

2016

Food Allergies on Flights - How a Narrow Interpretation of "Service" Preemption Under the Airline Deregulation Act Could Give Allergic Passengers Much Needed Protection

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Recommended Citation

Laci Verduco Resendiz, *Food Allergies on Flights - How a Narrow Interpretation of "Service" Preemption Under the Airline Deregulation Act Could Give Allergic Passengers Much Needed Protection*, 81 J. AIR L. & COM. 321 (2016)
<https://scholar.smu.edu/jalc/vol81/iss2/6>

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**FOOD ALLERGIES ON FLIGHTS—HOW A NARROW
INTERPRETATION OF “SERVICE” PREEMPTION
UNDER THE AIRLINE DEREGULATION ACT
COULD GIVE ALLERGIC PASSENGERS
MUCH NEEDED PROTECTION**

LACI VERDUSCO RESENDIZ*

TABLE OF CONTENTS

I.	INTRODUCTION.....	322
II.	WHY DO FOOD ALLERGIES MATTER?	324
	A. LIFELONG AFFLICTION.....	324
	B. SEVERITY OF REACTION—ANAPHYLAXIS	325
	C. RISING PREVALENCE OF FOOD ALLERGIES	327
	D. LOW THRESHOLD OF EXPOSURE TO TRIGGER A REACTION	328
III.	WHY ARE FOOD ALLERGIES SO PROBLEMATIC WHEN FLYING COMMERCIALY?.....	330
	A. TRIGGERS FOR FOOD ALLERGIES ON COMMERCIAL FLIGHTS	330
	B. INADEQUATE TREATMENT FOR ALLERGIC REACTIONS WHILE ON BOARD	331
	C. LACK OF FEASIBLE TRAVEL ALTERNATIVES	333
IV.	WHY HAS THE DEPARTMENT OF TRANSPORTATION NOT PROTECTED PEANUT ALLERGY SUFFERERS ON COMMERCIAL FLIGHTS?.....	334
V.	WHAT IS THE LEGAL FRAMEWORK FOR SERVICE PREEMPTION?.....	335
	A. SUPREME COURT PRECEDENT.....	336
	B. CIRCUIT SPLIT OVER THE DEFINITION OF SERVICE.....	340

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VI.	WHY SHOULD THE SUPREME COURT ADOPT A NARROW INTERPRETATION OF SERVICE PREEMPTION?	343
	A. LEGISLATIVE INTENT	343
	B. SUPREME COURT PRECEDENT	344
VII.	HOW WOULD A NARROW READING OF SERVICE PREEMPTION BE THE BEST SOLUTION FOR PROTECTING FOOD ALLERGY SUFFERERS?	345
VIII.	CONCLUSION	347

I. INTRODUCTION

ON MAY 28, 2011, when Alisa Gleason planned to travel to Chicago, Illinois, from Orlando, Florida, on United Airlines,¹ she did not just have to worry about parking at the airport or checking baggage. She had to worry about her health. Like a growing number of Americans, Gleason suffers from a “severe, grave allergy” to peanuts and peanut-related products.² Gleason alerted several of United’s employees of her situation before boarding the fateful flight.³ At least one of those employees assured Gleason that the flight attendants would make an announcement to ask passengers to refrain from eating peanut-related products while on board.⁴ However, when Gleason notified the flight attendants for her flight, they refused to make any such announcement.⁵ Consequently, Gleason suffered a serious reaction to a bag of peanuts opened a few rows behind her, which required an emergency landing in St. Louis and two days in an intensive care unit.⁶ Afterward, she sued United Airlines.⁷

The Eastern District of California disposed of all of Gleason’s seven causes of action—“negligence, negligent infliction of emotional distress, promissory estoppel, fraudulent misrepresentation, breach of contract, tortious breach of contract, and breach of implied covenant of good faith and fair dealing”—on summary judgment in favor of United.⁸ Judge England of the

¹ Gleason v. United Airlines, Inc., No. 2:13-CV-01064-MCE-DAD, 2015 WL 2448682, at *1 (E.D. Cal. May 20, 2015).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Eastern District of California based his decision on a broad reading of the preemption provision of the Airline Deregulation Act (ADA or the Act), which reads that “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or *service* of an air carrier”⁹ The word “service” in the preemption provision has confused courts for decades, but the U.S. Supreme Court has yet to clarify the definition.¹⁰ The Court has, however, addressed the broad scope of the preemption provision¹¹ and has noted and reaffirmed that “the key phrase ‘related to’ expresses a ‘broad pre-emptive purpose.’”¹² The facts and outcome of *Gleason v. United Airlines* highlight the vulnerability of the estimated fifteen million Americans who suffer from food allergies¹³ and travel commercially.¹⁴

