

[39] *See infra* Part II.

[40] *See infra* Part III.

one of two basis—as a matter of safety, or pursuant to the explicit terms of the Airline Deregulation Act, which nullifies state action "relat[ing] to" airline "price[s]."[41]

This Article proceeds in four Parts. Part I evaluates the risk of disease transmission on commercial flights according to applicable scientific literature assessing what infectious disease experts know (or think they know) about transmission within the aircraft passenger cabin.[42] It also describes the national and international laws and guidance documents that influence government and carrier management of the movement of passengers with communicable diseases.[43] Part II discusses the mechanics of preemption analysis under the Airline Deregulation Act and synthesizes the law to form a workable understanding of how courts construe the phrase "relating to" and the terms "price[s], route[s], and service[s]" under the law.[44] Part III then applies these terms as construed by federal courts of appeal to evaluate how courts might decide consumer tort cases under the doctrines of express and implied (field) preemption.[45] Also assessed is whether an airline's provision of a healthful aircraft cabin is a matter of safety, in which case precedent supports preemption.[46] Part IV offers analysis in the context of international treaties that govern commercial air transportation.[47] Finally, the Conclusion provides an evaluation of the advantages and disadvantages of a legal regime in which courts disallow rare claims arising from pandemic standards generated problems.[48] Altogether, this Article recommends immunity for airlines associated with the transmission of infectious diseases such as COVID-19.

I. PATHOGENS ON AIRPLANES

Before evaluating airline liability under the Airline Deregulation Act during health crises, this Part aims to appraise the actual risk of infectious disease transmission aboard civil aircraft. In doing

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[41] *See infra* Part III; 49 U.S.C. § 41713(b)(1).
[42] *See infra* Section I.A.
[43] *See infra* Section I.B.
[44] *See infra* Part II; 49 U.S.C. § 41713(b)(1), (b)(4)(A).
[45] *See infra* Sections III.A, III.B.
[46] *See infra* Section III.C.
[47] *See infra* Part IV.
[48] *See infra* Conclusion.

so, this Part intends to establish background from which to think about the follow on question of liability and whether and where responsibility should lie as a policy and legal matter. After all, if the risks are high and avoidable, then imposing a legal obligation on airlines to do more may be more justifiable than if risks are low and manageable by passengers also.[49]

Additionally, this Part examines existing national and international laws, policies, and guidelines designed to safeguard public health aboard aircraft. This analysis is intended to lay the groundwork for Parts II and III, *infra*, which center on whether courts should construe airline vector control and health screening strategies as: (1) falling within the ambit of the "prices, routes, and services" terminology of the Airline Deregulation Act, in which case passenger claims would be preempted as a matter of law, or (2) as concerning matters of safety, in which case airline immunity is arguable.[50]

Driving this work is the unexpected fact that the epidemiology of infectious diseases associated with air travel and the challenges of infection control are understudied even if universally regarded as important public health concerns.[51] In the absence of definitive research, discussion about what airlines should or should not do as a matter of law to mitigate the transmission of infectious disease too often lacks depth and substance, devolving into a blame game that alarms travelers and damns air carriers.[52] This sort of unproductive burden shifting has already taken place during the COVID-19 pandemic.[53]

For example, in December 2020, a United Airlines passenger bound for Los Angeles from Orlando attested in a predeparture "Ready-to-Fly" checklist that he had not tested positive for the

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[49] *See Domestic Travel During COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 20, 2021), https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html [https://perma.cc/M8RH-3M8N].

[50] 49 U.S.C. § 41713(b)(1); *see infra* Parts II, III.

[51] *See* Alexandra Mangili et al., *Infectious Risks of Air Travel*, MICROBIOLOGY SPECTRUM 1, 2 (2015).

[52] *See, e.g.*, Azi Paybarah, *Passenger Who Had Medical Emergency on Flight Died of Covid-19, Coroner Says*, N.Y. TIMES (Dec. 22, 2020), https://www.nytimes.com/2020/12/22/us/united-airlines-covid-death-lax.html [https://perma.cc/6YB8-N5GP].

[53] *See, e.g.*, *id.*

coronavirus and that he did not have symptoms of COVID-19.[54] However, he experienced a medical emergency twenty minutes into the flight, prompting several other passengers and flight attendants to offer help, including by administering CPR for forty-five minutes as the pilots diverted the flight to New Orleans—where the passenger died.[55] A social media firestorm erupted on news that the deceased passenger's wife had told emergency responders that her husband had COVID-19,[56] that the Louisiana coroner concluded that he died from acute respiratory failure and COVID-19 symptoms, and that the airline continued to fly the airplane on which the decedent traveled on to California as planned.[57] Rather than reporting on the actual risk to other passengers or whether the airline did anything wrong (it did not),[58] the sensational and sensationalized story of United Airlines Flight 591 mostly centered on a narrative of a callous airline that distributed modestly valued vouchers instead of invaluable information to passengers who acted as Good Samaritans: "Any kind of statement ... to show that the higher ups in the company were following the story" would have been appreciated, reportedly said one of the passengers, but "the only thing I ever saw were the statements saying it wasn't their responsibility to notify passengers."[59]

To be sure, communication between passengers and airlines is strained and the COVID-19 pandemic has only agitated circumstances with conflicts breaking out over airline face mask requirements.[60] In this context, and given that the risk management (i.e.,

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] In the aftermath of the tragedy, consistent with federal guidelines, the airline provided the Centers for Disease Control and Prevention with a passenger manifest for contact tracing purposes. *See* Mina Kaji & Amanda Maile, *Man Who Died After Collapsing on United Flight Had COVID-19, Coroner Confirms*, ABC NEWS (Dec. 22, 2020, 7:11 PM), https://abcnews.go.com/US/man-died-collapsing-united-flight-covid-19-coroner/story?id=74868916 [https://perma.cc/EG3B-FJMU].

[59] Hannah Sampson, *A Man Tried to Save a United Passenger who Died of Covid-19. The Airline Offered Him $200*, WASH. POST (Jan. 19, 2021, 1:39 PM), https://www.washingtonpost.com/travel/2021/01/19/united-flight-passenger-covid-death/ [https://perma.cc/KDB5-H2RL].

[60] *See, e.g.*, Lori Aratani, *Unruly Airplane Behavior Prompted Harsher Penalties and More Enforcement*, SEATTLE TIMES (Sept. 23, 2021), https://www.se

regulation or rule-making) associated with transporting infected passengers requires knowledge of transmission dynamics,[61] this Section reviews the relevant scientific, industry, and law-centered knowledge in order to establish a workable baseline about the knowable risk of transmission of infectious disease presented during commercial air travel.[62]

A. What Are the Risks of Infectious Disease Transmission on Commercial Flights?

No doubt exists that commercial aviation is a potential driver impacting the epidemiology of infectious disease.[63] Commercial airplanes are themselves vectors of infectious diseases.[64] For, whether or not infectious airline passengers or crew transmit illness to each other while on board aircraft, or whether or not healthy patients contract illness from crew members or other passengers, airplanes themselves potentially import pathogens from endemic areas of the world to nonendemic places and fuel, if not spark, pandemics.[65] For example, the scientific community believes that the transmission of the Zika virus was introduced to the Americas by air travel and that infected mosquitos on international flights contributed to the global spread of malaria, Middle East Respiratory Syndrome (MERS) and the West Nile virus.[66]

Yet, in contrast to what is broadly understood about airplanes as vectors for the spread of microorganisms, significant uncertainty exists about passenger to passenger transmission of infectious disease and data are lacking about the effects of air quality on cabin occupants.[67] This is unexpected given the outsized impact that air travel (and international travel especially) can

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attletimes.com/nation-world/unruly-airplane-behavior-prompted-harsher-penalties-and-more-enforcement-its-not-working-lawmakers-say/ [https://perma.cc/N62A-F2J7].

[61] *See* Alexandra Mangili & Mark Gendreau, *Transmission of Infectious Diseases During Commercial Air Travel*, 365 LANCET 989, 989 (2005).

[62] *See infra* Section I.A.

[63] *See infra* Section I.A.

[64] *See id.* at 992 ("The aircraft as a vector for global spread of influenza strains is a greater concern than is in-flight transmission.").

[65] *Id.* at 993.

[66] Nuno Rodrigues Faria et al., *Zika Virus in the Americas: Early Epidemiological and Genetic Findings*, 352 SCI. 345, 346 (2016).

[67] Mangili & Gendreau, *supra* note 61, at 990.

have on the epidemiology of infectious disease.[68] For that matter, anecdotal evidence suggests a strong correlation between commercial flying and upper respiratory tract illness.[69] Flying is a great way to get a head cold, the thinking goes. And, indeed, airline passengers have long associated catching cold- or flu-like symptoms with the cabin air quality and ventilation in commercial aircraft.[70] After all, "[d]uring flight, the aircraft cabin is a ventilated, enclosed environment that exposes passengers to hypobaric hypoxia, dry humidity, and close proximity to fellow passengers."[71] At least one study lends credence to the suspicion about the healthfulness of airplane cabins, identifying the risk of contracting an upper respiratory tract infection while in this confined ecosystem as high as twenty percent or 113 times greater than the normal daily ground level transmission rate.[72] Notwithstanding these and other problems potentially caused or spread by the volume of passengers traveling annually (approximately 3 billion),[73] the latest research pegs the risk of transmission of infectious diseases aboard aircraft as "difficult to determine" or unknown, with "the perceived risk [being] greater than the actual risk."[74]

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[68] *See id.* at 991.

[69] Martin B. Hocking & Harold D. Foster, *Common Cold Transmission in Commercial Aircraft: Industry and Passenger Implications*, 3 J. ENVI. HEALTH RSCH. 7, 7 (2004).

[70] *See, e.g.*, Scott McCartney, *Where Germs Lurk on Planes*, WALL ST. J. (Dec. 20, 2011), https://www.wsj.com/articles/SB10001424052970204058404577108420985863872 [https://perma.cc/TD3B-JXYH]. Only three studies of inflight transmission of the flu have been reported, for example. Mangili & Gendreau, *supra* note 61, at 992. The first occurred in 1979, when seventy-two percent of all passengers aboard an airliner contracted the influenza A/Texas strain within seventy-two hours. *Id.* The high transmission rate was attributed to a three-hour period during which passengers were kept aboard an aircraft with an inoperative ventilation system while repair work was being done. *Id.* The second study involved the transmission of influenza A/Taiwan/1/86 at a naval station both on the ground and aboard two aircraft transporting a squadron from Puerto Rico to a Florida naval station. *Id.* The third outbreak happened in 1999 on a seventy-five seat aircraft carrying mine workers. *Id.* No influenza outbreaks aboard commercial aircraft have been reported since 1999. *Id.*

[71] Mangili & Gendreau, *supra* note 61, at 989.

[72] Hocking & Foster, *supra* note 69, at 7.

[73] Vicki Stover Hertzberg et al., *Behaviors, Movements, and Transmission of Droplet-Mediated Respiratory Diseases During Transcontinental Airline Flights*, 115 PROC. NAT'L ACAD. SCIS. 3623, 3623 (2018).

[74] Mangili & Gendreau, *supra* note 61, at 990, 994 ("The aircraft as a vector for global spread of *influenza* strains is a greater concern than is in-flight

A silver lining to the COVID-19 pandemic may be that its economic devastation has motivated airlines, airplane manufactures, and regulators to get better answers and to research in a concerted way the behavior of viruses inside jetliners.[75] Such efforts to better understand the airline cabin environment and the health of passengers and crew are welcome as the work done by aviation stakeholders several decades ago did not progress terribly far.[76] For example, the 2003 outbreak of severe acute respiratory syndrome (SARS) and commensurate reports that a small number of SARS infections occurred on board aircraft prompted Congress to reassess the quality of air aboard airplanes.[77] Yet, that research explained that no definitive link between broad, nonspecific health complaints of passengers and flight attendants to possible causes, including cabin air quality, existed, despite the unique and unusual ecosystem of an airplane cabin.[78] What is more, no peer-reviewed scientific work had linked cabin air quality and aircraft ventilation with any heightened health risks of flying (as opposed to other modes of transportation).[79]

Rather, the leading literature covering the transmission of infectious disease during commercial air travel gravitates toward the idea that risk is most closely correlated with where a passenger is seated, and for how long, in relation to an infected passenger.[80] More specifically, according to the World Health Organization (WHO), the primary risk of disease transmission is with a flight time of more than eight hours and sitting within two rows of an infectious passenger.[81] As applied to COVID-19,

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transmission.") (emphasis added); *see also* Arnold Barnett & Keith Fleming, COVID-19 Risk Among Airline Passengers; Should the Middle Seat Stay Empty? 18 (Aug. 2, 2020) (unpublished manuscript) (on file with author) ("Actually ... covid-19 infections on planes can cause deaths to some people who [are] not passengers (e.g., a 22-year[-old] traveler gets infected, and passes the virus on to his elderly grandparents).").

[75] *See* Mangili & Gendreau, *supra* note 61, at 989.

[76] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-54, MORE RESEARCH NEEDED ON THE EFFECTS OF AIR QUALITY ON AIRLINER CABIN OCCUPANTS 1 (2004).

[77] *Id.*

[78] *Id.* at 11.

[79] Mangili & Gendreau, *supra* note 61, at 990.

[80] *See id.* at 991.

[81] *Id.*

researchers estimate that risk depends on the distance between two passengers such that a passenger's infection rate is approximately thirteen percent given physical contact with another contagious person, but essentially falls by a factor of two as the distance from that person increases by one meter.[82]

However, the application of the "2-row" rule has found a mixed reception. [83] For example, a paper published in the *Proceedings of the National Academy of Sciences* indicated that a "droplet-mediated respiratory infectious disease was unlikely to be directly transmitted beyond [one meter] from the infectious passenger,"[84] suggesting a more conservative understanding to public health guidance calling for surveillance of passengers within two rows of an infectious passenger.[85]

A different study detailed the need for greater caution. That warning arose from the study of a Hong Kong to Beijing flight that accounted for almost two dozen cases of SARS and more than 300 people (i.e., not passengers) who might have been secondarily affected—all from a single ill passenger.[86] The duration of the flight was three hours and affected passengers who were seated as far as seven rows in front and five rows behind the index passenger, a pattern (see Figure 1, below) that did not follow the typical example of inflight transmission of airborne pathogens (e.g., flight time of more than eight hours and seating within two rows of the index passenger).[87] Researchers have offered several explanations for this unexpected outbreak distribution, including that transmission of SARS was a result of a viral plume, that the airplane's cabin filtration system was malfunctioning, or that passengers were infected before or after the flight.[88]

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[82] *See* D. Chu et al., *Physical Distancing, Face Masks, and Eye Protection, To Prevent Person-to-Person Transmission of SARS-Cov-2 and COVID-19: A Systematic Review and Meta-Analysis*, 395 LANCET 1973, 1982 (2020).

[83] Vicki Stover Hertzberg & Howard Weiss, *On the 2-Row Rule for Infectious Disease Transmission on Aircraft*, 82 ANNALS GLOB. HEALTH 819, 819 (2017).

[84] Hertzberg et al., *supra* note 73, at 3625.

[85] *Id.*

[86] Mangili & Gendreau, *supra* note 61, at 992.

[87] *Id.*

[88] *Id.* at 991–92.

