

How to Address the Air Travel Crisis: Eliminating the Airlines' Legal Liability Shield

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The airline industry is in crisis, breaking records for canceled and delayed flights and lost baggage. Complaints to the Department of Transportation (DOT) are up 321% from the same period in 2019. Despite airlines canceling roughly \$10 billion in flights during Covid, they have refused to refund money to consumers, despite a legal mandate to do so from the DOT. This flouting of the law has created an unstable environment for travel, with no legal recourse for customers and thus few incentives for airlines to offer reliable service. This document explains the root cause and offers a simple legislative fix to address the problem.

The nation's airlines are unlike virtually every other consumer-facing industry in the United States in that their customers are de facto barred from pursuing their rights in court. This legislative subsidy, a liability shield against consumer and safety rules, is due in large part to how airlines are regulated. When Congress passed the Airline Deregulation Act of 1978, a clause in this legislation barred anyone but the DOT from pursuing claims against airlines. That legislation stated that “no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.”¹

¹ S.2493 - Airline Deregulation Act, 95th U.S. Congress (1977-1978), www.congress.gov/bill/95th-congress/senate-bill/2493.

At the time, Congress was concerned that individual states — particularly states with carriers operating intrastate airline service — would attempt to create their own route and price models for airlines, undercutting the policy rationale for deregulation. Congress also assumed that antitrust enforcement would protect a competitive market by blocking mergers, which would force airlines to compete for consumers based on quality of service. Deregulation supporters argued that even the threat of new entry would be sufficient to discipline prices.

In a classic case of unintended consequences, the drawbacks of this consumer liability subsidy have far outweighed the benefits. State courts, state legislatures, and state attorneys general do not have the same authority to regulate the airlines as they do with all other industries. From a customer perspective, passengers have far fewer rights than they do when interacting with virtually any other business.

The only enforcer for consumers is the DOT, which is highly conflicted in its mission. The DOT has a mandate to protect the financial health of the airlines. It also has sole regulatory authority over the industry on behalf of consumers and for safety. These two mandates are in conflict, because any action against airlines for violating consumer rights will harm the financial health of airlines. In other words, in 1978, Congress accidentally set up a situation where customer rights vis-à-vis air travel are highly limited. Compounding this dynamic is that dozens of airlines have merged into just a few major “fortress hubs,” meaning that consumers can’t meaningfully protect themselves by choosing different options in the marketplace.

For decades, courts have upheld this liability shield, and all three branches of state governments have been blocked from providing any oversight of the airline industry. Consider the following:

- **LEGISLATIVE.** After thousands of passengers were left stranded in New York by a 2007 winter storm that disrupted JetBlue Airways’ flight schedule, the New York State Legislature passed an Airline Passenger Bill of Rights, which detailed specific provisions for consumers at commercial airports within the state, with penalties against airlines of up to \$1,000 per passenger. The industry’s largest trade organization filed suit in federal court. Based on this federal consumer liability shield, the new law was struck down before going into effect.²

² Thomas A. McCann, “Second Circuit Shuts Down New York’s Airline Passenger Bill of Rights,” *Loyola Consumer Law Review* 20 (4), 2008, <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1122&context=lcrlr>.

- EXECUTIVE. In 2020, Attorney General Phil Weiser of Colorado issued a public letter to then-DOT Secretary Elaine Chao urging the DOT “to use its authority under federal law” to investigate Denver-based Frontier Airlines for engaging in unfair and deceptive practices by failing to pay flight refunds. Weiser stated that his office had received more complaints about Frontier than any other company during Covid. Chao took no public action against Frontier or any other airline over refunds.³
- JUDICIAL. As just one example among dozens of a passenger lawsuit against an airline being thrown out of state court, in *Abdullah v. American Airlines*, four passengers were injured when a flight to San Juan encountered severe turbulence and the crew failed to warn all passengers to wear seat belts. A trial in a district court in the U.S. Virgin Islands initially awarded the passengers more than \$2 million, but the U.S. Court of Appeals struck down the ruling in 1999, citing federal preemption.⁴

This consumer liability shield creates a dangerous concentration of power, effectively making the U.S. DOT the sole arbiter of nearly all oversight of the airlines. Across multiple presidential administrations and under multiple secretaries of transportation, when the transportation secretary fails to act on key issues, consumers are stymied, and states are powerless to act. In addition to the flight refund issue detailed above, DOT inaction has also allowed U.S. airlines to charge fees for families to sit together in-flight, as well as cancel tens of thousands of flights — often at the last minute — during 2021 and 2022, all without any enforcement actions by the DOT.

The American Economic Liberties Project is recommending a repeal of the 44-year-old federal preemption clause, and to facilitate this effort we’re assembling a broad coalition of members of Congress, state attorneys general, governors, mayors, airline labor unions, travel agencies and travel management companies, trial attorneys, and consumer advocates.