This article expounds on the vulnerability of food allergy sufferers when facing the prospect of flying commercially, explains why a narrow reading of service preemption under the ADA is a logical outgrowth of the legislative history of the Act and Supreme Court precedent, and explicates how that narrow reading will offer protection to food allergy sufferers. Part II explains why food allergies are of particular importance to both those who suffer from them and the general public. Part III discusses why food allergies are especially problematic when flying commercially. Part IV talks about how the Department of Transportation (DOT) has failed to protect food allergy sufferers. Part V outlines the legal framework for service preemption under the ADA based on Supreme Court precedent and the circuit split regarding service preemption. Part VI discusses how the narrow reading of service preemption is a logical consequence of legislative intent and Supreme Court precedent. And Part VII ex-

⁹ 49 U.S.C. § 41713(b)(1) (2012) (emphasis added).

¹⁰ See *Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1058 (2000) (O’Connor, J., dissenting to a denial of a writ of certiorari) (“The petition for a writ of certiorari in this case presents an important issue that has divided the Courts of Appeals: the meaning of the term ‘service’ in the [ADA] that pre-empts any state law ‘related to a price, route, or service of an air carrier.’”).

¹¹ See, e.g., *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428–29 (2014).

¹² *Id.* at 1428 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)).

¹³ *Facts and Statistics*, FOOD ALLERGY RES. & EDU., <https://www.foodallergy.org/facts-and-stats> [<https://perma.cc/7RYB-BXSW>].

¹⁴ See *Gleason v. United Airlines, Inc.*, No. 2:13-CV-01064-MCE-DAD, 2015 WL 2448682, at *1 (E.D. Cal. May 20, 2015).

plains how this narrow reading offers much needed protection to food allergy sufferers.

II. WHY DO FOOD ALLERGIES MATTER?¹⁵

There are four main reasons why food allergies have rightfully drawn and should draw public attention: (1) food allergies are life-long obstacles; (2) exposure to a food allergen triggers severe and even fatal reactions; (3) the percentage of those afflicted with food allergies is on the rise;¹⁶ and (4) a very low threshold of exposure to a food allergen can cause a severe reaction.¹⁷

A. LIFELONG AFFLICTION

Of the eight most common food allergens (“milk, eggs, peanuts, tree nuts, soy, wheat, fish[,] and shellfish”—accounting for 90% of food allergies),¹⁸ four of those allergies typically last a lifetime (peanuts, tree nuts, fish, and shellfish).¹⁹ Taking peanut allergies as an example to show the bleak prognosis of those afflicted with the allergy,²⁰ only about 20% of children diagnosed with a peanut allergy will ever outgrow it,²¹ and in fact, when considering the top three triggers of food-induced allergic reaction in children versus in adults, peanuts make both lists.²² Food allergies will affect a passenger for more than just one flight; allergy-afflicted passengers will have to worry about traveling their whole lives.

¹⁵ See John M. James, *Airline Snack Foods: Tension in the Peanut Gallery*, 104 J. ALLERGY & CLINICAL IMMUNOLOGY 25, 25 (1999); see also *Facts and Statistics*, *supra* note 13.

¹⁶ See James, *supra* note 15, at 25.

¹⁷ See M. Morisset et al., *Thresholds of Clinical Reactivity to Milk, Egg, Peanut, and Sesame in Immunoglobulin E-Dependent Allergies: Evaluation by Double-Blind or Single-Blind Placebo-Controlled Oral Challenges*, 33 CLINICAL & EXPERIMENTAL ALLERGY 1046, 1047–48 (2003).

¹⁸ *Facts and Statistics*, *supra* note 13.

¹⁹ *Id.*; see James, *supra* note 15, at 25.

²⁰ See James, *supra* note 15, at 25; *Facts and Statistics*, *supra* note 13; see also J. O’B Hourihane, *Peanut Allergy—Current Status and Future Challenges*, 27 CLINICAL & EXPERIMENTAL ALLERGY 1240, 1242 (1997).