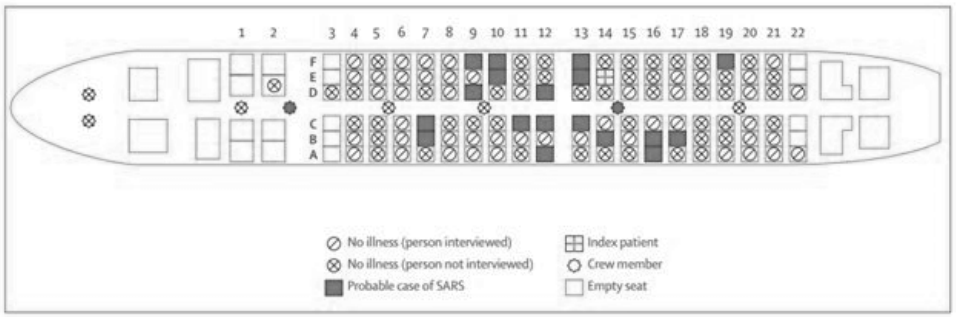

FIGURE 1. SCHEMATIC DIAGRAM OF SARS OUTBREAK ABOARD HONG KONG-BEIJING FLIGHT (2003)[89]

While what happened on the Hong Kong to Beijing flight may be anomalous or never fully understood, the regulatory response to news of the super spreading event was impactful.[90] That is, no onboard transmissions of SARS have occurred since March 2003, when the WHO issued specific guidelines for inflight containment of SARS.[91] This suggests a powerful influence regulatory or standards setting authorities can exert in the management of airline associated infectious diseases.[92] In this regard, the next Section details both the potential and limitations of existing legal and regulatory guidance and governance associated with the transmission of infectious disease aboard aircraft.[93]

B. Disconnects: Global Guidance and National Legislation

Just as researchers have long lacked solid epidemiological data about the effects of air quality on aircraft cabin occupants,[94] so too have national and international laws and regulations related to infection control measures for air travel failed to achieve an overall coherence or enforceability.[95]

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[89] *Id.* at 991 fig.2.
[90] *Id.* at 992.
[91] *Id.*
[92] *See id.* at 994.
[93] *See infra* Section I.B.
[94] Mangili & Gendreau, *supra* note 61, at 990–91.
[95] *See id.* at 994.

Internationally, a number of different public health measures exist to control airline associated infectious disease.[96] Essentially two entities are vested with authority to impact international aviation operations. One is the International Civil Aviation Organization (ICAO), a United Nations body that governs many operational aspects of international aviation.[97] A second is the International Air Transport Association (IATA), the trade association of the world's airlines responsible for setting industry technical standards.[98] ICAO and IATA frequently coordinate with WHO to provide health related recommendations.[99] But this work often runs into significant headwinds in the form of national laws and policies that allow for the discretionary adoption of international controls.[100]

As a team of Australian researchers noted in an opinion paper entitled "Guidelines, Law, and Governance: Disconnects in the Global Control of Airline-Associated Infectious Disease," "[n]ational guidance and legislation are uncoordinated across countries, and—with no strong evidence underpinning control measures—they are often inconsistent."[101] For example, national laws in Australia and New Zealand require usage of insecticides in commercial aviation operations whereas the U.S. Environmental Protection Agency prohibits usage of some insecticides because of potential risks to aircrew.[102] In 2013, ICAO encouraged more research into nonchemical disinsection procedures, but "procedures have not changed and airplane disinsection policies and implementation remain inconsistent worldwide."[103] These and other control measures for airline associated infectious diseases are thus weak, as perhaps additionally exemplified by the fact that International Health Regulations adopted by almost 200 nations for the purpose of controlling

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[96] *Id.*

[97] *About ICAO*, ICAO, https://www.icao.int/about-icao/Pages/default.aspx [https://perma.cc/DMW2-VE3Q].

[98] *Vision and Mission*, INT'L AIR TRANSP. ASS'N (IATA), https://www.iata.org/en/about/mission/ [https://perma.cc/Q43Q-MJCW].

[99] Andrea Grout et al., *Guidelines, Law, and Governance: Disconnects in the Global Control of Airline-Associated Infectious Disease*, 17 LANCET e118, e119 (2017).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

the global spread of disease express only one provision relating to air travel—a requirement that the pilots in command merely provide a brief aircraft general declaration of passenger health to ground staff before disembarkation.[104]

U.S. law similarly provides a regulatory framework whose effectiveness at mitigating the transmission of infectious disease aboard aircraft is as potentially toothless as international guidelines.[105] For example, pursuant to the Public Health Services Act enacted in 2012, Congress authorized the creation of Do Not Board (DNB) list.[106] The Center for Disease Control and Prevention (CDC) maintain DNB lists in order to prevent passengers with certain contagious diseases from obtaining a boarding pass for any flight into, out of, or within the United States; the Transportation Security Administration enforces this list for commercial air travel.[107] In addition, under the Aviation and Transportation Security Act, the TSA may take actions necessary to mitigate threats to aviation and transportation security, including denying boarding to travelers that the CDC identifies as likely posing a public health threat to passengers or crew.[108] Placement on the DNB list is a time consuming process, however, and the strength of these prevention methods is questionable.[109]

Apart from government and industry led initiatives, the law vests airlines with self-executing authority to refuse to transport passengers they consider to be health risks, including that the passengers present a threat to spread communicable diseases or infections.[110] But, the applicable law—the Air Carrier Access Act

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[104] *Id.*

[105] *See id.* at e120.

[106] 42 U.S.C. §§ 264–65; *see also* Criteria for Requesting Federal Travel Restrictions for Public Health Purposes, Including for Viral Hemorrhagic Fevers, 80 Fed. Reg. 16400 (Mar. 27, 2015); Dep'ts of Health and Hum. Servs. Ctrs. for Disease Control and Prevention, *Federal Air Travel Restrictions for Public Health Purposes—United States, June 2007–May 2008*, 57 MORBIDITY & MORTALITY WEEKLY REP. 1009, 1009 (2008).

[107] *FAQs for Public Health Do Not Board and Lookout Lists*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 16, 2019), https://www.cdc.gov/quarantine/do-not-board-faq.html [https://perma.cc/VNV3-GWPX].

[108] 49 U.S.C. § 114.

[109] Kathryn Brown, *Please Expect Turbulence: Liability for Communicable Disease Transmission During Air Travel*, 66 DEPAUL L. REV. 1081, 1103 (2017).

[110] *See* 14 C.F.R. § 382.21(b) (2016) (citing 14 C.F.R. § 382.19(c)(1)–(2)). In distinguishing communicable disease or condition from a disability, the regulations

(ACAA)—is an antidiscrimination law in nature.[111] As such, airlines are not permitted to limit a passenger's access to transportation on the mere basis that the passenger has a communicable disease or other condition by, for example, refusing to transport the passenger, delaying the passenger's transportation (e.g., requiring the passenger to take a later flight), imposing on the passenger any condition, restriction, or requirement not imposed on other passengers, or requiring the passenger to provide a medical certificate.[112] Rather, under the terms of the ACAA, an airline may bar a passenger from boarding a flight only after first determining a passenger's condition poses a "direct threat"[113]—an assessment fraught with difficulty and potential liability for the airline itself, among other reasons because airline personnel are not necessarily qualified to make this medical determination and because the tests airlines may be asked to use are not themselves foolproof.[114]

Even with perfect information, the process to establish a "direct threat" involves many steps and presents many judgment calls.[115] First, the, ACAA permits (though does not require) airlines to "rely on directives issued by public health authorities," including the U.S. Centers for Disease Control or Public Health Service or comparable agencies in other countries, or the WHO.[116] The ACAA also explicitly requires airlines to determine the existence of a "direct threat" by considering "the significance of the consequences of a communicable disease and the degree to which it can be readily transmitted by casual contact in an aircraft cabin environment."[117] In this context, the regulations disallow airlines

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provide that an airline is not permitted to "refuse to provide transportation to a passenger with a disability because the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers." 14 C.F.R § 382.19(b).

[111] *See* 14 C.F.R. § 382.1.

[112] *See* 14 C.F.R § 382.21(a)(1)–(4).

[113] *See id.*

[114] *See* 14 C.F.R. § 382.21(b)(1)–(2)*; see also* Scott McCartney, *Why Airlines Let Sick Passengers on Flights*, WALL ST. J. (June 21, 2021), https://www-wsj-com.cdn.ampproject.org/c/s/www.wsj.com/amp/articles/why-airlines-let-sick-passengers-on-flights-11623848201 [https://perma.cc/Z9DU-AZ6K]; Scott McCartney, *The Airline Bet on Covid Tests*, WALL ST. J., Dec. 17, 2020, at A11 (reporting about fake negative test certificates cropping up for sale and forgery concerns).

[115] 14 C.F.R. § 382.21 (2016).

[116] *See* 14 C.F.R. § 382.21(b)(1).

[117] 14 C.F.R. § 382.21(b)(1)–(2).

from characterizing a passenger with the common cold as a "direct threat" because colds do not have severe health consequences even if they are readily transmissible in an aircraft cabin environment.[118] Nor would a passenger who is HIV-positive or who has AIDS be a "direct threat" because, though posing "very severe health consequences," those diseases are not readily transmissible in an aircraft carrier.[119] In contrast, the regulations expressly recognize Severe Acute Respiratory Syndrome (SARS) as a "direct threat" insofar as "SARS may be readily transmissible in an aircraft cabin environment and has severe health consequences. Someone with SARS probably poses a direct threat."[120] Neither regulators nor courts have yet assessed whether or how the ACAA would apply in terms of COVID-19, though it ostensibly seems more akin to SARS (a "direct threat") than HIV or the common cold (not "direct threats").[121]

In any case, even a passenger with a communicable disease that meets the "direct threat" criteria of the ACAA has a pathway to flying.[122] Such a passenger can present a carrier with a medical certificate describing measures for preventing transmission of the disease during the normal course of the flight,[123] at which point the airline must provide transportation to the passenger, unless the airline is "unable to carry out the measures."[124] What is more, airlines may require that a passenger with a medical certificate undergo additional medical review if there is a legitimate medical reason for believing that there has been a significant adverse change in the passenger's condition since the issuance of the medical certificate or that the certificate significantly understates the passenger's risk to the health of other persons on the

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[118] 14 C.F.R. § 382.21(b)(2) (ex. 1).

[119] *Id.* (ex. 2).

[120] *Id.* (ex. 3).

[121] 14 C.F.R. § 382.21.

[122] *Id.*

[123] *See id.*

[124] 14 C.F.R. § 382.21(c). The regulations elaborate that "a medical certificate is a written statement from the passenger's physician saying that the disease or infection would not, under the present conditions in the particular passenger's case, be communicable to other persons during the normal course of a flight." *Id.* The medical certificate must state any conditions or precautions that would have to be observed to prevent the transmission of the disease or infection to other persons in the normal course of a flight. *Id.* A medical certificate must also be dated within ten days of the date of the flight for which it is presented. *Id.*

flight.[125] If the results of this medical review demonstrate that the passenger, notwithstanding the medical certificate, is likely to be unable to complete the flight without requiring extraordinary medical assistance (e.g., the passenger has apparent significant difficulty in breathing, appears to be in substantial pain, etc.) or would pose a direct threat to the health or safety of other persons on the flight, the carrier may limit the passenger's access to transportation as otherwise prohibited under § 382.21(a).[126]

Generally, if an airline's actions result in the postponement of a passenger's travel, it must permit the passenger to travel at a later time (i.e., up to ninety days from the date of the postponed travel) at the fare that would have applied to the passenger's originally scheduled trip without penalty, or at the passenger's discretion, provide a refund for any unused flights, including return flights.[127] Moreover, if an airline takes action that restricts a passenger's travel, it must, on the passenger's request, provide a written explanation within ten days of the request.[128] On March 2, 2020, however, the United States Department of Transportation (DOT) modified this regulatory framework by issuing an Enforcement Notice related to the ability of airlines to refuse transportation to a passenger who has or may have COVID-19.[129] It relieved airlines of the obligation to obtain a medical certificate from a passenger as a precondition of a decision to deny boarding, but held airlines to their responsibility to otherwise accommodate a passenger impacted by an adverse decision:

> As a matter of prosecutorial discretion, the Enforcement Office will not enforce the requirement that airlines first request a medical certificate before denying boarding to individuals who have been screened by airlines, and are suspected of having COVID-19 on flights to the United States from countries with travel health notices issued by CDC stemming from the COVID-19 epidemic. [130]

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[125] *See id.*

[126] *See id.*

[127] *See* 14 C.F.R. § 382.21(d).

[128] *See* 14 C.F.R. § 382.21(e).

[129] *See* U.S. DEP'T OF TRANSP., ENFORCEMENT NOTICE REGARDING DENYING BOARDING BY AIRLINES OF INDIVIDUALS SUSPECTED OF HAVING CORONAVIRUS 3 (2020) [hereinafter ENFORCEMENT NOTICE].

[130] *Id.*

The potential for COVID-19 to spread rapidly and cause severe disease and death highlights the fact that obtaining a medical certificate would likely not be sufficient to demonstrate that a passenger is not a direct threat to the health or safety of others.[131] There are no known measures that will prevent the transmission of COVID-19 in a closed environment, such as an aircraft.[132]

The Enforcement Office cautions airlines that this enforcement policy does not change their current obligation to allow passengers to travel at a later time if the passenger's travel had to be postponed, or provide a refund to the passenger for any unused flights.[133] This policy also does not affect the obligations of airlines to provide a written explanation to the passenger of the reason that the passenger's travel was restricted.[134]

Suffice it to say that refusing to transport a passenger is burdensome for airlines and presents a number of potentially insurmountable administrative and practical challenges, not to mention the prospect of an enforcement action alleging discrimination.[135] The ACAA not only requires airlines to make determinations in matters for which they are not qualified (or, at least, are less qualified than say health care providers) to assess the threat of pathogens,[136] but also demands that airlines make a preflight

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[131] *See id.*

[132] *See id.*

[133] *See id.*

[134] *See id.*

[135] Interestingly, there is no private right of action under the ACAA. Madison Gafford, *Taking an Independent Look at the Air Carrier Access Act: Why No Private Right of Action Exists*, 84 J. AIR L. & COM. 135, 135 (2019). As such Part 382 (as the ACAA is also known) an airline is faced only with regulatory liability and DOT enforcement actions that result in a civil fine or civil penalty. *See* Tom Stilwell, Keep Calm and Fly On: Your Essential Guide to the Air Carrier Access Act 17 (2015) (unpublished manuscript) (on file with BakerHostetler LP). That said, Part 382 and the Federal Aviation Regulations may define the standard of care applicable to claims by passengers arising out of the spread of COVID-19. 14 C.F.R. § 382.19(c)(4) ("If your actions are inconsistent with any of the provisions of this part, you are subject to enforcement action under Subpart K of this part."). *See* Allison M. Surcouf & Marissa N. Lefland, *An Overview of Federal Law Governing the Carriage of Passengers Who May Have a Communicable Disease on International Flights* (Mar. 16, 2020), https://condonlaw.com/2020/03/an-overview-of-federal-law-governing-the-carriage-of-passengers-who-may-have-a-communicable-disease-on-international-flights/ [https://perma.cc/YW82-DZS6].