We are proposing new legislation, detailed below, that will address the following:

- Eliminating preemption for states seeking to enact or enforce laws related to an air carrier’s prices, routes, or service
- Providing the U.S. attorney general with authority to enforce relevant airline commerce and safety regulations without the request of the secretary of transportation

³ Colorado Office of the Attorney General, “Weiser Urges US Department of Transportation to Investigate Frontier Airlines Consumer Complaints,” September 1, 2020, coag.gov/press-releases/9-1-20.

⁴ *Abdullah v. American Airlines Inc.*, 181 F.3d 363 (3d Cir. 1999), www.casemine.com/judgement/us/5914bb06add7b04934794551.

- Providing state attorneys general with authority to enforce relevant airline commerce and safety regulations
- Restoring a private right of action for relevant airline commerce and safety regulations
- Setting forth penalties in private right of action cases

In addition, because the problems with the airline industry run deeper than this consumer liability shield, the American Economic Liberties Project is recommending that this legislation also prohibit “common ownership” of U.S. air carriers. Even in the absence of mergers and monopoly power, firms still sell some shares to a third party, or to each other, which softens the incentives to compete.⁵ This legislation prohibits Wall Street investment groups from owning significant shares of competing airlines, which introduces concerns that they would influence airlines to collude and fix prices, whether indirectly or by visiting airline C-suite executives at one airline after another.

In addition to harming competition and service among airlines, it also has provided an artificial economic barrier to new entry for startup airlines, particularly low-cost carriers, which would lower airfares in markets nationwide. In the U.S. airline industry, taking common ownership into account shows that airline markets are already 10 times more concentrated than what is “presumed likely to enhance market power” by antitrust authorities.⁶

SECTION BY SECTION SUMMARY

- Section 1 strikes a provision preempting a state from enacting or enforcing a law related to a price, route, or service of an air carrier, and replaces it with a regulatory “floor” for state airline commerce and safety standards
- Section 2 provides the United States attorney general with authority to enforce relevant airline commerce and safety regulations, without request by the secretary of transportation
- Section 3 provides state attorneys general with authority to enforce relevant airline commerce and safety regulations

⁵ Posner, Eric A., Policy implications of the Common Ownership Debate (January 5, 2021), Available at <https://doi.org/10.1177/0003603X20985802>.

⁶ Azar, José, Schmalz, Martin C. and Tecu, Isabel, Anticompetitive Effects of Common Ownership (May 10, 2018). *Journal of Finance*, 73 (4), 2018, Available at SSRN: <https://ssrn.com/abstract=2427345> or <http://dx.doi.org/10.2139/ssrn.2427345>.

- Section 4 broadens the existing private right of action for enforcement of airline carrier certificate requirements to include additional relevant airline commerce and safety regulations
- Section 5 sets forth penalties in a private right of action, which include injunctive relief, actual damages, and, for willful or knowing violations, treble damages
- Section 6 renders predispute arbitration agreements and class-action waiver clauses in contracts relating to passenger air travel invalid and unenforceable
- Section 7 prohibits common ownership of air carriers

This model legislation would provide state attorneys general and private actors with authority to enforce airline commerce and safety regulations, and for the U.S. attorney general to unilaterally bring enforcement actions. Other relevant sections of Title 49 may reference the secretary of transportation’s existing sole jurisdiction to initiate or bring some of those claims. For the sake of brevity, the model legislation presented here does not include the amendments that would be necessary to conform those sections accordingly.

A BILL

To amend Title 49, United States Code, to allow States to enact and enforce laws relating to a price, route, or service of an air carrier, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. State authority over prices, routes, and service; floor preemption

Section 41713 of title 49, United States Code, is stricken in its entirety and replaced, as follows—

(a) ~~Definition. In this section, “State” means a State, the District of Columbia, and a territory or possession of the United States.~~

(b) ~~Preemption.~~

~~(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart [49 USCS §§ 41101 et seq.].~~

~~(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a~~

certificate issued under section 41102 of this title [49 USCS § 41102].

~~(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.~~

~~(4) Transportation by air carrier or carrier affiliated with a direct air carrier~~

~~(A) General rule. Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).~~

~~(B) Matters not covered. Subparagraph (A)—~~

~~(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and~~

~~(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title [49 USCS § 13102].~~

~~(C) Applicability of paragraph (1). This paragraph shall not limit the applicability of paragraph (1).~~

Nothing in this part shall preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce any standard related to prices, routes, or services of an air carrier; except that if a standard related to prices, routes, or services is in effect under this part [49 USCS §§ 40101 et seq.], or under a requirement or regulation prescribed, or an order or any term of a certificate or permit issued, under this part [49 USCS §§ 40101 et seq.], such State or political subdivision or interstate agency may not adopt any standard which is less stringent than any such existing standard.