²¹ *Peanut Allergy*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/allergens/peanut-allergy> [<https://perma.cc/95A5-6FCE>].

²² Hugh A. Sampson, *Update on Food Allergy*, 113 J. ALLERGY & CLINICAL IMMUNOLOGY 805, 807 (2004).

B. SEVERITY OF REACTION—ANAPHYLAXIS

Reactions to allergen ingestion for food allergy sufferers are often severe and occasionally fatal,²³ a scary realization for an allergy sufferer boarding an airplane. Allergic reactions to food allergens are dangerous because they can lead to anaphylaxis.²⁴ Anaphylaxis is defined as “a serious allergic reaction that is rapid in onset and may cause death”²⁵ or “an acute systemic allergic reaction that varies in severity from mild to life-threatening or fatal and may be rapidly progressive.”²⁶ Anaphylaxis is characterized by “respiratory [or] cardiovascular symptoms,” or both, in addition to other more generalized symptoms.²⁷

Most episodes of food-triggered anaphylaxis occur outside the presence of trained medical professionals.²⁸ In fact, IgE-mediated food hypersensitivity “is the most common cause of anaphylaxis in children outside of the hospital setting.”²⁹ Food-induced anaphylaxis sends someone to the emergency room every three minutes, accounting for upward of 200,000 emergency room visits every year.³⁰ Peanuts alone account for the majority of food-related anaphylactic fatalities and for upward of one-fourth of all cases of anaphylaxis outside of the hospital setting.³¹

²³ James, *supra* note 15, at 25.

²⁴ See Michael S. Gold & Robyn Sainsbury, *First Aid Anaphylaxis Management in Children Who Were Prescribed an Epinephrine Autoinjector Device (EpiPen)*, 106 J. ALLERGY & CLINICAL IMMUNOLOGY 171, 172 (2000).

²⁵ Hugh A. Sampson, M.D. et al., *Second Symposium on the Definition and Management of Anaphylaxis: Summary Report—Second National Institute of Allergy and Infectious Disease/Food Allergy and Anaphylaxis Network Symposium*, 47 ANNALS OF EMERGENCY MEDICINE 373, 374 (2006).

²⁶ F. Estelle R. Simons, M.D., *First-Aid Treatment of Anaphylaxis to Food: Focus on Epinephrine*, 113 J. ALLERGY & CLINICAL IMMUNOLOGY 837, 837 (2004).

²⁷ Gold & Sainsbury, *supra* note 24, at 172; *see infra* text accompanying note 40.

²⁸ Simons, *supra* note 26, at 837.

²⁹ Jennifer S. Kim et al., *Parental Use of EpiPen for Children with Food Allergies*, 116 J. ALLERGY & CLINICAL IMMUNOLOGY 164, 164 (2005); *see also* Gold & Sainsbury, *supra* note 24, at 171 (finding that food is a more common trigger for anaphylaxis than insect venom). IgE stands for immunoglobulin E, an antibody produced by the immune system when it overreacts to an allergen that releases chemicals into cells. *Immunoglobulin E (IgE)*, AM. ACAD. OF ALLERGY ASTHMA & IMMUNOLOGY, [https://www.aaaai.org/conditions-and-treatments/conditions-dictionary/immunoglobulin-e-\(ige\)](https://www.aaaai.org/conditions-and-treatments/conditions-dictionary/immunoglobulin-e-(ige)) [<https://perma.cc/SG2A-VJD2>].

³⁰ *Facts and Statistics*, *supra* note 13.

³¹ *See* Hourihane, *supra* note 20, at 1240 (citations omitted) (“Peanut accounts for the majority of food-related anaphylactic fatalities and for between 24% and 30% of all cases of anaphylaxis in the community (i.e. excluding intravenous drugs and anaesthetics given in hospitals.)”; *see also* Sampson, *supra* note 22, at 811 (“Generalized anaphylaxis caused by food allergies accounts for at least