[136] *See* Surcouf & Lefland, *supra* note 135.

diagnosis where inadequate information[137] exists about the transmission of infectious disease in civil aircraft.[138] This is unlikely to succeed as researchers have noted that "[c]onsiderable debate continues about the effectiveness and practicality of screening passengers at entry, exit, or both."[139]

II. CONSUMER PROTECTION AND AIRLINE IMMUNITY

The previous Sections of this Article identified leading research concerning the risk of infectious disease spreading aboard civil aircraft, outlined existing national and international laws and regulatory gaps and problems related to the enforceability of health mitigation measures in civil aviation, and described the legal mechanisms by which airlines themselves can safeguard their aircraft from passengers who pose a direct threat.[140]

This Section examines airline liability for commercial claims sounding in tort and contract as a general matter. It does so first by qualitatively describing the Airline Deregulation Act and its impact on the relationship between airlines and their passengers, and second, empirically, by evaluating a split among the federal circuit courts of appeals in the interpretation of the law's sweeping preemption provision. Finally, it presents an important and nuanced contract based exception to preemption. Taken together, the content in this Section, coupled with the discussion in Part I, *supra*, will inform a policy based analysis in Part III that evaluates whether a healthful aircraft cabin is an issue of "safety" or "service"—in other words whether or not private claims related to the transmission of infectious diseases are, or should be, preempted under the Airline Deregulation Act and national aviation safety laws.

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[137] *See* ENFORCEMENT NOTICE, *supra* note 129, at 2–3.

[138] *See* Surcouf & Lefland, *supra* note 135.

[139] Grout et al., *supra* note 99, at e119–20 ("Further research must be prioritized before national and international legislation can take a consistent, evidence-informed approach to screening, because flight duration and pathogen transmission dynamics are just two important factors that challenge one-size-fits-all recommendations.").

[140] *See supra* Part I and accompanying text.

A. Understanding Federal Preemption

The risk to commercial aviation posed by transmissible diseases, like COVID-19, may have complicated the airline-passenger relationship, but it certainly did not worsen it.[141] The deteriorating state of passengers' rights has been years in the making as a function of the special legal protections air carriers have under the Airline Deregulation Act.[142] The law's breadth is nearly without comparison,[143] giving an entire industry a unique status in everyday commerce by virtue of granting airlines complete immunity from state consumer protection laws.[144] To be sure, the economic policies and assumptions underpinning deregulation are defensible—albeit debatable and not fully realized.[145] Additionally, the law's resulting benefits, low fares being the most prominent, are consistently prized by most consumers over and above other features of commercial air transportation.[146]

But, an unintended consequence of the Airline Deregulation Act has been the gallingly bad things airlines sometimes do to their customers, from imposing add on and ancillary fees for offerings that were once standard and expected, to sometimes leaving travelers stranded, to shrinking seat size, to losing and damaging belongings, to bumping passengers from flights when they have a ticket, to forcing families to pay fees to sit together.[147] Among the more horrendous examples to have gone "viral" is that of police, at the summoning of an airline, dragging a bloodied passenger off

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[141] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 418 (1992).

[142] *See id.* at 418–19.

[143] *See id.* at 384 (analogizing the preemptive sweep of the Airline Deregulation Act with a since amended version of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), which preempted all state laws "insofar as they ... relate to any employee benefit plan.").

[144] *See id.* at 374.

[145] *See* James W. Callison, *Airline Deregulation—Only Partially a Hoax: The Current Status of the Airline Deregulation Movement*, 45 J. AIR L. & COM. 961, 964 n.4 (1980) (noting that before deregulation, "[v]arious public opinion polls had shown that the airlines consistently ranked at the very top among all industries in terms of consumer satisfaction and confidence.").

[146] *See id.* at 968.

[147] *See* Scott McCartney, *Airline Rules are up for Review*, WALL ST. J., Feb. 8, 2018, at A11 [hereinafter *Airline Rules*].

a plane,[148] and a seven hour international trip that suffered four different mechanical problems that kept a flight grounded three days in a row with passengers boarding and taxiing out each day only to end up back in the terminal standing in lines to reenter the airport, collect luggage, and ride shuttles to hotels.[149] Each episode was a "case study of the choices airlines make when flights go badly wrong, and how ... it went worse fast."[150]

In fact, barring external regulatory interventions, airlines have little legal internal compunction, as opposed to innately market borne incentives and notions of good will, to do the right thing by their passengers—or at least those passengers in the non-premium classes.[151] This is by design as Congress, in enacting the Airline Deregulation Act, sought to encourage "maximum reliance on competitive market forces" and on actual and potential competition.[152] To effect this policy, lawmakers expressly prohibited the enactment or enforcement of any nonfederal "law, rule, regulation, standard, or other provision having the force and effect of law relating to airline prices, routes, or services."[153] In other words, the economic dimension of commercial aviation—codified in the Airline Deregulation Act by the terms "prices, routes, and service[s]"—are matters of federal law exclusively.[154] Consequently, the consumer protection laws applicable to local and interstate firms like hotels, car dealerships, cruise ships, movie theaters, and nearly any other retailer and consumer facing business do not apply to airlines.[155]

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[148] *See, e.g.*, Lindsey Bever, *Doctor Who Was Dragged, Screaming, from United Airlines Flight Finally Breaks Silence*, WASH. POST (Apr. 9., 2019), https://www.washingtonpost.com/transportation/2019/04/09/doctor-who-was-dragged-screaming-united-airlines-flight-finally-breaks-silence/ [https://perma.cc/J97G-3UH3].

[149] *See* Scott McCartney, *The American Flight that Wouldn't Take Off*, WALL ST. J., Sept. 26, 2019, at A13 (reporting that passengers had reached their emotional limits and "broke down": "Some sobbed uncontrollably [while others] screamed at airline employees they were out of vital medicine ... or were losing thousands of dollars of work pay.").

[150] *Id.*

[151] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 379 (1992).

[152] *See id.* at 378 (quoting 49 U.S.C. § 1302(a)(4), (9)).

[153] 49 U.S.C. § 41713(b)(1).

[154] *Id.*

[155] *See id.*

The federal character of aviation law is not inherently problematic. In fact, it is explicable given the national goal of centralized authority over innately interstate activities.[156] But, the substance of federal aviation laws raise concerns insofar as they are generally silent on consumer protection issues or else clear in their intent to deprive consumers of private rights of action.[157] What is more, the majority of federal courts of appeal that have considered the Airline Deregulation Act have expansively defined the terms "prices, routes, and service[s]," and construed the anteceding phrase "relating to," to mean that essentially any state law claim having a connection to airline economics is preempted as a matter of law.[158] Consequently, passengers are routinely left without any rights or remedies for practices that would be actionable under state law if undertaken by almost any nonairline business.[159] Indeed, airline passenger consumer protection grievances rarely advance or survive beyond the pleading or motion to dismiss stage.[160]

Thus, aggrieved passengers are often left with no choice but the extraordinary one of lobbying members of Congress to pass laws that address and resolve problems best avoided at the ticket counter.[161] But, even if Congress is amenable to crafting legislation aimed at fortifying passengers' rights (as it sometimes is on a bipartisan basis), the rule-making process rarely offers timely or complete relief.[162] Altogether, then, passengers with claims tied to airline practices and policies must overcome enormous legislative and judicial hurdles codified in the Airline Deregulation Act and predicated on the theory that consumer choice should be the primary tool for disciplining unpopular business decisions.[163] Choose a different airline next time, in other words.

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[156] *See id.*

[157] *See Airline Rules*, *supra* note 147, at A11.

[158] *See infra* Section III.B and accompanying text.

[159] *See* 49 U.S.C. § 41713(b)(1).

[160] *See* Scott Dodson, *A New Look at Dismissal Rates in Federal Civil Cases*, 96 JUDICATURE 127, 128 (2012).

[161] *See Airline Rules*, *supra* note 147, at A11.

[162] *See id.*

[163] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378–79 (1992).

In fairness, the overwhelming majority of the millions of passengers who travel by air daily are satisfied customers,[164] and the Airline Deregulation Act neither leaves airlines totally unsupervised nor passengers entirely defenseless in the consumer protection space.[165] The U.S. Department of Transportation (DOT) is vested with jurisdiction to enforce consumer concerns or violations.[166] As the Supreme Court recognized, this authority is vast and exclusive,[167] effectively stripping even state attorneys' generals of their traditional mandate to enforce general consumer protection statutes against any business operating within their jurisdiction.[168] The DOT has on various occasions promulgated and enforced rules responsive to public outrage over airline fiascos like holding people on planes for eight hours or more in poor weather conditions (i.e., tarmac delay rule), bumping low fare customers off planes to seat higher paying passengers, or broadcasting misleading advertisements.[169] In 2018, moreover, a bipartisan Congress required the DOT to hire an Aviation Consumer Advocate to help travelers resolve service complaints, audit the DOT's handling of such complaints, and make recommendations to improve enforcement of aviation consumer protection rules.[170] In connection with the COVID-19 pandemic during which airlines ignored federal law by forcing passengers to take vouchers for cancelled trips,[171] the DOT twice issued an Enforcement Notice warning

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[164] *Attentive Flight Crews, Flexible Fares and Charges During the Pandemic Drive Record High Customer Satisfaction with North American Airlines, J.D. Power Finds*, J.D. POWER (May 12, 2021), https://www.jdpower.com/business/press-releases/2021-north-america-airline-satisfaction-study [https://perma.cc/Z3FC-MYGC].

[165] *See Airline Rules*, *supra* note 147, at A11.

[166] *See* Am. Airlines v. Wolen, 513 U.S. 219, 228 n.4 (1995).

[167] *See Morales*, 504 U.S. at 378–79 (1992).

[168] *See id.* at 391; *see also Airlines Aren't Making It Easy*, *supra* note 20, at A9 (reporting that Colorado's attorney generally appealed to the DOT in light of many complaints about Frontier Airline's ninety day rebooking expiration on its credits).

[169] *Airline Rules*, *supra* note 147, at A11.

[170] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3358, 3337–38.

[171] *Airline Rules*, *supra* note 147, at A9 ("A credit from a store is usually straightforward. A credit from an airline can be anything but: It's often hard to use, and you may never get back all your money.").

airlines that federal law required a prompt refund to passengers whose flight schedules were changed significantly.[172]

That Congress and the DOT needed to take these actions—and airlines flouted these rules without penalty[173]—suggests fundamental problems with an administrative regime that entrusts politically influenced authorities with discretionary decision-making powers in the area of consumer protection. For that matter, the DOT's zeal for consumer protection has been inconsistent over the last few decades both in terms of rule-making and enforcement.[174] For example, President Barack Obama's administration aggressively focused on airline passenger rights and protections, imposing millions of dollars in civil penalties for violations of consumer protection and disability rules and creating many new regulations that imposed steep costs on the industry.[175] In contrast, during President Donald Trump's administration enforcement of fines against major U.S. airlines dropped eighty-eight percent over a two-year period during which three hour tarmac delays more than doubled.[176]

Arguably worse than lax or episodic enforcement may be the combination of a regulatory cycle of overenforcement or nonenforcement with consistent and persistent attempts by the airlines to opportunistically constrict the already limited universe of rights passengers have under the Airline Deregulation Act.[177] For example, airlines require parents to pay extra fees to sit together with their children—a practice industry observers describe

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[172] ENFORCEMENT NOTICE, *supra* note 129, at 2–3.

[173] *Id.* at 3–4.

[174] *See, e.g.*, Scott McCartney, *A Deadline Passes with Little to Show for Fliers*, WALL ST. J., Oct. 10, 2019, at A13 [hereinafter *A Deadline Passes*] (reporting that the DOT had missed deadlines on key traveler related issues such as seat dimensions and refunds for services not delivered: "The big question is whether it ever will fully comply with congressional requirements signed into law by President Trump a year ago.").

[175] *See* Scott McCartney, *Muted Response to Bid for Air Travel Rules*, WALL ST. J., Mar. 13, 2019, at A12.

[176] *See id.* To be clear, it is not necessarily the case that regulatory proponents are Democrats while deregulation advocates are Republicans. In fact, President Jimmy Carter and Senator Edward Kennedy successfully enacted the Airline Deregulation Act in the first place. *See, e.g.*, *A Deadline Passes*, *supra* note 174, at A13 ("It turns out airline mistreatment of travelers is one area on which a divided Congress can sometimes agree.").

[177] *See A Deadline Passes*, *supra* note 174, at A12.

as an "underhanded business practice," but one that the DOT has done nothing to address when asked.[178] In this sense, deregulation seems to give airlines cover to advocate for rules that openly antagonize their clientele while the DOT idles. Part of an Executive Order signed by President Trump required federal agencies to repeal, replace, or modify existing regulations,[179] for instance, "[a]irlines want[ed] to nix a host of rules that attempt[ed] to keep them from mistreating their customers."[180] As one industry observer wrote:

> The rules matter because DOT is just about the only protection consumers have in U.S. air travel. If the airlines get what they want, the government would weaken the tarmac delay rule, which imposes hefty fines for stranding passengers on planes for long periods, and eliminate a requirement that they show the full price of a ticket when people shop.

Carriers have also asked DOT to scrap the twenty-four-hour grace period for a full refund when buying a ticket—you'd pay a change fee even if you realized right away you booked the wrong date or made a mistake in the passenger name. They want to eliminate a rule that requires them to honor tickets sold for "mistake fares," and they're asking for freedom to charge fees for wheelchair service.

They also want to reintroduce bias in travel agency search results, so one airline might pay to dominate the first page of available options you see, and drop requirements to show on time and cancellation data with flights.[181]

In late 2020, the DOT acceded to some of these consumer-unfriendly initiatives, principally by issuing a final rule that redefined the phrase "unfair or deceptive practice" in the aviation consumer protection statutes.[182] At the urging of the major U.S.

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[178] *See* Scott McCartney, *Six Ways to Instantly Improve Flying*, WALL ST. J., Jan. 21, 2019, at A13 (quoting the president of the Family Travel Association: "If you're traveling with a 4-year-old, it's not a convenience [to have seats together]. It's a necessity.").

[179] Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

[180] *Airline Rules*, *supra* note 147, at A11.