Sec. 2. Enforcement by the Attorney General

Section 46107 of title 49, United States Code, is amended as follows—

~~(a) Civil actions to enforce section 40106(b). The Attorney General may bring a civil action in a district court of the United States against a person to enforce section 40106(b) of this title [49 USCS § 40106(b)]. The action may be brought in the judicial district in which the person does business or the violation occurred.~~

- (b) Civil actions to enforce this part [49 USCS §§ 40101 et seq.].
- (1) On request of the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation of Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration);
- (a) The Attorney General may bring a civil action *in a district court of the United States* an appropriate court—
- (A1) to enforce this part [49 USCS §§ 40101 et seq.] or a requirement or regulation prescribed, or an order or any term of a certificate or permit issued, under this part [49 USCS §§ 40101 et seq.]; and
- (B2) to prosecute a person violating this part [49 USCS §§ 40101 et seq.] or a requirement or regulation prescribed, or an order or any term of a certificate or permit issued, under this part [49 USCS §§ 40101 et seq.].
- (b) *The action may be brought against a person in the judicial district in which the person does business or the violation occurred.*
- (2c) The costs and expenses of a civil action shall be paid out of the appropriations for the expenses of the courts of the United States.
- (ed) Participation of Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration. On request of the Attorney General, the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate, may participate in a civil action under this part [49 USCS §§ 40101 et seq.].

Sec. 3. Enforcement by State attorneys general

A new Section 46108 is added to title 49, United States Code, as follows, and subsequent sections are redesignated accordingly—

49108. Enforcement by State attorneys general

Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States in which the person does business or the violation occurred:

- (a) *to enforce this part [49 USCS §§ 40101 et seq.] or a requirement or regulation prescribed, or an order or any term of a certificate or permit issued, under this part [49 USCS §§ 40101 et seq.]; and*
- (b) *to prosecute a person violating this part [49 USCS §§ 40101 et seq.] or a requirement or regulation prescribed, or an order or any*

term of a certificate or permit issued, under this part [49 USCS §§ 40101 et seq.].

Sec. 4. Enforcement by interested persons

Section 46108 of Title 49, United States Code, is redesignated as Section 46109, and is amended—

- (1) by striking “of certificate requirements” in the section heading; and
- (2) by further amending the section, as follows—

461089. Enforcement of ~~certificate requirements~~ by interested persons

An interested person who has suffered any loss by reason of any violation of this part [49 USCS §§ 40101 et seq.] or a requirement or regulation prescribed, or an order or any term of a certificate or permit issued, under this part [49 USCS §§ 40101 et seq.] may bring a civil action in a district court of the United States against a person to enforce section 41101(a)(1) of this title. The action may be brought in the judicial district in which the defendant does business or the violation occurred.

Sec. 5. Statutory damages in enforcement actions by interested persons

A new Section 46321 is added to Title 49, United States Code, as follows—

Section 46321. Statutory damages in enforcement actions brought by interested persons

- (a) Any interested person who has suffered any loss by reason of any violation of this part [49 USCS §§ 40101 et seq.] or a requirement or regulation prescribed, or an order or any term of a certificate or permit issued, under this part [49 USCS §§ 40101 et seq.] may bring a civil action to enjoin such unlawful act or practice; an action to recover actual damages or fifty dollars per violation, whichever is greater; or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages, or \$2,500 per violation, whichever is greater if the court finds the defendant willfully or knowingly violated this section. In addition to any damages awarded, the court may award reasonable attorney's fees to a prevailing plaintiff.*
- (b) Additional Remedies. A remedy under this Section is in addition to any other remedies provided by law.*

Sec. 6. Invalidation of pre-dispute arbitration and class-action waiver clauses

A new Section 46322 is added to Title 49, United States Code, as follows—

Section 46322. Invalidation of pre-dispute arbitration and class-action waiver clauses in contracts relating to passenger air transportation.

- (a) Arbitration. Notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable with respect to any dispute arising from, or relating to, a provision of a contract relating to passenger air transportation, and arbitration may be used to settle any such dispute only if,*

after the dispute arises, all parties to the dispute consent in writing to use arbitration to settle the dispute.

(b) Class Actions. Notwithstanding any other provision of law, an agreement waiving or otherwise prohibiting the right of a person to bring a claim regarding a dispute arising from, or relating to, a provision of a contract relating to passenger air transportation as a class action that had not arisen before the date on which the agreement is executed shall not be enforceable and shall have no force or effect.

(c) Subsections (a) and (b) shall apply with respect to contracts entered into or renewed on or after the date of the enactment of this Act.

Sec. 7. Prohibition on common ownership of airline carriers

A new Section 20 is added to Title 15, United States Code, as follows—

After two years from the approval of this Act, a person who owns or controls a more than 1 percent voting interest, or any dealings in securities, supplies or other articles of commerce that amount to a 1 percent ownership interest, in an air carrier shall not own or control, or attempt to own or control, a more than 1 percent voting interest, or any dealings in securities, supplies or other articles of commerce that amount to a 1 percent ownership interest, in another air carrier.

“Air carrier” means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

“Citizen of the United States” means—

an individual who is a citizen of the United States;

a partnership each of whose partners is an individual who is a citizen of the United States; or

a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

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The American Economic Liberties Project is a non-profit and non-partisan organization fighting against concentrated corporate power to secure economic liberty for all. We do not accept funding from corporations. Contributions from foundations and individuals pay for the work we do.

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