Symptoms of anaphylaxis can be divided according to the systems in the body that are affected.³² Respiratory symptoms include “a hoarse voice, persistent cough, and difficult or noisy breathing”;³³ laryngeal oedema (a “feeling of fullness in the throat”);³⁴ airway tract obstruction; wheezing;³⁵ and, although uncommon, asthma and acute bronchospasms (“abnormal contraction of the smooth muscle of the bronchi, resulting in an acute narrowing . . . of the respiratory airway”).³⁶ Cardiovascular symptoms include “dizziness or loss of consciousness,”³⁷ cardiovascular collapse,³⁸ and hypertension.³⁹ Cutaneous and gastrointestinal symptoms often manifest during anaphylaxis but are also characteristic of non-anaphylactic reactions.⁴⁰ Cutaneous symptoms include cyanosis (“bluish” coloration of skin “usually due to lack of oxygen”);⁴¹ rash; facial or limb swelling; urticaria (hives);⁴² pruritus (itchiness); wheal (red, raised lump on the skin); and flare (red, inflamed area surrounding a wheal).⁴³ “Gastrointestinal symptoms include[] vomiting, nausea, [and] diarrhea.”⁴⁴

An illustration of the severity of food allergy reactions can actually be found in the *lack* of double-blind oral challenge studies

one[-]third to one[-]half of anaphylaxis cases seen in hospital emergency departments.”)

³² See Gold & Sainsbury, *supra* note 24, at 172.

³³ *Id.*

³⁴ Pamela W. Ewan, *Clinical Study of Peanut and Nut Allergy in 62 Consecutive Patients: New Features and Associations*, 312 BRITISH MEDICAL J. 1074, 1075 (1996).

³⁵ J. O’B Hourihane et al., *Clinical Characteristics of Peanut Allergy*, 27 CLINICAL & EXPERIMENTAL ALLERGY 634, 636 (1997).

³⁶ Sampson, *supra* note 22, at 810; *Bronchospasm*, HEALTH CENTRAL ENCYCLOPEDIA, <http://www.healthcentral.com/encyclopedia/hc/bronchospasm-3168846/> [<https://perma.cc/352C-VEHZ>] (defining bronchospasm).

³⁷ Gold & Sainsbury, *supra* note 24, at 172.

³⁸ *Id.* at 171.

³⁹ Sampson, *supra* note 22, at 811.

⁴⁰ Gold & Sainsbury, *supra* note 24, at 172.

⁴¹ Hourihane et al., *supra* note 35, at 635; *Skin Discoloration - Bluish*, MEDLINE PLUS, <https://www.nlm.nih.gov/medlineplus/ency/article/003215.htm> [<https://perma.cc/U8SD-Q4JP>] (defining cyanosis).

⁴² Gold & Sainsbury, *supra* note 24, at 172.

⁴³ Steven J. Simonte et al., *Relevance of Casual Contact with Peanut Butter in Children with Peanut Allergy*, 112 J. ALLERGY & CLINICAL IMMUNOLOGY 180, 181 (2003); *Pruritus and Systematic Disease*, MEDSCAPE, <http://emedicine.medscape.com/article/1098029-overview> [<https://perma.cc/Y798-4Q82>] (defining pruritus); *What You Need to Know About Food Allergy Testing*, ASTHMA & ALLERGY FOUND. OF AM., <http://www.kidswithfoodallergies.org/page/food-allergy-test-diagnosis-skin-prick-blood.aspx> [<https://perma.cc/XMT4-UTQ6>] (defining wheal and flare).

⁴⁴ Gold & Sainsbury, *supra* note 24, at 172.

of food allergy sufferers.⁴⁵ Many double-blind studies are disallowed because of the potential dangerousness of a reaction.⁴⁶ And, in illustration of the increasing severity of reactions over time, a self-reported study of successive reactions to peanut allergies revealed that over one-third of respondents (201 respondents accounting for 38% of all respondents) felt that their reactions to peanuts were getting successively worse with each reaction, as compared with only 2.5% of respondents who felt their reactions were successively improving.⁴⁷

In terms of fatalities, the latest estimates indicate that food allergy anaphylaxis causes approximately 150 deaths per year in the United States.⁴⁸ “Teenagers and young adults . . . are at the highest risk” for food-related anaphylactic fatalities.⁴⁹ One study determined that the median time between exposure and respiratory or cardiac arrest was only thirty minutes for food-related anaphylaxis.⁵⁰

C. RISING PREVALENCE OF FOOD ALLERGIES

Another noteworthy characteristic of food allergies is the sheer number of people who suffer from them.⁵¹ New studies estimate that 8% of children suffer from a food allergy, totaling around six million American children.⁵² To put it another way, one child in every thirteen children suffers from a food allergy, translating to about two children per American classroom.⁵³ “IgE-mediated food allergies affect 3.5% to 4%” of people in the United States.⁵⁴ Anaphylaxis, a severe allergic reaction, affects 1% to 2% of the general population, with food being a more common trigger than insect venom.⁵⁵ In fact, children with food

⁴⁵ See Hourihane, *supra* note 20, at 1242 (noting the danger for double-blind testing with peanut allergies).