[181] *Id.*

[182] Defining Unfair or Deceptive Practices, 85 Fed. Reg. 78,707 (Dec. 7, 2020) (to be codified at 14 C.F.R. pt. 399.79).

airline trade association, Airlines for America (A4A), the DOT's definition of unfairness and deception now aligns with Federal Trade Commission principles.[183] Also at the urging of A4A, the DOT established a new set of procedural rules that potentially hamper the DOT's own rule-making and enforcement efforts in the area of aviation consumer protection.[184] For example, whereas the DOT tended to make conclusory statements that a practice was unfair or deceptive without also providing a reason for its decision,[185] the rule now subjects future discretionary rule-making to a hearing procedure, which affords airlines the right to be heard and to present mitigating evidence.[186] Finally, the new rule permits the presentation of evidence before any determination against an airline of anticompetitive or unfair practice,[187] and requires the DOT to explain its decision-making process and the evidence it considered when making a determination of whether a practice is unfair and deceptive.[188] Transparency is good, of course, but it is best when it flows in both directions, not just as to enforcement proceedings against airlines and not as to the policies of airlines as applied to passengers.[189] Yet, the airline industry has persuaded lawmakers to narrow the definition of deceptive and unfair practices and provide additional due process rights for carriers to be heard in opposition to the consumer protection challenges against them.[190]

To be sure, the legacy of the Airline Deregulation Act is mixed as stakeholders have struggled to arrive at an equilibrium between creating value for and protecting consumers, on the one

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[183] *Id.* at 78,708. An act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot reasonably be avoided by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition. *Id.* An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and (3) the misleading representation, omissions, or practice is material. *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *See id.*

[190] *Id.*

hand, and the goal of eliminating red tape for the industry, on the other.[191] That is perhaps the cost of any deregulatory scheme. Less palatable, however, is the lack of a clear cut and consistent principle or rule of law as to the construction of "prices, routes, and services" in the Airline Deregulation Act.[192] The next Section details the state of the law in this regard, shedding light on the mechanics of adjudicating claims under the Airline Deregulation Act and the particular complexity of deciding claims "relating to" an airline's "services."[193]

B. Defining "Relating to" and "Services"

Resolution of state law claims arising under the Airline Deregulation Act and challenging some aspect an airline's dealings with passengers invariably centers on a key question—whether a state law claim is "related to" the "service of an air carrier."[194] The state law is preempted if so.[195] Resolving this question requires courts first to define the phrase "related to" and the word "service" as used in 49 U.S.C. § 41713.[196] The Supreme Court addressed the issue in 1992, in *Morales v. Trans World Airlines, Inc.*[197] There, Justice Antonin Scalia, writing for the majority, reasoned that "the ordinary meaning of these words ['related to'] 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,'—and the words thus express a broad preemptive purpose."[198] In this context, "so long as the state law has a connection with airline prices, routes or services, preemption under § 41713 is mandated" and "[t]his [connection exists] so regardless of whether the state statute specifically addresses the airline industry."[199]

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[191] Goetz & Dempsey, *supra* note 29, at 962–63.

[192] *See* Northwest, Inc. v. Ginsburg, 572 U.S. 273, 273 (2014).

[193] *See id.* at 273.

[194] *Id.*

[195] *Id.*

[196] Morales v. Trans World Airlines, 504 U.S. 374, 374 (1992).

[197] *Id.*

[198] *Id.* at 383. "Relating to" was the original terminology in the Airline Deregulation Act and was later amended to "related to." *See id.* at 383–84. *Morales* regarded as "immaterial" the distinction which resulted from a nonsubstantive amendment of the original version "relating to." *Id.* at 83.

[199] Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1254 (11th Cir. 2003).

Notably, *Morales* did not define particular circumstances under which a state law "relates to" air carrier services.[200] Yet, the majority of federal courts of appeal have understood *Morales* as establishing a connection between a state law and an airline's activities in two circumstances: (1) where the law expressly references the air carrier's prices, routes or services, or (2) where the law at issue has a "forbidden significant effect" upon a carrier's prices, routes, or services.[201] Stated otherwise, the phrase "related to the ... services of an air carrier," under *Morales*, "means having a connection with or reference to the elements of air travel that are bargained for by passengers with air carriers"[202] and, according to at least one court of appeals, which "includes not only the physical transportation of passengers, but also the incidents of that transportation over which air carriers compete."[203] Altogether, *Morales* helpfully provided a working definition of the phrase "related to" though it ultimately left it to lower appellate courts to define the words "prices, routes, and services" themselves.[204]

Courts have not had too much difficulty deciding what and whether state law claims "relating to" an airline's "prices" or "routes" should succumb to the preemptive effect of the Airline Deregulation Act.[205] Defining "services" is an altogether different matter, however.[206] Indeed, federal appellate courts are split between a majority position articulated by the Fifth Circuit Court of Appeals and a minority position expressed by the Ninth and Third Circuit Courts of Appeal.[207]

In *Charas v. Trans World Airlines, Inc.*, the Ninth Circuit, sitting *en banc*, held that "services" "refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided, as in, '[t]his airline provides service from Tucson to New York twice a day.'"[208] In

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[200] *Morales*, 504 U.S. at 390.

[201] *Branche*, 342 F.3d at 1255 (citing United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323, 335 (1st Cir. 2003).

[202] *Id.* at 1258.

[203] *Id.* at 1258–59.

[204] *Id.* at 1256.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.* (quoting Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1265–66 (9th Cir. 1998)).

addition, the *Charas* court held that "services" do *not* encompass things such as "'the dispensing of food and drinks, flight attendant assistance, or the like. '"[209] *Charas* held that a narrow reading of "services" was compelled because a broader construction "effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended."[210] *Charas*, then, is passenger friendly because it defines "services" extraordinarily narrowly such that most claims would fall outside of its definition and amenable to state law claims.

The Third Circuit's approach to preemption is generally consistent with *Charas*.[211] In *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*,[212] the Third Circuit held that the Airline Deregulation Act did not preempt a defamation claim because application of the relevant state law would "not frustrate Congressional intent, nor does it impose a state utility like regulation on the airlines."[213] As such, the *Taj Mahal Travel, Inc.* court acknowledged that even claims, which conceivably are "relate[d] to" airline services, could escape preemption if they did so in "'too tenuous, remote, or peripheral' [a manner as] to be subject to preemption."[214]

Taken together, *Charas* and *Taj Mahal Travel, Inc.* constitute a minority viewpoint that regards "services" very narrowly, involving essentially little more than transportation from point A to point B, and/or allows to proceed claims that bear only a "tenuous, remote, or peripheral" relationship to airline economics.[215] By declining to preempt state law claims with an attenuated relationship to the policies of the Airline Deregulation Act, *Charas* and *Taj Mahal Travel, Inc.* ostensibly animate a statement in *Morales* in which Justice Scalia clarified that the court, in broadly construing the Airline Deregulation Act's preemption clause did "not ... set out on a road that leads to preemption of state laws against gambling and prostitution as applied to airlines."[216]

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[209] *Id.*

[210] *Charas*, 160 F.3d at 1266.

[211] Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d. 186, 193, 195 (3d Cir. 1998).

[212] *Id.* at 186.

[213] *Id.* at 195.

[214] *Id.*

[215] *Id.* at 193, 195.

[216] Morales v. Trans World Airlines, 504 U.S. 374, 390 (1992).

Oppositely, the Fifth and Seventh Circuits have applied "services" expansively in line with *Morales* and more broadly than the Ninth and Third Circuit Courts of Appeal. In *Hodges v. Delta Airlines, Inc.*,[217] the Fifth Circuit, sitting *en banc*, opined that "services" extended beyond transportation to include "matters ... appurtenant and necessarily included with the contract of carriage between the passenger ... and the airline."[218] In this context, "services" includes all matters that are "a bargained-for or anticipated provision of labor," as follows:

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as "services" and broadly to protect from state regulation. [219]

As between the wide-ranging definition of "services" adopted by the Fifth and Seventh Circuits, on the one hand, and the constricted definition of "services" applied by the Ninth and Third Circuit Courts of Appeal, on the other hand, the majority of federal courts of appeal have found the former most compelling.[220] Defining "services" thus remains a circuit by circuit, case by exercise, and no single definition of the term or interpretative mechanism for understanding the term exists.[221] *Morales* nevertheless provides a model for construing the Airline Deregulation Act, and courts that read "services" broadly, as required by *Morales*, do so with the common understanding that the Airline Deregulation Act applies to the economic aspects of airline operations for which

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[217] 44 F.3d 334 (5th Cir. 1995).

[218] *Id.* at 336.

[219] *Id.* at 336.

[220] Nat'l Fed'n of the Blind v. United Airlines Inc., 813 F.3d 718, 727–28 (9th Cir. 2016).

[221] *See id.*

passengers bargain.[222] While this covers nearly all dimensions of the passenger carrier relationship, certain contractual claims can proceed unimpeded by preemption (and have advanced in the COVID-19 era), as discussed in the next Section.

C. Contracts of Carriage: COVID-19 "Refund Cases"

Before the COVID-19 pandemic, the policy of United Airlines was to offer passengers a refund if it canceled a flight and could not provide alternative air transportation arriving within two hours of the originally scheduled arrival time.[223] The carrier changed its policy to six hours at the outset of the pandemic, however, effectively denying refunds to millions of customers while violating a longstanding DOT decision disallowing airlines from altering the terms of tickets postsale.[224] Then, the airline changed its policy back to two hours, allowing passengers to get a refund, but only on the condition that they take the initiative to call the airline.[225] Altogether, following travel restrictions, lockdowns, and shelter in place orders due to COVID-19, United Airlines allegedly changed its refund policy four times within a span of seven days in March 2020 regarding passenger rights for altered flights.[226]

To be sure, United Airlines, like every airline around the world, struggled to formulate coherent policies at the outset of the COVID-19 pandemic, which posed an existential threat to the entire commercial aviation industry.[227] But, for sowing confusion and making matters measurably more frustrating for their customers by playing coy with refunds in potential violation of federal law, United Airlines was sued as a part of a federal class action

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[222] *See Hodges*, 44 F.3d at 336.

[223] Scott McCartney*, Frustrated Travelers Battle for Refunds*, WALL ST. J., Aug. 13, 2020, at A9 [hereinafter *Frustrated Travelers*]; *see* Ward v. Am. Airlines, Inc., 498 F. Supp. 3d 909, 926–27 (N.D. Tex. 2020).

[224] *Frustrated Travelers*, *supra* note 223, at A9.

[225] *Id.*

[226] *United Airlines Travel COVID-19 Denied Refunds*, HAGENS BERMAN (Apr. 6, 2020) [hereinafter *United Airlines Travel*], https://www.hbsslaw.com/press/united-airlines-travel-covid-19-denied-refunds/passenger-files-class-action-lawsuit-against-united-airlines-for-denying-ticket-refund-following-coronavirus-related-flight-cancellation [https://perma.cc/489U-HPUY].

[227] David Gelles & Niraj Chokshi, *Airlines Worried Virus May Erase Up to $113 Billion*, N.Y. TIMES, Mar. 6, 2020, at A1, A12.

lawsuit under state consumer fraud and protection acts, along with claims of unjust enrichment and other causes of action.[228] As explained in the discussion in Section II.B, *supra*, these claims were dead on arrival under the precedent of *Morales* whatever their merit (which was probably great given the undisputed nature of the passengers' factual claims and persuasive evidence of airline noncompliance articulated in the DOT's Enforcement Notice).[229] Yet, for as poorly or obliquely as United Airlines behaved, its actions, and any claim based on its conduct, unambiguously "related to" airline "prices, routes, and services" under either a broad or narrow reading of those terms. Consequently, some courts had little difficulty dismissing "refund cases" at the pleading stage.[230]

Notably, however, a class of commercial airline passengers that sued American Airlines and Delta Air Lines for refusing to issue refunds for coronavirus-related flight cancellations fared better than the lawsuits initially brought against United Airlines.[231] The

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[228] Complaint at 17, 21, Rudolph v. United Airlines Holdings, Inc., No. 1:20-cv-02124 (N.D. Ill. Feb. 12, 2021). Similar suits were initiated or threatened against Canadian and European airlines such as Air France, KLM, and Ryanair over their refusal to refund fares impacted by the COVID-19 pandemic. *See, e.g.*, Oliver Whitfield Miocic, *European Airlines Could Face Class-Action Suit over Unpaid Coronavirus Refunds*, EURONEWS (Apr. 28, 2020), https://www.euronews.com/2020/04/28/european-airlines-could-face-class-action-suit-over-unpaid-coronavirus-refunds [https://perma.cc/GY52-HJJ9].

[229] *Refund-Related Lawsuits*, *supra* note 28.

[230] Amanda Bronstad, *Class Actions Seeking Refunds for Flights Canceled Due to COVID Hit Turbulence,* LAW.COM (Oct. 14, 2020), https://www.law.com/2020/10/14/class-actions-seeking-refunds-for-flights-canceled-due-to-covid-hit-turbulence/?slreturn=20210020203423 [https://perma.cc/8AS3-BAXY]; Jacob R. Sorenson et al., *Court Dismisses COVID-19 Flight Cancelation and Refund Cases Brought Against Norwegian Air*, PILLSBURY LAW (Sept. 23, 2020), https://www.pillsburylaw.com/en/news-and-insights/cancellation-refund-class-action-airline-covid-19.html#_ftn1 [https://perma.cc/C77G-XZQE].

[231] *Delta Airlines Travel COVID-19 Denied Refunds*, HAGENS BERMAN (Apr. 17, 2020) [hereinafter *Delta Airlines Travel*], https://www.hbsslaw.com/press/delta-air-lines-travel-covid-19-denied-refunds/delta-latest-airline-hit-by-class-action-lawsuit-seeking-consumer-flight-refunds-amid-covid-19-outbreak [https://perma.cc/ND89-VEGZ]; *American Airlines Travel COVID-19 Denied Refunds*, HAGENS BERMAN (Apr. 22, 2020) [hereinafter *American Airlines Travel*], https://www.hbsslaw.com/press/american-airlines-travel-covid-19-denied-refunds/american-airlines-customer-sues-airline-in-class-action-lawsuit-demanding-refunds-for-flights-cancelled-due-to-covid-19 [https://perma.cc/C77G-XZQE].

law of contract explains why.[232] Whereas the suit against United Airlines sought to enforce state laws—general consumer protection statutes and common law judicial doctrines like unjust enrichment—the claims against American and Delta turned on each carrier's contract of carriage, that is the airlines' own expression of the terms, conditions, rights, duties, and liabilities accompanying the tickets each sold.[233] Under Delta's Contract of Carriage, for example, passengers are entitled to a full refund if the airline cancels a flight or changes a flight time by more than 120 minutes.[234] American Airlines' Conditions of Carriage similarly provides that if the airline cancelled a flight or changed a flight time by over four hours, passengers could receive a full refund.[235] Because these terms represented the voluntary undertakings of the airlines rather than an externally imposed requirement in the form of state consumer protection statutes and decisional laws, some American-Delta passengers escaped application of the sweeping preemption provision in the Airline Deregulation Act and overcame initial procedural hurdles put in place by the airlines' respective counsel.[236]

More specifically, according to *American Airlines, Inc. v. Wolens*,[237] a Supreme Court case decided three years after *Morales*, lawsuits that seek fundamentally to enforce the parties' "own, self-imposed undertakings" fall outside of the Airline Deregulation Act's preemption clause.[238] Importantly, this breach of contract exception extends only to the terms of the parties' bargain, "with no enlargement or enhancement based on state laws or policies external to the agreement."[239] Thus, under *Wolens*, contract claims survive preemption where the parties limit their dispute to the

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[232] Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228–29 (1995).

[233] *See United Airlines Travel*, *supra* note 226; *Delta Airlines Travel*, *supra* note 231; *American Airlines Travel*, *supra* note 231.

[234] *Contract of Carriage: U.S., Rule 19: Flight Delays/Cancellations*, DELTA AIRLINES (Feb. 18, 2021), https://www.delta.com/us/en/legal/contract-of-carriage-dgr [https://perma.cc/2B9A-P8D3].

[235] *Conditions of Carriage, Involuntary Refunds*, AMERICAN AIRLINES (Apr. 29, 2021), https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp?anchorEvent=false&from=footer? [https://perma.cc/A2TX-S3QK].

[236] Ward v. Am. Airlines, Inc., 498 F. Supp. 3d 909, 926–27 (N.D. Tex. 2020).

[237] *Wolens*, 513 U.S. at 223, 228.

[238] *Id.* at 228.