⁴⁶ *Id.*

⁴⁷ Hourihane et al., *supra* note 35, at 636.

⁴⁸ Kim et al., *supra* note 29, at 167.

⁴⁹ *Facts and Statistics*, *supra* note 13.

⁵⁰ Kim et al., *supra* note 29, at 167.

⁵¹ See Scott H. Sicherer et al., *US Prevalence of Self-Reported Peanut, Tree Nut, and Sesame Allergy: 11-Year Follow-Up*, 125 J. ALLERGY & CLINICAL IMMUNOLOGY 1322, 1324 (2010).

⁵² Marissa Cevallos, *Food Allergies May Affect Nearly 6 Million Children in U.S., Study Estimates*, L.A. TIMES (June 20, 2011), <http://articles.latimes.com/2011/jun/20/news/la-heb-food-allergy-children-20110620> [<https://perma.cc/B9ZQ-W5XY>].

⁵³ *Facts and Statistics*, *supra* note 13.

⁵⁴ Sampson, *supra* note 22, at 805.

⁵⁵ Gold & Sainsbury, *supra* note 24, at 171.

anaphylaxis are four times as likely to have had recurrent generalized reactions than those with insect venom anaphylaxis.⁵⁶ One-third to one-half of anaphylaxis cases seen in hospital emergency rooms are triggered by food allergies.⁵⁷ Also, one study found that once children were identified as at-risk for anaphylaxis, they averaged 0.98 allergic reactions per year, per child.⁵⁸

Moreover, the number of food allergy sufferers is rising.⁵⁹ A study by the Centers for Disease Control and Prevention (CDC) revealed that food allergies in children increased by approximately 50% between 1997 and 2011.⁶⁰ For example, the U.S. population has seen the number of child peanut allergy sufferers double and even triple in just over a decade.⁶¹ As of 2004, 0.8% of young children and 0.6% of adults suffered from a peanut allergy.⁶² And a more comprehensive study, published in 2010, reported even more staggering statistics.⁶³ This study used identical methodology in 1997, 2002, and 2008 to compare the prevalence of peanut allergies in those years.⁶⁴ Although the rate of peanut allergies and the prevalence among the total population stayed rather constant,⁶⁵ the percentage of reported peanut allergies in children under eighteen years of age more than *tripled* from 1997 to 2008, going from 0.6% to 2.1% in just eleven years.⁶⁶

D. LOW THRESHOLD OF EXPOSURE TO TRIGGER A REACTION

The final reason that food allergies should be of interest to the general public is that a very small amount of exposure to a food allergen can trigger a reaction.⁶⁷ Reaction can occur with extremely limited amounts of food ingested,⁶⁸ with mere contact

⁵⁶ *Id.* at 172–74.

⁵⁷ See Sampson, *supra* note 22, at 811.

⁵⁸ Gold & Sainsbury, *supra* note 24, at 172.

⁵⁹ See Sampson, *supra* note 22, at 806; see also *Facts and Statistics*, *supra* note 13.

⁶⁰ See *Facts and Statistics*, *supra* note 13.

⁶¹ See, e.g., Sampson, *supra* note 22, at 806; Sicherer et al., *supra* note 51, at 1324.

⁶² Sampson, *supra* note 22, at 806.

⁶³ See Sicherer et al., *supra* note 51, at 1324.

⁶⁴ *Id.*

⁶⁵ *Id.* (estimating that the percentages of adults with peanut allergies were 1.6%, 1.3%, and 1.3% in 1997, 2002, and 2008, respectively, and estimating that the percentages of the total population with peanut allergies were 1.4%, 1.2%, and 1.4%, in 1997, 2002, and 2008, respectively).

⁶⁶ *Id.*

⁶⁷ See Morisset et al., *supra* note 17, at 1047–48.