[239] *Id.* at 233.

terms of their bargain, and a court can adjudicate a contract claim without having to resort to outside sources of law.[240]

In this context, *Ward v. American Airlines, Inc.*,[241] offered a helpful path forward for passengers who were battling with their airline for a COVID-19 related refund.[242] *Ward* involved a putative class action lawsuit demanding refunds for passengers whose travel was impacted by the COVID-19 virus, and it largely succeeded (it settled) under the precedent of *Wolens*.[243] At the pleading stage, U.S. District Judge Reed O'Connor of the Northern District of Texas rejected American Airlines' preemption claim, reasoning that the carrier had set the terms of its conditions of carriage and therein represented that its customers, irrespective of ticket types, would be refunded monies "if you decide not to fly because your flight was delayed or cancelled, we'll refund the remaining ticket value and any optional fees."[244] Therefore, the preemption clause of the Airline Deregulation Act did not and could not apply where passengers could plausibly prove that an airline dishonored a term the airline itself stipulated.[245]

Claims sounding in contract under *Wolens* offer perhaps the most promising mechanism for passengers challenging airline policies or actions,[246] therefore, particularly as compared to tort-based claims that invariably get thrown out for attempting to enforce state laws "relating to" an airline's "prices, routes, or services."[247] But, they are not bulletproof.

For starters, airline contracts (or conditions) of carriage are contracts of adhesion, and passengers lack any power to bargain for, create, or modify the terms and conditions controlling their

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[240] *Id.* at 232–33; *see also* Northwest, Inc. v. Ginsberg, 572 U.S. 273, 288 (2014) (unanimous decision holding that the Airline Deregulation Act preempts a state law claim for a breach of implied good faith and fair dealing).

[241] Complaint ¶¶ 71–72, 83–84, 90–92, 99–102, Ward v. American Airlines, Inc., 498 F. Supp. 3d 909 (N.D. Tex. 2020) (No. 4:20-cv-00371).

[242] *See Ward*, 498 F. Supp. 3d at 913–14, 926 (N.D. Tex. 2020).

[243] *Id.* at 928–29.

[244] *Id.* at 927.

[245] *Id.* at 926–27.

[246] *See* Kent Anderson, Note, *An Alternative Consumer Complaint Against Frequent Flyer Programs After* American Airlines, Inc. v. Wolens, *115 S. Ct. 817 (1995)*, 49 WASH. U. J. URB. & CONTEMP. L. 217, 242 (1996).

[247] *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228–29 (1995); Hodges v. Delta Airlines, Inc., 44 F.3d 334, 337–38 (5th Cir. 1995).

itinerary.[248] For that matter, airlines have strategically leveraged their contracts of carriage to outflank consumer-leaning legislators, for example, by promising to include certain consumer protections in their terms and conditions as a way of warding off lawmakers' attempts to codify or fortify passengers rights under federal law.[249] What is more, even claims that ostensibly arise from an airline's contract of carriage may be swept up by the Airline Deregulation Act's preemption provision.[250] That was the case in *Northwest, Inc. v. Ginsberg*[251] in which the Supreme Court unanimously affirmed dismissal of a passenger's claim arising from his expulsion from a frequent flyer program because his cause of action—for breach of the implied covenant of good faith and fair dealing—was itself a creature of state law and so preempted to the extent it was an attempt to use state law to enlarge the contractual obligations that the parties voluntarily adopted.[252]

In all, contracts of carriage can be an effective tool to set the mutual expectations of airlines and passengers in regular and irregular times.[253] And, for passengers especially, the written conditions of carriage are invaluable compared to the variability and vastness of preemption under the Airline Deregulation Act. However, they do not necessarily free courts of the interpretative difficulties that typify lawsuits asserted on the basis of state law.[254] For example, what constitutes a force majeure or "events beyond our control" or a "significant" delay remain thorny issues.[255]

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[248] Sarah Firshein, *The Fine Print on Your Plane Ticket May Have a New Clause*, N.Y. TIMES, June 22, 2020 at B8.

[249] *See, e.g.*, Chris Woodyard, *Airlines Voluntary Steps Fall Short with Fliers: Sky-High Gripes Bring New Call for Passenger Bill of Rights*, USA TODAY, Jan. 9, 2001, at B14 (noting the airline industry frustrated Congress's attempt to pass a "Passenger Bill of Rights" by creating the "Passengers First" customer service plan, which did not include additional compensation for passengers); Laura Goldberg, *Airlines Detail How They Will Improve Customer Service*, HOUS. CHRON., Sept. 16, 1999, at 2 (detailing airlines' promise to improve customer service in response to the "passenger bill of rights" movement).

[250] *See* Northwest, Inc. v. Ginsberg, 572 U.S. 273, 276 (2014).

[251] *Id.*

[252] *Id.* at 287–90.

[253] *See* Ward v. Am. Airlines, Inc., 498 F. Supp. 3d 909, 927 (N.D. Tex. 2020).

[254] *See Ginsberg*, 572 U.S. at 281–82.

[255] *See* Bill McGee, *Contracts of Carriage: Deciphering Murky Airline Rules*, USA TODAY (July 12, 2017), https://www.usatoday.com/story/travel/columnist/mcgee/2017/07/12/airline-contract-carriage/469916001/ [https://perma.cc/C4BD-B9EU]; *Refund-Related Lawsuits*, *supra* note 28.

Moreover, no airline is required to offer a contract of carriage, and every airline that does can impose whatever conditions of carriage it sees fit.[256] For that matter, even travel insurance may not cover COVID-19 claims,[257] and shrewd airlines now explicitly add public health emergencies of domestic or international concern (as announced by government or other appropriate authorities) to their existing lists of events that allow them to unilaterally cancel, divert, or delay flights without liability.[258] Doing so places COVID-19 and future pandemic-related lawsuits squarely within the *Wolens* framework and potentially exculpates airlines by way of summary

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[256] *See* McGee, *supra* note 255; Richard Ritorto & Stephan A. Fisher, *Exploring Airline Contracts of Carriage and European Union Flight Delay Compensation Regulation 261 (EU 261)—A Bumpy But Navigable Ride*, 82 AIR L. & COM. 561, 564–65 (2017).

[257] *See, e.g.*, Christopher Elliott, *What Travel Insurance Does Not Cover After The Pandemic*, FORBES (June 7 2020), https://www.forbes.com/sites/christopherelliott/2020/06/07/what-travel-insurance-does-not-cover-after-the-pandemic/?sh=54c24ce12d1d [https://perma.cc/MXR4-B224].

[258] American Airlines explicitly does so:

> When there's an event we can't control like weather, a strike or other civil disorder, we may have to cancel, divert or delay flights. If your ticket still has value (if you were, for example, re-accommodated in a different class of service) we'll refund the unused portion to the original form of payment, but beyond that we are not liable. Such "Force Majeure" events include ... [p]ublic health emergencies of domestic or international concern.

Conditions of Carriage, *Events Beyond our Control (Force Majeure)*, AMERICAN AIRLINES (Feb. 23, 2021), https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp?anchorEvent=false&from=footer? [https://perma.cc/C8SF-XKRU]. In comparison, United Airlines addresses events beyond its control in more general terms and links that events to government action:

> UA has the right to cancel reservations (whether or not confirmed) of any Passenger whenever such action is necessary to comply with any governmental regulation, upon any governmental request for emergency transportation in connection with the national defense, or whenever such action is necessary or advisable by reason of weather or other conditions beyond UA's control, (including, but not limited to acts of God, force majeure events, strikes, civil commotions, embargoes, wars, hostilities, or other disturbances, whether actual, threatened, or reported).

Contract of Carriage, Rule 5 Cancellation of Reservations, UNITED AIRLINES (Mar. 5, 2021), https://www.united.com/ual/en/us/fly/contract-of-carriage.html#tcm:76-6640 [https://perma.cc/2U63-STD3]. Southwest Airlines similarly defines conditions beyond its control, inter alia, as events dependent on "[g]overnment action." SW. AIRLINES, CONTRACT OF CARRIAGE—PASSENGER 42 (33d ed. 2021).

judgment if passenger contract claims somehow advance beyond the motion to dismiss stage.[259]

III. ASSESSING AIRLINE LIABILITY UNDER THE AIRLINE DEREGULATION ACT

The preceding Sections posit that, absent intervention by federal aviation regulators (which is inconsistent), national aviation laws essentially immunize airlines from liability for mistreating passengers in the realm of consumer protection both in general as well as in the particular context of the COVID-19 pandemic.[260] Contracts of carriage, meanwhile, offer predictability for both passengers and airlines, but are only as strong or advantageous for passengers as easily amendable contracts of adhesion go.[261] Altogether, this discussion has been descriptive and empirical in nature and has not necessarily attempted to assert that the current approach to preemption or liability is optimal or normatively desirable as a legal matter, though examples of sour dealings between airlines and passengers certainly suggest the *status quo* has many shortcomings as a practical matter.

This Section assesses potential claims against airlines related to pandemics such as COVID-19. More specifically, it makes the affirmative case that airlines should be immune from liability. In the consumer space, this would mean that claims such as unjust enrichment, deceptive and unfair trade practices, and the like should be preempted as "relating to" an airline's "prices" and "routes" under the Airline Deregulation Act. This is so notwithstanding numerous examples of appallingly bad treatment by airlines of their customers, including their refusal to issue refunds, their creation of unnecessarily complicated voucher schemes, and their implementation of policies that too often made and make matters more difficult and stressful for passengers whose travel plans were disrupted by spread of the COVID-19 virus.[262]

Whether claims "relating to" airline policies and practices associated with COVID-19 would fall within the word "services" in the Airline Deregulation Act's preemption clause is a more

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[259] *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995).

[260] *See supra* Section II.A.

[261] *See supra* Section II.B.

[262] *See Frustrated Travelers*, *supra* note 223, at A9.

challenging question.[263] This is so because an airline's decision to cancel a flight or refuse to board a passenger during a pandemic is arguably more a safety decision than an economic one under the Airline Deregulation Act.[264] And, because safety is not an element of operation over which airlines bargain,[265] claims creditably couched in terms of safety could survive assertions of preemption.[266] Stated otherwise, the Airline Deregulation Act does not preempt claims relating to or based on safety.[267] Indeed, litigation based on personal injury proceeds all the time.[268] Nevertheless, existing regulations (aviation and nonaviation related) are probative that even safety-type claims should be preempted as Congress has arguably indicated an intention to occupy the field of public health, particularly in terms of a national and global pandemic.[269] This also would mean that the law should regard pandemic-related airline policies as constituting (preempted) safety matters that fall exclusively within the ambit of federal law and the authority of national regulators.[270] In all, the law should find COVID-19 related claims as preempted under federal law, if not as "services" than as matters of both aviation and public safety.

A. Express Preemption and Congressional Intent

The weight of authority commands a broad reading of the Airline Deregulation Act's preemption provision, and in fact, courts routinely rule that commercial tort claims against airlines are preempted—expressly so.[271] Express preemption "occurs when the language of the federal statute reveals an express or explicit

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[263] *See, e.g.*, Smith v. Am. W. Airlines, Inc., 44 F.3d 344, 346 (5th Cir. 1995).

[264] *See* Alison Sider & Ted Mann, *Airlines Press for Aid Topping $50 Billion*, WALL ST. J., Mar. 17, 2020, at A4.

[265] Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1260 (11th Cir. 2003).

[266] *See Smith*, 44 F.3d. at 346–47.

[267] *See id.*

[268] *See* Matthew I. Kelly, Comment, *Federal Preemption by the Airline Deregulation Act of 1978: How Do State Tort Claims Fare?*, 49 CATH. U. L. REV. 873, 895–97 (2000).

[269] *See* Montalvo v. Spirit Airlines, 508 F.3d 464, 471 (9th Cir. 2007).

[270] *See id.* 472–74.

[271] *See* Roy Goldberg & Megan Grant, Ginsberg v. Northwest*: An Opportunity to Bring the Ninth Circuit into the Fold on ADA Preemption*, 26 AIR & SPACE L. 21, 24 (2013).

congressional intent to preempt state law."[272] Characterizing airline policies such as refunds and boarding denials associated with COVID-19 or other infectious diseases as matters "relating to" an airline's "prices" and "routes" is reasonable, if not compelled, in this regard.[273] It is consistent with *Morales*,[274] moreover, subject to the contract-based exception articulated in *Wolens*.[275]

Indeed, efforts by airlines to anticipate or respond to the business consequences of COVID-19 and other infectious diseases have costs—be it in terms of reducing occupancy by keeping middle seats open to ensure social distancing protocols, installing seat dividers and shields, or purchasing and using new gadgets to curb virus propagation.[276] These costs almost certainly impact (or may impact) airline prices and nonprice aspects of an airline's operations.[277] Moreover, these costs would impose a "forbidden significant effect" on airline operations in contravention of the Airline Deregulation Act.[278] As such, the preemption clause of the Airline Deregulation Act surely would nullify state law claims "relating to" refunds, cancelled flights, reaccommodation policies, and schedule changes related to COVID-19 because such claims have a connection with or reference to the economic elements of

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[272] U.S. Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1324 (10th Cir. 2010).

[273] *See* Northwest, Inc. v. Ginsberg, 572 U.S. 273, 284–85 (2014); Dia Adams & Caroline Lupini, *Master List of All Major International Airline Coronavirus Change and Cancellation Policies*, FORBES (Feb. 5, 2021), https://www.forbes.com/sites/advisor/2021/02/05/master-list-of-all-major-international-airline-coronavirus-change-and-cancellation-policies/?sh=489703ef1ba4 [https://perma.cc/JJW7-7MZQ].

[274] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388 (1992).

[275] *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995).

[276] *See, e.g.*, *Delta Extends Middle Seat Blocking Through April 2021*, DELTA AIRLINES (Feb. 8, 2021, 10:00 AM), https://news.delta.com/delta-extends-middle-seat-blocking-through-april-2021-only-us-airline-continue-providing-more-space [https://perma.cc/HRY8-EL9J]; Cailey Rizzo & Christine Burroni, *How US Airlines Are Adapting to Ongoing Coronavirus Concerns*, TRAVEL & LEISURE (June 11, 2020), https://www.travelandleisure.com/airlines-airports/airlines-coronavirus-cancellations-suspended-service [https://perma.cc/7UL8 -NAYB].

[277] *Deep Losses Continue Into 2021*, INT'L AIR TRANSP. ASS'N (Nov. 24, 2020), https://www.iata.org/en/pressroom/pr/2020-11-24-01/ [https://perma.cc/2VGF-9E2N].

[278] *Morales*, 504 U.S. at 388; *see* Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1255 (11th Cir. 2003).

air travel, which Congress intentionally sought to remove from the reach of state laws and regulation.[279]

Finding COVID-19 related claims expressly preempted under the Airline Deregulation Act is far from required under the law, however.[280] A finding of express preemption turns on congressional intent and nothing in the history or text of the Airline Deregulation Act imagines preemption in the context of a public health emergency or makes explicit the idea that airline activities and policies directed at public health emergencies fall within the "price, route, or service" terminology of 49 U.S.C. § 41713(b)(1).[281] One reason for this, as discussed in Section III.C, *infra*, is that public health emergencies ostensibly relate more to airline operations and passenger safety (for which traditional negligence claims may be appropriate) than economics.[282] After all, safety concerns primarily motivated passengers to cancel their reservations at the outset and during the pandemic.[283] Passengers worried, among other things, about getting sick or getting others sick—fatally so—or being marooned someplace where stay-in-place or shelter orders would go into effect after their arrival.[284] These are not the sort of garden variety consumer complaints from which Congress sought to shelter the airline industry.[285] Rather, they are extraordinary concerns that may warrant special consideration outside of the ordinary preemption regime of the Airline Deregulation Act.[286]

Another reason militating a finding of express preemption may lie in the fact that Congress inserted a preemption provision in the Airline Deregulation Act to ensure that states would not

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[279] *See Morales*, 504 U.S. at 278.