⁶⁸ *Id.*

with intact skin,⁶⁹ or even through inhalation,⁷⁰ making allergy-afflicted passengers especially vulnerable in compact areas, like the cabin of an airplane.

In terms of ingestion, recent studies suggest even lower thresholds for a reaction than previously considered.⁷¹ One study on peanut allergies found “positive oral challenges . . . to a cumulative dose below 100 [mg]” in more than one-third of cases (36.2%).⁷² Accordingly, less than 65 mg of peanut caused a reaction in 18% of cases,⁷³ less than 10 mg of peanut caused a reaction in 3.9% of cases,⁷⁴ and some people experienced a reaction with less than 5 mg of peanut ingested.⁷⁵ For reference, 100 mg is less than 1/5 of a peanut and 5 mg is less than 1/100 of a peanut.⁷⁶

Importantly for airlines and their passengers, food allergy sufferers not only react to contact with peanut protein through ingestion, but also contact with intact skin⁷⁷ and contact through inhalation.⁷⁸ Studies of food allergy reactions on airplanes have mostly focused on peanut allergies.⁷⁹ When researchers contacted 150 people who had reported experiencing a reaction to peanuts on an airplane, 15.7% reported a reaction through ingestion, 48.6% through inhalation, 27.9% through skin contact, and 7.8% were unsure of the means of exposure.⁸⁰ Markedly, a

⁶⁹ Hourihane, *supra* note 20, at 1241; Hourihane et al., *supra* note 35, at 637; Simonte et al., *supra* note 43, at 181.

⁷⁰ *Peanut Allergy: Causes*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/peanut-allergy/basics/causes/con-20027898> [<https://perma.cc/7H2A-E96W>]; *Shellfish Allergy*, AM. COLL. OF ALLERGY, ASTHMA & IMMUNOLOGY, <http://acaai.org/allergies/types/food-allergies/types-food-allergy/shellfish-allergy> [<https://perma.cc/DWL7-QY5U>].

⁷¹ See Hourihane, *supra* note 20, at 1241.

⁷² See Morisset et al., *supra* note 17, at 1048.

⁷³ *Id.* at 1047–48.

⁷⁴ *Id.* at 1050.

⁷⁵ Hourihane, *supra* note 20, at 1241 (reporting double-blind, placebo-controlled food challenge evidence that peanut allergies react to oral doses of only 2–5 mg of peanut protein); Morisset et al., *supra* note 17, at 1048 (reporting four study subjects reacting to less than 5 mg of peanut).

⁷⁶ This author found that a 42 g bag of commercially sold peanuts contains roughly 64 nuts. Therefore, 100 mg would be 0.15 nuts and 5 mg would be 0.0075 nuts.

⁷⁷ See Simonte et al., *supra* note 43, at 181.

⁷⁸ *Peanut Allergy: Causes*, *supra* note 70; *Shellfish Allergy*, *supra* note 70.

⁷⁹ See, e.g., Matthew J. Greenhawt et al., Letter to the Editor, *Self-Reported Allergic Reactions to Peanut and Tree Nuts Occurring on Commercial Airlines*, 124 J. ALLERGY & CLINICAL IMMUNOLOGY 598, 598 (2009).

⁸⁰ *Id.*

full one-third of those individuals reported symptoms consistent with anaphylaxis.⁸¹

Some scientists publishing self-reported studies of a reaction to food allergens through inhalation note that what individuals perceive as inhalation reactions could be attributed to unrecognized trace ingestion.⁸² However, some scientists believe that perceptions of inhalation reactions to peanuts on planes may be accurate considering the fact that many packets of roasted peanuts are opened simultaneously on commercial airlines.⁸³ Regardless, unrecognized trace amounts of ingestion, contact with intact skin, and even inhalation trigger reactions in food allergy sufferers at a very low threshold.⁸⁴

III. WHY ARE FOOD ALLERGIES SO PROBLEMATIC WHEN FLYING COMMERCIALY?⁸⁵

Food allergy sufferers face a tough road no matter what their activity,⁸⁶ but flying commercially is particularly problematic for a variety of reasons. First, triggers for food allergies are widespread on airplanes, particularly for peanut allergy sufferers.⁸⁷ If a reaction does occur, then individuals may not be able to adequately treat their reactions while on board the aircraft.⁸⁸ And, on top of the risks, food allergy sufferers may not have other options when traveling.⁸⁹

A. TRIGGERS FOR FOOD ALLERGIES ON COMMERCIAL FLIGHTS

As noted above, inhalation or trace ingestion exposure can trigger a reaction in allergic individuals.⁹⁰ For peanut allergy sufferers, this danger is exacerbated by the prevalence of peanuts on board the plane. In 2009 alone, Delta Air Lines and Southwest Airlines collectively served approximately ninety-two mil-

⁸¹ *Id.*

⁸² *See id.* at 599; *see also* Simonte et al., *supra* note 43, at 181.

⁸³ *See* Simonte et al., *supra* note 43, at 181.

⁸⁴ *See* Morisset et al., *supra* note 17, at 1048.

⁸⁵ *See* Kim et al., *supra* note 29, at 167; Simonte et al., *supra* note 43, at 181; *Policies by Airlines, ALLERGY SAFE TRAVEL*, <http://allergysafetravel.com/policies-by-airlines/> [https://perma.cc/L7BV-S9DB].

⁸⁶ *See* Kim et al., *supra* note 29, at 164 (noting that “available studies in the medical literature exploring the effect of childhood food allergy report that quality of life appears to be diminished in this population”).

⁸⁷ *See* Simonte et al., *supra* note 43, at 181.

⁸⁸ Kim et al., *supra* note 29, at 167.

⁸⁹ *See Policies by Airlines, supra* note 85.

⁹⁰ *See supra* Part II.D.

lion bags of peanuts.⁹¹ For individuals with sensitivity to trace ingestion or inhalation exposure, peanut dust in the air is a serious issue.⁹² An associate professor of pediatrics at Mt. Sinai School of Medicine's Jaffe Food Allergy Institute, Dr. Anna Nowak-Wegrzyn, opined that because of the re-circulated air in the small, confined space of an airplane cabin, "[i]f people five rows behind you are releasing peanut dust[,] it doesn't matter[;] at the end of the flight the peanut is in the air everywhere."⁹³ In fact, traces of peanut allergen have been collected from the ventilation filters of commercial airplanes, confirming that peanut protein is present in the air.⁹⁴

B. INADEQUATE TREATMENT FOR ALLERGIC REACTIONS WHILE ON BOARD

In addition to the greater risk of suffering a reaction, individuals on an airplane are at risk for inadequate treatment of their reaction.⁹⁵ Effective treatment is available but has certain limitations,⁹⁶ which are even greater in the context of a commercial flight.

The "drug of choice" for respiratory and cardiovascular symptoms, symptoms characteristic of anaphylaxis, is epinephrine.⁹⁷ Epinephrine, when administered correctly, can slow down, stop, and even reverse the development of anaphylaxis.⁹⁸ An EpiPen (or another form of injectable epinephrine) should be the first medication used to combat a potentially life-threatening allergic reaction.⁹⁹

⁹¹ John G. Browning, *Keep Your Hands Off My Nuts – Airlines, Peanut Allergies, and the Law*, 77 J. AIR L. & COM. 3, 14 (2012) (citing Harriet Baskas, *Passengers Peeved About Peanuts on Planes*, MSNBC (Sept. 9, 2010, 12:43 PM), <http://www.nbcnews.com/id/39068278/ns/travel-travel#.VqpcVIMrLsE> [<https://perma.cc/WC3X-TXYT>]).

⁹² See Tas Anjarwalla, *Should Peanuts be Banned from Planes?*, CNN (June 22, 2010, 8:43 AM), <http://www.cnn.com/2010/TRAVEL/06/22/ban.peanuts.planes/> [<https://perma.cc/577J-3LEZ>].

⁹³ *Id.*

⁹⁴ James, *supra* note 15, at 25.

⁹⁵ See *id.* at 26.

⁹⁶ See Greenhawt et al., *supra* note 79, at 598.

⁹⁷ See Gold & Sainsbury, *supra* note 24, at 171; Sampson et al., *supra* note 25, at 375.

⁹⁸ See Kim et al., *supra* note 29, at 164.

⁹⁹ James, *supra* note 15, at 26 ("There are no contraindications for [EpiPen] use in a life-threatening allergic reaction . . .").

Unfortunately, although epinephrine effectively addresses the severe symptoms associated with anaphylaxis,¹⁰⁰ it has its own limitations. Epinephrine falls short in the areas of dosage, usage when situations call for its use, and knowledge, or lack thereof, of caregivers expected to administer the drug.