[280] *See id.*; 49 U.S.C. § 41713(b)(1).

[281] *See Morales*, 504 U.S. at 383; 49 U.S.C. § 41713(b)(1).

[282] *See infra* Section III.C.

[283] *See, e.g.*, U.S. DEP'T OF TRANSP., FREQUENTLY ASKED QUESTIONS REGARDING AIRLINE TICKET REFUNDS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL 1 (2020).

[284] *See, e.g.*, Kim Schive, *How Safe Is Air Travel?*, MIT MEDICAL (July 23, 2020), https://medical.mit.edu/covid-19-updates/2020/09/how-safe-air-travel [https://perma.cc/SD2S-ENC5]; Tariro Mzezewa, *Americans Abroad: 'I Feel Completely Abandoned'*, N.Y. TIMES (May 11, 2020), https://www.nytimes.com/2020/03/18/travel/coronavirus-americans-stranded.html [https://perma.cc/MH3V-H5UN].

[285] *See Morales*, 504 U.S. at 386–88.

[286] *See id.* at 390; Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 224 (1995).

undo federal deregulation with their own regulation.[287] Allowing a limited class of claims to proceed, say for unjust enrichment, deceptive and unfair trade practices, or restitution arising from the failure of airlines to readily accommodate passengers during a health care crises like COVID-19, presents minimal to no risk to deregulation policy.[288] True, the last several decades suggest that epidemics and pandemics may occur more frequently than once every hundred years, but such outbreaks are episodic nonetheless,[289] and the argument that allowing passenger claims to proceed now will undo deregulation is a red herring, slippery-slope-type contention.

Nor would a narrow exception to preemption during a public health crises undermine Congress' determination in 1978 that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices.'"[290] In fact, by refusing to preempt consumer protection type claims arising from the pandemic, courts would leave the dynamics of the airline marketplace uninterrupted.[291] Concededly, the consequences could be extreme, including widespread bankruptcies, or as actually happened, a decision by Congress to interfere in the marketplace by providing enormous financial assistance bordering on nationalization (i.e., the complete undoing of deregulation).[292] In either case, by declining to expressly preempt consumer claims related to the pandemic, courts would avoid artificially propping up airlines that were failing.[293] Stabilizing the airline was never the intent of the Airline Deregulation Act as evidenced by the striking number of airline failures that occurred *after* (if not because of) the enactment of the Airline Deregulation Act.[294] In fact,

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[287] *See* 49 U.S.C. § 41713(b)(1).

[288] *Wolens*, 513 U.S. at 228.

[289] *See* Frank Houghton, *Geography, Global Pandemics & Air Travel: Faster, Fuller, Further & More Frequent*, 12 J. INFECTION & PUB. HEALTH 448, 448 (2019).

[290] *See Morales*, 504 U.S. at 378 (quoting 49 U.S.C. § 1302(a)(4), (a)(9)).

[291] *See id.* at 389.

[292] *See* Niraj Chokshi, *Relief Bill Gives Airline and Airport Workers a Reprieve, for Now*, N.Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/business/stimulus-bill-airline-jobs.html [https://perma.cc/5EJQ-CAEK].

[293] *See Morales*, 504 U.S. at 389.

[294] Stacey R. Kole & Kenneth M. Lehn, *Deregulation and the Adaptation of Governance Structure: The Case of the U.S. Airline Industry*, 52 J. FIN. ECON. 79, 84–85 (1999).

airlines theoretically could not fail in the prederegulation era because they operated as a government-supported cartel.[295] In contrast, by enacting the Airline Deregulation Act, Congress clearly intended to dismantle that state of affairs, letting loose the competitive instincts of unregulated firms.[296] Consequently, to find COVID-19-related claims expressly preempted may be to overread the language and policy of the Airline Deregulation Act.

Ultimately, however, the decision and power to carve out an exception from preemption is properly a legislative one.[297] And, until Congress acts, if ever, the majority of courts, under the authority of *Morales*, may be inclined to construe the Airline Deregulation Act as expressly preempting consumer tort claims arising from public health emergencies, including those related to the transmission of infectious disease.[298] To be sure, some courts may be swayed otherwise and find that lawsuits based on state law arising from the once-in-a-generation pandemic are not preempted because they bear only a "tenuous, remote, or peripheral" relationship to airline "rates, routes, or services."[299] Courts taking this position may be persuaded by the argument that the claims "relating to" "rates, routes, or services" are grounded in safety, not economics, and are allowable, therefore.[300]

Ample anecdotal, textual, and historical evidence exists to give judges pause in dismissing lawsuits against airlines on express preemption grounds in circumstances of unprecedented disruption to air travel.[301] After all, the DOT's issuance of an Enforcement Notice warning airlines that federal law required a prompt refund to passengers whose flight schedules were changed significantly due to COVID-19 is probative of the fact that airlines were, in fact, violating consumer protection laws even if state attorneys' general and state laws were technically impotent against

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[295] Reuel Schiller, *The Curious Origins of Airline Deregulation: Economic Deregulation and the American Left*, 93 BUS. HIST. REV. 729, 746–47 (2020).

[296] *See Morales*, 504 U.S. at 378.

[297] *See* 49 U.S.C. § 41713(b)(1).

[298] *See Morales*, 504 U.S. at 378–88.

[299] *Id.* at 374, 390 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 (1983)).

[300] *See Morales*, 504 U.S. at 374, 388; Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995).

[301] *See* All World Pro. Travel Servs., Inc. v. Am. Airlines, Inc., 282 F. Supp. 2d 1161, 1164, 1167, 1169, 1172 (C.D. Cal. 2003).

such behavior.[302] What is more, aggrieved passengers who have no adequate remedy at law could theoretically sue to enjoin the appropriate federal agency to prosecute noncompliant airlines.[303] Indeed, that the DOT issued its notice at all might and perhaps should prompt lawmakers to revisit the enormous protections afforded to airlines under the deregulation act. Until such time, however, Congress has expressed no intent to walk back the preemptive scope of the Airline Deregulation Act at any time, be they unprecedented or unimagined.[304]

In all, courts should be restrained and principled in their interpretation of the Airline Deregulation Act even in never-before-experienced situations, and reformulation of the broad and express policies of airline deregulation should rest exclusively with the lawmaking branch of government. An airline's decision to reroute passengers or issue vouchers instead of refunds may be subject to federal law and DOT enforcement,[305] but otherwise falls outside of the purview of state law under the express terms of the Airline Deregulation Act and is beyond the adjudicatory powers of courts.

B. Implied Preemption

When the language of a federal statute does not reveal an express or explicit congressional intent to preempt state law, courts evaluate whether Congress somehow implied that its laws should have preemptive effect.[306] Courts have recognized two types of implied preemption—field and conflict.[307] The latter occurs either when compliance with both a federal and state law is a physical impossibility, or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[308] Conflict preemption is unlikely to be a feature of claims against airlines in the context of COVID-19 because the

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[302] *See* U.S. DEP'T OF TRANSP., ENFORCEMENT NOTICE REGARDING REFUNDS BY CARRIERS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL 1–2 (2020) [hereinafter REFUNDS BY CARRIERS].

[303] *See, e.g.*, 28 U.S.C. § 1361; 5 U.S.C § 554; FED. R. CIV. P. 65.

[304] *See* 49 U.S.C. § 40101.

[305] *See* REFUNDS BY CARRIERS, *supra* note 302, at 1–2.

[306] *See* Ariz. v. United States, 567 U.S. 387, 399–400 (2012).

[307] *Id.* at 399.

[308] *Id.*

DOT and FAA have promulgated no regulations related to onboard exposure that could conflict with state laws on the same subject, though theoretically the regulations of other agencies might be asserted to show conflict.[309] Where grounds for asserting express preemption are indeterminate, cases arising from COVID-19 or other infectious diseases against airlines are likely to be litigated within the space of field preemption, "which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it."[310]

At least one court has evaluated implied (field) preemption under the Airline Deregulation Act within the context of health conditions onboard aircraft.[311] In *Montalvo v. Spirit Airlines*,[312] the Ninth Circuit Court of Appeals considered negligence claims under California common law against various airlines for failing to warn passengers about the danger of developing deep vein thrombosis (DVT) and for providing an unsafe seating configuration on domestic flights.[313] In evaluating the claims, the court noted that the FAA had issued "pervasive regulations" in the area of air safety, including "airworthiness standards, crew certification and medical standards, and aircraft operating requirements."[314] Given that the FAA had issued these regulations and other guidance materials regarding passenger warnings and aviation safety, the court inferred a preemptive intent to displace all state law on the subject of air safety and assert "the dominance of the federal interest in this area, and the legislative goal of establishing a single, uniform system of control over air safety."[315] In this context, the plaintiff-passenger's negligence claim failed because the FAA had imposed no requirement that airlines warns about the risks of developing DVT, and in the absence of any such requirement, no breach of duty could be established.[316]

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[309] *See id.*

[310] US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1324 (10th Cir. 2010) (quoting Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 486 (10th Cir. 1998)); *see Arizona*, 567 U.S. at 399.

[311] Montalvo v. Spirit Airlines, 508 F.3d 464, 472 (9th Cir. 2007).

[312] *Id.*

[313] *Id.* at 468.

[314] *Id.* at 472.

[315] *Id.* at 473.

[316] *Id.* at 468.

Whether Congress intended to occupy the entire field of regulation related to COVID-19 specifically, or infectious disease aboard aircraft broadly, so as to preempt any state claims against airlines is unclear, but also apparently unlikely.[317] Neither the DOT nor the FAA has promulgated COVID-19 specific regulations related to onboard exposure.[318] *A fortiori*, the DOT and FAA have affirmatively deflected responsibility for matters respecting the novel coronavirus, and instead, opined that other agencies bear primary duty, specifically the Department of Health and Human Services or the Centers for Disease Control.[319] In an April 2020 letter to the Air Line Pilots Association (ALPA), FAA administrator Steve Dickson emphatically stated:

> [T]he FAA has statutory authority and responsibility to promote the safe operation of civil aircraft. Aviation safety is our most important priority. While the FAA remains steadfast in its focus on safety of flight, *we are not a public health agency*. We must look to other U.S. Government agencies for guidance on public and occupational health.[320]

This position is potentially fatal to any implied preemption defense that an airline could assert because establishing that aviation regulators are vested with authority in managing COVID-19 issues, let alone interested in occupying the entire field of public health, is contradicted by statements of the relevant regulatory authorities themselves.[321]

To prevail on an implied preemption argument, then, airlines would have to establish that the DOT's and FAA's understanding of their own powers is incorrect.[322] At least one decision—*Sikkelee v. Precision Airmotive Corp.*—may support that seemingly unusual

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[317] *See* Letter from Steve Dickson, Adm'r, Fed. Aviation Admin., to Joseph G. DePete, President, Air Line Pilots Ass'n, Int'l 2–3 (Apr. 14, 2020) [hereinafter Letter from Steve Dickson], https://www.alpa.org/-/media/ALPA/Files/pdfs/news-events/letters/041420-faa-dickson-reply-covid-19.pdf [https://perma.cc/SWV3-ZU8P].

[318] *See generally Coronavirus (COVID-19) Information from the FAA*, FED. AVIATION ADMIN., https://www.faa.gov/coronavirus/ [https://perma.cc/EHL6-DXYD].

[319] *See* Letter from Steve Dickson, *supra* note 317, at 1.

[320] *Id.*

[321] *See* US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1324 (10th Cir. 2010).

[322] *See* Ariz. v. United States, 567 U.S. 387, 399–400 (2012); Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 694 (3d Cir. 2016).

tact.[323] There, the Third Circuit Court of Appeals declined to "defer to an agency's view that its regulations preempt state law."[324] Rather, the weight the court accorded "the FAA's 'explanation of state law's impact on the federal scheme'... 'depend[ed] on its thoroughness, consistency, and persuasiveness.'"[325]

Under this precedent, courts convinced that the DOT and FAA are wrong presumably would preempt passenger claims on grounds of implied preemption, while courts unpersuaded by this argument would rule against airlines, finding that the preemption provision of the Airline Deregulation Act did not apply. Ironically, this may invert the *Hodges-Charas* circuit split. That is, the majority of courts—which historically have been inclined to accept an airline's implied preemption argument—may now be compelled to allow passenger claims given that neither Congress nor the agencies obligated to carry out Congress' intention have expressed any intention to occupy public health.[326] In fact, they disclaim it.[327] Meanwhile, courts adopting the minority position established in *Charas* to rule in favor of passengers may decide in favor of airlines upon determining that the FAA and DOT failed to meet their burden under *Sikkelee* to thoroughly, consistently, and persuasively establish that public health issues are outside of their statutory responsibility.[328]

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[323] *See Sikkelee*, 822 F.3d at 694.

[324] *See id.* at 693–94.

[325] *Id.* at 694.

[326] *See Ariz.*, 567 U.S. at 399–400; *see also* Letter from Steve Dickson, *supra* note 317, at 2–3.

[327] Letter from Steve Dickson, *supra* note 317, at 2–3.

[328] A number of arguments exist to show that the FAA, in fact, may be incorrect. For example, some practitioners have noted that the FAA extensively regulates crew member health, including what is required to be "fit for duty" as a safety matter. *See, e.g.*, 14 C.F.R. § 117.5. In addition, the Department of Labor's OSHA COVID-19 Control and Prevention website discusses airline workers and employees, providing: "the occupational safety and health of flight crewmembers (i.e., pilot, flight engineer, flight navigator) are under the jurisdiction of the [FAA] and not covered by OSHA standards while they are on aircraft in operation." *Airline Workers and Employers*, U.S. DEP'T OF LABOR, https://www.osha.gov/coronavirus/control-prevention/airline [https://perma.cc/67LL-98HY]. Whether this indicates an inter-agency recognition of FAA's jurisdiction in the area of airline crew member occupational health and safety, at least with respect to pilots, notwithstanding what the FAA may have said in

Suffice it to say that airlines will face formidable headwinds in convincing courts to find nonprice tort suits arising from the transmission of the COVID-19 virus, or infectious disease aboard aircraft generally, to be impliedly preempted.[329] To do so, an airline need not only establish that a claim "relates to" a "service," but also that it implicates safety.[330] Alternatively, to the extent a safety issue is raised, an airline must demonstrate that Congress intended to occupy that particular issue.[331] And, what makes all of this particularly difficult, as the next Section shows, is that the terms "services" and "safety" overlap—in some cases inextricably.

C. Infectious Disease on Aircraft: Service or Safety?

This Section explores whether an airline's nonprice policies and practices relating to epidemics or pandemics are or should be preempted under the Airline Deregulation Act or other applicable aviation laws. Resolving this question will require courts to distinguish "services" from safety and potentially to make a difficult policy choice between public health, on the one hand, and the economic policies of the Airline Deregulation Act, on the other.[332]

As an initial matter, differentiating "services" and safety is as challenging as it is consequential.[333] Drawing this line is consequential because the viability of a claim against an airline frequently turns on how a court characterizes that claim—"services" are ostensibly subject to preemption under the Airline Deregulation Act while some safety related matters are not, including personal injury claims arising from aircraft operations or accidents.[334]

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other contexts, is to be determined. *See* William H. Walsh & Anusha E. Jones, *The Efficacy of Preemption Defenses in Airline COVID-19 Litigation*, COZEN O'CONNOR (July 27, 2020), https://www.cozen.com/news-resources/publications/2020/the-efficacy-of-preemption-defenses-in-airline-covid-19-litigation [https://perma.cc/LE3L-ULSD].

[329] Walsh & Jones, *supra* note 328.

[330] *See* Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 371 (3d Cir. 1999); Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1264 (11th Cir. 2003).

[331] *See Abdullah*, 181 F.3d at 367.

[332] *See* Walsh & Jones, *supra* note 328.

[333] *See Abdullah*, 181 F.3d at 373.

[334] State law personal injury claims are not preempted as evidenced by the fact that the Airline Deregulation Act requires airlines to carry liability insurance "sufficient to pay, not more than the amount of the insurance, for bodily injury

Differentiating the terms is challenging because safety and service overlap; safety is an inherent and fundamental part of every airline's core business offering of scheduled air travel.[335] To say that an airline can provide its services without safety is absurd, yet saying that an airline offering safe flights without services may well describe the actual experience of many economy-fare passengers. As the Third Circuit Court of Appeals stated in *Abdullah v. American Airlines, Inc.*:

> Safe operations ... are a necessity for all airlines. Whether or not to conform to safety standards is not an option for airlines in choosing a mode of competition. For this reason, safety of an airline's operations would not appear to fall within the ambit of the[Airline Deregulation Act] and its procompetition preemption clause.[336]

Reading safety as distinct from "services" theoretically means that passengers may escape the preemptive effect of the Airline Deregulation Act by framing their claims (including consumer protection type claims) in terms of safety.[337] This possibility and the blurry boundary between airline "services" and safety that courts may confront in this regard is not hard to imagine.

Suppose that an airline, confronted with the global reality of transmission of a potentially fatal airborne infectious disease, decides against installing seat dividers and shields because such features add weight, cost, and complexity to commercial operations. Instead, the airline sanitizes aircraft through other industry standard means.[338] Imagine further that a prospective passenger of that airline, fearful of contracting the disease, cancels his flight ahead of the departure date and requests a refund of his (nonrefundable)

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to, or death of, an individual or for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft." 49 U.S.C. § 41112(a). In this context, nothing theoretically forecloses lawsuits against airlines for negligent operation or maintenance of ventilation and air filtration technologies aboard aircraft, including high efficiency particulate air filters ("HEPA").

[335] *Abdullah*, 181 F.3d at 373.

[336] *Id.*

[337] *Id.*

[338] *See* Mike Arnot, *See for Yourself: How Airplanes Are Cleaned Today*, N.Y. TIMES (Aug. 5, 2020), https://www.nytimes.com/2020/08/05/travel/coronavirus-airplane-cleaning.html [https://perma.cc/X5SN-GUZN].

fare for an upcoming flight. The airline refuses, and not wanting to lose his money, the passenger (reluctantly) travels as originally planned. He allegedly contracts the illness while aboard an aircraft operated by the subject airline and ultimately dies. Later, his estate sues the airline for a laundry list of claims, including breach of contract, wrongful death, and negligence related to the passenger's personal injuries (e.g., failure to warn, failure to prevent or mitigate his contracting the disease). How should a court decide these claims at the motion to dismiss stage if the airline raises preemption as a defense, contending that the plaintiff's claims are disallowed consumer tort claims masquerading as allowable personal injury claims?

At the outset, arguably all of the claims imagined here should be dismissed under the Airline Deregulation Act. The lawsuit in question plainly seeks the enforcement of state laws "relating" to "prices" as well as "services," broadly defined.[339] Seeking a refund relates to price. It falls squarely within the realm of express preemption under *Morales*.[340]

Alternatively, to the extent fares are covered by the subject airline's contract of carriage, the passenger's claim might resolve by reference to that agreement under *Wolens*.[341] A court could dismiss the negligence components of the lawsuit, too, as such claims have a direct connection with and reference to airline economics subject to preemption under *Morales*.[342] What is more, a court could also find the negligence claims so relate to a subject matter (safety) that is pervasively regulated by national authorities as to be impliedly preempted under the authority of *Montalvo*.[343]

But, a court could just as easily decline to find the claims preempted pursuant to the *Hodges-Charas* framework for construing the term "services" in the Airline Deregulation Act,[344] and a court may be particularly inclined to do so given the gravity of the injury alleged in the hypothetical.[345] True, if the passenger's

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[339] *See* 49 U.S.C. § 41713(b)(1).

[340] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388, 390 (1992).

[341] Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 219 (1995).

[342] *Morales*, 504 U.S. at 375.

[343] Montalvo v. Spirit Airlines, 508 F.3d 464, 473 (9th Cir. 2007).

[344] *See* Hodges v. Delta Airlines, Inc., 44 F.3d 334, 340 (5th Cir. 1995); Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998).

[345] *See, e.g.*, El Al Israel, Ltd. v. Tseng, 525 U.S. 155, 159 (1999).

estate ultimately recovered damages, the judgment could affect the airline's ticket selling, training, or other practices. Yet, allowing negligence allegations associated with a public health issue to proceed would not necessarily entail regulation of the economic or contractual aspects of the flight.[346] Indeed, a court could find that any effect on the price or nonprice aspects of an airline's operations would be "too tenuous, remote, or peripheral" to be preempted.[347] In doing so, the court could rest its holding on *Charas*, which construed "services" narrowly as referring to the limited universe of issues associated with "the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided."[348] Disease mitigation falls outside of this narrow definition and the preemptive clause of the Airline Deregulation Act would not apply, therefore.[349]

Notably, these claims could also avoid preemption under the broader holding of *Hodges* pursuant to which safety is not a bargained-for element of air travel.[350] The Eleventh Circuit Court of Appeals has reasoned that three elements must be present for a particular service to be deemed a "service" for purposes of the Airline Deregulation Act: (1) it must fit within the limited range of services over which airlines compete; (2) it must be bargained for; and (3) the bargained-for exchange must be between an air carrier and its customers.[351] Airlines do not compete over safety records like car manufacturers might in terms of airbags or running lights or crash test ratings.[352] No marketing campaign exists touting Airline A as safer than Airline B. Doing so would not only be taboo and counter to industry norms, but cannot and should not be true if carriers are complying with uniform safety regulations and regulators are doing their jobs.[353] Accordingly, compelling arguments exist to find that negligence claims or claims otherwise plausibly

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[346] *See Charas*, 160 F.3d at 1265.

[347] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983).

[348] *Charas*, 160 F.3d at 1265–66.

[349] *See id.* at 1266.

[350] *See* Hodges v. Delta Airlines, Inc., 44 F.3d 334, 338 (5th Cir. 1995).

[351] *See* Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1256–57 (11th Cir. 2003).

[352] *See* Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 373 (3d Cir. 1999).

[353] *Id.*

associated with the transmission of infectious disease do *not* relate to airline "services," and so are not preempted.[354]

As the *Branche* Court noted,

> even if 'services,' as used in § 41713, is construed to encompass aspects of air carrier operations beyond the transportation of passengers—i.e., the trappings and incidents of that transportation like on-board food and beverage services, ticketing and the like—its definition is nonetheless still limited to the bargained-for aspects of airline operations over which carriers compete.[355]

Stated otherwise, those elements of air carrier operations over which airlines do not compete are not "services" within the meaning of the Airline Deregulation Act's preemption provision,[356] and so state laws related to those elements would not be preempted.[357]

To the extent that efforts by airlines to mitigate the transmission of infectious disease are not services, then negligence and other tort claims, including potential consumer protection type claims against airlines, could survive a preemption defense under the Airline Deregulation Act.[358]

Interestingly, however, the COVID-19 pandemic has raised a novel question: Do airlines, in fact, compete to be the safest in terms of COVID-19? In other words, are airline policies and activities arising from the potential or actual transmission of infectious disease a "service"? Airlines have publicly disagreed among themselves about whether taking certain COVID-19 precautions represent a safety or service issue.[359] Early in the pandemic (i.e., July 2020), for example, Alaska Airlines, Delta, JetBlue, and Southwest instituted a policy of keeping middle seats open on their aircraft to limit infection.[360] Allegiant, American Airlines, Spirit, and United Airlines took a different approach, "selling all seats when demand warranted."[361] United Airlines vigorously defended this policy, "describing 'middle seats only' as a 'PR strategy and not a safety

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[354] *Id.*
[355] *Branche*, 342 F.3d at 1258.
[356] *See Abdullah*, 181 F.3d at 373.
[357] *Id.*
[358] *Id.* at 376.
[359] Barnett & Fleming, *supra* note 74, at 2.
[360] *Id.*
[361] *Id.*

strategy.'"[362] This disagreement spurred a professor of management science and statistics at the Massachusetts Institute of Technology to estimate the level of risk to U.S. airline passengers under both "middle seat empty" and "fill all seats" policies. He determined:

> Coach passengers on full flights two hours long on popular US jets suffer a 1 in 4300 risk of contracting Covid-19 from a nearby passenger. Under "middle seat empty," the risk is approximately 1 in 7700, a factor of 1.8 lower .... The calculations ... however imperfect, do suggest a measurable reduction in Covid-19 risk when middle seats on aircraft are deliberately kept open. The question is whether relinquishing 1/3 of seating capacity is too high a price to pay for the added precaution.[363]

This study supports the argument that efforts by airlines to promote social distancing within their airplanes is a safety issue with an important economic implication.[364] Arguably, then, a passenger alleging he contracted an illness onboard an aircraft, or cancelled a flight and sought a refund from an airline that did not leave its middle seats empty, could sue the offending airline for the consequences of its (economic) decision to "fill all seats."[365] Courts, in turn, could rule that airline policies and practices in furtherance of public health are *not* "services" even though they have an economic dimension.[366]

This result would be contrary to existing precedent, however.[367] *Morales*, foremost, explains that the Airline Deregulation Act preempts state laws, regulations, and policies that "would have a significant impact upon the airlines' ability to market their product, and hence a significant impact on the fares they charge."[368] State-law-based lawsuits against airlines for failing to scrap nearly one-third of the capacity on each of its aircraft would qualify.[369] And, leaving it to courts to decide which of the different approaches, "middle seat empty" or "fill all seats," is a better policy,

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[362] *Id.*
[363] *Id.* at 3, 20.
[364] *Id.*
[365] *See* Walsh & Jones, *supra* note 328.
[366] *See* Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 373 (3d Cir. 1999).
[367] *See, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992).
[368] *Id.*
[369] *See* Barnett & Fleming, *supra* note 74, at 20.

or whether reducing capacity to mitigate against the risk of transmission of infectious disease is a safety or "service" issue, invites inconsistent results about matters more appropriately dealt with by lawmakers.[370] In any case, while "some safety related claims may be tied to air carrier services, the very fact that they concern safety, standing alone, is insufficient to demonstrate [a] nexus" to "services."[371] As such, the connection between the "services" airlines offer and public health may be closer than first anticipated such that preempting state law claims relating to public health may, in fact, serve the purposes of the Airline Deregulation Act and its inoculation of claims "relating to" airline "services."

Wrangling over whether public health measures are "services" under the Airline Deregulation Act may be unnecessary, however, as preemption is arguably consistent with the safety responsibilities of the Federal Aviation Administration (FAA).[372] For example, some aviation practitioners have noted sources that may establish the "FAA's traditional role in regulating the health of flight personnel and passengers aboard aircraft."[373] In a 2006 notice published in the Federal Register, the FAA acknowledged that it "has statutory responsibility for promoting safe flight of civil aircraft in air commerce" and that "[t]he scope of this statutory responsibility includes the performance of medical research intended to protect the occupants of aircraft from risks and hazards that are attendant to flight."[374] Additionally, the DOT and FAA collaborated with HHS in 2020 to issue comprehensive guidance on protecting crew, passengers and the entire aviation workforce from exposure to the virus.[375] Although the Public Health Authority Notification is worded as a guideline,[376] the FAA has publicly expressed its expectation that airlines abide

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[370] *See Abdullah*, 181 F.3d at 367.

[371] Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1260 (11th Cir. 2003).

[372] *See* Walsh & Jones, *supra* note 328.

[373] *Id.*

[374] Public Health Authority Notification, 71 Fed. Reg. 8042 (Feb. 15, 2006).

[375] U.S. DEP'TS TRANSP., HOMELAND SEC., AND HEALTH AND HUM. SERVS., RUNWAY TO RECOVERY: THE UNITED STATES FRAMEWORK FOR AIRLINES TO MITIGATE THE PUBLIC HEALTH RISKS OF CORONAVIRUS 1, 3 (2020).

[376] U.S. DEP'T TRANSP., FED. AVIATION ADMIN., COVID-19: UPDATED INTERIM OCCUPATIONAL HEALTH AND SAFETY GUIDANCE FOR AIR CARRIERS AND CREWS 1 (2021).

by federal guidelines and its intent to investigate incidents of alleged noncompliance.[377] Whether these guidelines are something more than best practices is debatable,[378] but the notification may also be probative of the FAA's views of its own responsibilities and thus whether matters of safety are also nullified by the Airline Deregulation Act or other federal laws under the doctrine of implied preemption.

IV. INTERNATIONAL CARRIAGE: WHAT IS AN "ACCIDENT"?

The Airline Deregulation Act and the *Morales* and *Wolens* decisions discussed in Parts II and III, above, apply to airline operations to and from the United States, not to international carriage, which is governed by international treaty. But, given the significant degree to which international air travel influences the epidemiology of infectious disease,[379] this Section looks beyond domestic air transportation and evaluates legal claims arising from the transmission of communicable diseases on overseas flights. This analysis is also important because the relevant treaties applicable to international carriage constitute the exclusive set of remedies available to passengers. Stated otherwise, when a treaty governing international air travel allows no recovery, it correspondingly precludes a passenger from maintaining an action for damages under any other source of law, be it national or local law.[380] Thus, just as the Airline Deregulation Act preempts state law in the realm of domestic air transportation,[381] so too does the law governing international air travel displace other state (i.e., national) laws.[382] What is more, just as the Airline Deregulation Act presents problems of statutory construction for courts—specifically as to the definition of the phrase "relating to" and the terms

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[377] Walsh & Jones, *supra* note 328.

[378] *Id.*

[379] Allison Taylor Walker et al., *Introduction to Travel Health & the CDC Yellow Book*, *in* CENTERS FOR DISEASE CONTROL AND PREVENTION YELLOW BOOK: HEALTH INFORMATION FOR INTERNATIONAL TRAVEL (2020), https://wwwnc.cdc.gov/travel/yellowbook/2020/introduction/introduction-to-travel-health-and-the-cdc-yellow-book [https://perma.cc/5DB2-UFQM].

[380] *See, e.g.*, El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 176 (1999).

[381] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 374 (1992).

[382] *See* 49 U.S.C. § 1305(a)(1); Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. 13038 [hereinafter Montreal Convention].

"prices, routes, or services"—the Montreal Convention, and its predecessor the Warsaw Convention, present problems of textual interpretation and application for litigants and judges.[383]

Fundamentally, an airline's liability to a passenger in international carriage turns on whether an accident occurred and caused injury.[384] Under Article 17 of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention),

> [t]he carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[385]

The treaty does not define the word "accident" and courts have not fully explored the phrase "in the course of embarking or disembarking."[386] Whether a passenger's contraction of COVID-19 or any other infectious disease aboard an aircraft constitutes an "accident" under the treaty is unsettled, therefore.[387] Also unclear is whether liability could attach to an airline that implements precautionary measures such as preflight testing or other procedures during the embarking and disembarkation phases of flight.[388] For that matter, little guidance exists about whether the mode of transmission—crew to passenger or passenger to passenger—matters for liability purposes.[389] Adjudicating issues such as these, along with myriad other yet imagined scenarios, will present enormous evidentiary difficulties and involve intensely fact-based and case-by-case analysis.

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[383] *See* Olympic Airways v. Husain, 540 U.S. 644, 646 (2004)*;* Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1254 (11th Cir. 2003); *Morales*, 504 U.S. at 383; Air Fr. v. Saks, 470 U.S. 392, 396 (1985).

[384] *See* Montreal Convention, *supra* note 382, art. 17.

[385] *See id.*

[386] *See Air Fr.*, 470 U.S. at 399.

[387] *See id.*

[388] *See id.*

[389] *See* Andrew Hamelsky et al., *Protecting Your Business From Liability Claims Stemming From Covid-19 Exposure*, WHITE & WILLIAMS LLP (Apr. 6, 2020), https://www.whiteandwilliams.com/resources-alerts-Protecting-Your-Business-from-Liability-Claims-Stemming-From-COVID-19-Exposure.html [https://perma.cc/2QLG-SPER].

Nevertheless, existing precedent broadly suggests that lawsuits against airlines under applicable international treaty will be unsuccessful on average—and less successful than they perhaps should be as a normative matter.[390] For example, courts have construed the word "accident" in Article 17 by focusing on causation.[391] In the seminal case of *Air France v. Saks*, the Supreme Court concluded that liability under Article 17 "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."[392] There, a passenger felt severe pressure and pain in her left ear during the descent of a flight arriving in the United States from France, and just five days after the flight a doctor confirmed that she had become permanently deaf in that ear.[393] She sued, alleging that her hearing loss was caused by "negligent maintenance and operation of the jetliner's pressurization system."[394] She was entitled to no relief, however, according to the Supreme Court because her condition represented her own internal reaction to the normal and expected operation of the aircraft (i.e., normal cabin pressure change).[395] This harsh result obtained notwithstanding the court's clarification that the "definition [of accident] should be flexibly [not rigidly] applied after assessment of all the circumstances surrounding a passenger's injuries."[396]

But even if parties stipulate that an "accident" occurred, another issue exists—which "event" should be the focus of the "accident" may be litigated, including for example, whether a carrier would bear liability if a passenger traveling internationally contracted an infectious disease as part of the "embarking or disembarking" process. Courts have held that injuries that aggravate preexisting conditions are not considered "accidents" absent proof of abnormal external factors.[397] Still, litigants may press courts to construe the circumstances in which a passenger contracted a communicable disease as the liability triggering "event or happening,"

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[390] *See* Olympic Airways v. Husain, 540 U.S. 644, 646 (2004); *see also Air France*, 470 U.S. at 393.

[391] *See Air France*, 470 U.S 403 at 393.

[392] *Id.* at 405.

[393] *Id.* at 394.

[394] *Id.*

[395] *Air France*, 470 U.S. at 395–96.

[396] *Id.* at 405.

[397] *See id.*

especially if transmission is the result of an action—or inaction—of the crew.[398]

In *Olympic Airways v. Husain*, for example, the Supreme Court decided whether an airline's conduct was unusual and unexpected, and thus a link in the causal chain leading to an "accident."[399] There, a passenger, Dr. Abid Husain, an asthma sufferer, asked to be reseated away from the smoking section of the aircraft.[400] The flight crew refused.[401] And, as the "smoking noticeably increased in the rows behind" him, Dr. Husain required CPR and oxygen; but, ultimately, he died.[402] A wrongful death suit followed on claims that the "unexpected or unusual event or happening" that constituted an "accident" within the meaning of Article 17 was not Dr. Husain's death, but the airline's refusal to reseat him.[403] Framing the controversy in this way, the Supreme Court held that the "accident" condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's preexisting medical condition being aggravated by exposure to a normal condition in the aircraft cabin.[404]

Finally, concerns about the spread of hypervirulent pathogens like COVID-19 invites litigants and courts to reevaluate the contours of emotional damage claims brought by airline passengers traveling internationally.[405] Courts have not addressed whether any (or some level of) psychological distress over the risk of contracting a communicable disease is cognizable under the Montreal Convention.[406] What is more, for decades courts have declined to read Article 17 as allowing "recovery for mental or

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[398] *See* Olympic Airways v. Husain, 540 U.S. 644, 646 (2004).

[399] *Id.* at 644.

[400] *Id.* at 647.

[401] *Id.*

[402] *Id.*

[403] *Id.* at 644, 648.

[404] *Id.* at 646.

[405] *See* Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 410–11, 434 6th Cir. 2017).

[406] *See* Judy R. Nemsick et al., *Flying with COVID-19: Navigating Potential Passenger Claims Against Airlines*, HOLLAND & KNIGHT (Mar. 25, 2020), https://www.hklaw.com/en/insights/publications/2020/03/flying-with-covid19-navigating-potential-passenger-claims [https://perma.cc/6XRA-GBMA].

psychic injuries unaccompanied by physical injury or physical manifestation of injury."[407] However, the United States Court of Appeals for the Sixth Circuit recently held that passengers aboard international flights may recover for emotional harm in the context of a health scare.[408]

In *Doe v. Etihad Airways, P.J.S.C.*, a passenger was pricked unexpectedly by a hypodermic needle (i.e., an insulin syringe) that lay within a seatback pocket into which she had reached.[409] The supervising flight attendant gave the passenger an antiseptic wipe and personally wrapped a Band-Aid around the passenger's finger.[410] Another flight attendant recommended that the passenger see a doctor, but the airline otherwise provided no medical assistance.[411] The next day, the passenger saw a family physician, who noted a "small needle poke" and prescribed medication for possible exposure to hepatitis, tetanus, and HIV.[412] "Two days after the flight", the passenger sent an email to the airline to follow up "because it had neither sent her a copy of the incident report nor offered her any further assistance."[413] One week later, the airline replied by email to offer a "purely goodwill gesture" of "possible reimbursement" of the passenger's medical expenses, "without any admission of liability."[414] For the next year, the passenger underwent a battery of tests (all negative) and refrained from sexual intercourse with her husband and from sharing food with her minor daughter until her doctor told her that she could be certain that she had not contracted a disease from the needlestick.[415] The passenger subsequently brought suit (together with her husband's loss of consortium claims) for both physical injury and "mental distress, shock, mortification, sickness and illness, outrage and embarrassment from natural sequela of possible exposure to various diseases."[416]

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[407] *See, e.g.*, E. Airlines, Inc. v. Floyd, 499 U.S. 530, 533 (1991).
[408] *See Doe*, 870 F.3d at 409.
[409] *Id.* at 406.
[410] *Id.* at 409.
[411] *Id.* at 409–10.
[412] *Id.* at 410.
[413] *Id.*
[414] *Id.*
[415] *Id.* at 409.
[416] *Id.*

In an extensive thirty-one page decision, the Sixth Circuit Court of Appeals concluded that the Etihad Airline passenger's injury was actionable under the Montreal Convention because her mental anguish was "damage sustained in case of death or bodily injury" as that phrase exists in Article 17.[417] According to the court: (1) the accident was the needle pricking the passenger's finger; (2) the accident happened on board the airline's aircraft; and (3) the accident caused bodily injury.[418] Given these uncontested facts, the court concluded that the airline was therefore liable for the passenger's "damage sustained, which includes both her physical injury and the mental anguish that she is able to prove that she sustained."[419]

So, what does all of this mean in a post-COVID-19 world? Lower courts have greater flexibility in adjudicating liability for "accidents" occurring in international air travel under *Saks* than they do when assessing passenger claims under the strictly construed Airline Deregulation Act.[420] To be sure, this is a function of the differing focus of each law.[421] The treaties that govern international air carriage are oriented to passenger rights and "the need for equitable compensation based on the principle of restitution,"[422] while the Airline Deregulation Act effects a national economic policy that promotes industry interests primarily.[423] What is more, the Airline Deregulation Act requires judges to engage in work with which they may be unacquainted or unpracticed, including statutory interpretation of highly detailed aviation regulations and application of a doctrine (preemption) that presents only rarely on most dockets, while the causation-centric framework for determining liability in the Montreal Convention may be more comfortable territory for courts and litigants.[424] All this said, the results should be the same—transmission or contraction of an infectious disease, be it crew to passenger or passenger to

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[417] *Id.* at 418, 427.

[418] *Id.* at 434.

[419] *Id.*

[420] *See* Morales v. Trans World Airlines, 504 U.S. 374, 378 (1992); Air Fr. v. Saks, 470 U.S. 392, 392 (1985).

[421] *See Morales*, 504 U.S. at 378; *Air Fr.*, 470 U.S. at 392.

[422] *See* Montreal Convention, *supra* note 382.

[423] *See Morales*, 504 U.S. at 422–23.

[424] *See id.* at 383; *Air Fr.*, 470 U.S. at 404, 406.

passenger, should not give rise to liability for an airline.[425] This is especially so given the indeterminate nature of current research on the matter in current scientific literature.[426]

CONCLUSION

Existing federal law could and perhaps should do more to remedy the bad ways in which airlines sometimes treat their customers. But, as currently configured, the market-oriented policies underpinning the Airline Deregulation Act broadly and explicitly obligate courts to preempt garden variety state law consumer claims relating to airline prices and services. But, what about in the context of public health crises? For example, should carriers be permitted to assert preemption under the Airline Deregulation Act as a basis to immunize themselves against claims demanding refunds for passengers uncomfortable with traveling commercially? While passenger claims "relating to" airline "prices" are undoubtedly preempted under the terms of the Airline Deregulation Act, nonprice elements of an airline's operations arguably fall outside the term "services" as the majority of courts have construed that term in the deregulation law. In this context, public health is not a type of service over which passengers bargain or airlines compete. As such, a narrow exception to preemption during a public health crises is not inconsistent with Congress' determination in 1978 that "maximum reliance on competitive market forces" would best further "efficiency, innovation, and low prices."[427] Airlines can compete to accommodate passengers during difficult times, after all. Moreover, even if stripping an airline of the protections of the preemption clause of the Airline Deregulation Act exposes it to vast consumer protection type claims that accelerate or cause its collapse, failure is a normal feature of the marketplace and nonbankruptcy courts should not be in the practice of rescuing unsuccessful firms.[428]

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[425] *See* Nemsick et al., *supra* note 406.

[426] *See* Michel Bielecki et al., *Air Travel and COVID-19 Prevention in the Pandemic and Peri-pandemic Period: A Narrative Review*, 39 TRAVEL MED. & INFECTIOUS DISEASE 1, 2 (2021).

[427] *See* 49 U.S.C. § 40101(a)(6) (2006).

[428] *See*, *e.g.*, Natali Sachmechi, *Airlines Are Being Bailed out Again, Here's What Economists Think Will Happen Next*, FORBES (Apr. 17, 2020, 10:00 AM),

Change must come from Congress, not any court, however. The Airline Deregulation Act nullifies the enactment or enforcement of nonfederal law "relating to" airline "prices, routes, or services" and Congress has not undone this state of affairs in the more than forty years since it first freed airlines from the regulatory controls of the Civil Aeronautics Board. Most recently, lawmakers in 2020 proposed some consumer protection measures, including the Cash Refunds for Coronavirus Act of 2020 to require airlines to refund cash to customers who decided to cancel their flight plans for any reasons during the pandemic.[429] And since the 1990s, laws proposed by both Republicans and Democrats to reregulate the airline industry or appreciably fortify the rights of airline passengers as a matter of law have effected only incremental changes, if any.[430]

In contrast, Congress has demonstrated its intent to occupy the field of aviation safety by vesting regulators with significant authority in numerous areas relating to commercial aircraft operation, including the health of flight personnel and passengers on board aircraft.[431] Thus, even if policies and practices associated with the transmission of infectious disease are *not* "services" and so not preempted under the Airline Deregulation Act, passenger claims that are fundamentally consumer protection suits masquerading as safety claims should be preempted under the doctrine of implied (field) preemption under existing decisional law.[432]

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https://www.forbes.com/sites/nataliesachmechi/2020/04/17/airlines-are-being-bailed-out-again-heres-what-economists-think-will-happen-next/?sh=1aa3ecf2356f [https://perma.cc/R3NB-8629] (quoting Stanford finance professor Jonathan B. Berk: "People confuse bankruptcy with liquidation.").

[429] *See* Kenneth Kiesnoski, *Proposed Law Would Guarantee Refunds for Flights Canceled During Pandemic*, CNBC (June 3, 2020, 11:54 AM), https://www.cnbc.com/2020/06/03/proposed-law-would-guarantee-refunds-for-flights-canceled-during-pandemic.html [https://perma.cc/22HK-2926].

[430] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-76, AIRLINE CONSUMER PROTECTIONS: ADDITIONAL ACTIONS COULD ENHANCE DOT'S COMPLIANCE AND EDUCATION EFFORTS (2018) (recommending that DOT develop performance measures for compliance activities); *see also* 14 C.F.R. pt. 259 ("Enhanced Protections for Airline Passengers") (regulating aspects of airline delays, cancellations, and diversions and "to mitigate hardships for airline passengers during lengthy tarmac delays and otherwise bolster air carriers' accountability to consumers.").

[431] *See* CONG. RSCH. SERV., R46483, ADDRESSING COVID-19 PANDEMIC IMPACTS ON CIVIL AVIATION OPERATIONS 1 (2020).

[432] *See* William H. Walsh et al., *The Efficacy of Preemption Defenses in Airline COVID-19 Litigation*, COZEN O'CONNOR (July 27, 2020), https://www

In the final analysis, while it may be the case that, as between passenger and airline welfare, lawmakers reliably seem to favor the latter, that is the intent of Congress and courts are not the appropriate forum to undo that policy preference. Still, spread of the COVID-19 virus has exposed an unimagined application of the Airline Deregulation Act. In this regard, this Article recommends that Congress consider amending the Airline Deregulation Act to create a pandemic-type exception such that airlines must refund passengers whose flights are cancelled (voluntarily or involuntarily) on account of a public health crises. This would be in line with existing DOT policies.[433] Or, Congress could clarify that no such exception exists, sparring courts and litigants the effort of divining the intent of lawmakers. Alternatively, Congress could establish a fund (drawn from existing aviation taxes and excises) to proportionately assist airlines and passengers during public health emergencies that significantly disrupt commercial air travel. To be sure, the time may have come for Congress to formulate a cure because, unfortunately, episodic epidemics and pandemics may be the new normal as life in a global economy returns.[434] Providing regulatory clarity will ease the pain for both industry and consumers at such times.

.cozen.com/news-resources/publications/2020/the-efficacy-of-preemption-defenses-in-airline-covid-19-litigation [https://perma.cc/JJ3B-FL5H].

[433] *See* REFUNDS BY CARRIERS, *supra* note 302, at 1–2.

[434] *See* Harriet Constable & Jacob Kushner, *Stopping the Next One: What Could the Next Pandemic Be?*, BBC (Jan. 25, 2021), https://www.bbc.com/future/article/20210111-what-could-the-next-pandemic-be [https://perma.cc/E35C-M55L].