To begin, the doses available are problematic.¹⁰¹ If using a syringe to measure epinephrine for administration to a child suffering symptoms of anaphylaxis, then the prepared dose by the parent has to be accurate. But one study showed that the difference between prepared doses was extreme and even dangerous—the maximum dose prepared was forty times the amount of the minimum dose prepared.¹⁰² On the other hand, although devices like the EpiPen take out the possibility of caretaker error and reduce the variance in doses, the EpiPen does not allow enough flexibility for doctors to prescribe a dose appropriate for a particular patient because it is only available in two fixed doses (0.15 mg and 0.3 mg).¹⁰³

In addition to problems with dosage amounts, epinephrine must be administered every five to fifteen minutes as necessary, which requires that multiple doses be available.¹⁰⁴ However, airplanes are only required to carry two doses of epinephrine¹⁰⁵ (which many passengers do not know about),¹⁰⁶ and it may be cost-prohibitive for an individual to carry multiple doses.¹⁰⁷

Epinephrine is also greatly underused in situations that call for its use.¹⁰⁸ In fact, in studies of persons who survived anaphylactic episodes, only 30% to 40% of those who required epinephrine actually received it.¹⁰⁹ Another study showed that in up to 71% of anaphylactic episodes, an EpiPen autoinjector was

¹⁰⁰ See Gold & Sainsbury, *supra* note 24, at 171.

¹⁰¹ See Simons, *supra* note 26, at 840.

¹⁰² See *id.* at 839.

¹⁰³ See *id.* at 840–41.

¹⁰⁴ See Sampson et al., *supra* note 25, at 375.

¹⁰⁵ 14 C.F.R. § 121.803 (requiring passenger-carrying airplanes to carry an emergency medical kit); 14 C.F.R. pt. 121, app. A (defining an “emergency medical kit” so as to require two different doses of epinephrine).

¹⁰⁶ See Greenhawt et al., *supra* note 79, at 598.

¹⁰⁷ Terry J. Allen, *Anaphylactic Sticker Shock*, IN THESE TIMES (Aug. 4, 2014), http://inthesetimes.com/article/16951/anaphylactic_sticker_shock [<https://perma.cc/FQ8J-GXS5>] (reporting that a two-pack of EpiPens costs \$333 and only have an eighteen-month shelf life).

¹⁰⁸ See Simons, *supra* note 26, at 841; see also Gold & Sainsbury, *supra* note 24, at 171.

¹⁰⁹ Simons, *supra* note 26, at 842.

not administered as first aid treatment.¹¹⁰ A study of peanut and tree nut allergic reactions on commercial airlines reported that although one-third of cases reported symptoms consistent with anaphylaxis, only 10% of respondents received epinephrine despite its availability aboard the aircraft,¹¹¹ probably due to lack of knowledge of its availability aboard or a passenger's unwillingness to bother the flight staff.

Additionally, one of the greatest issues with the use of epinephrine is the knowledge deficiency of caretakers charged with administering epinephrine.¹¹² One study revealed that when parents were asked to describe symptoms of anaphylaxis that would necessitate the use of epinephrine, very few parents recognized respiratory or cardiovascular symptoms as symptoms consistent with anaphylaxis.¹¹³ Also, less than 25% of the parents could recall all four steps required for proper administration of an EpiPen, and 5% could not recall a single step.¹¹⁴ Unfortunately, on a flight without any guarantee of having a medical professional available, if parents cannot properly administer epinephrine, then a child may have no adequate treatment for a severe allergic reaction.

C. LACK OF FEASIBLE TRAVEL ALTERNATIVES

Despite all of the risks involved with flying commercially, food allergy sufferers still continue to fly, presumably because they do not have feasible alternatives.¹¹⁵ Although most major airlines will refrain from serving peanuts while someone with a severe allergy is on board,¹¹⁶ no airline currently has a blanket policy of making an announcement alerting other passengers.¹¹⁷

¹¹⁰ Gold & Sainsbury, *supra* note 24, at 174.

¹¹¹ Greenhawt et al., *supra* note 79, at 598.

¹¹² See Kim et al., *supra* note 29, at 164.

¹¹³ See Gold & Sainsbury, *supra* note 24, at 172.

¹¹⁴ See *id.*

¹¹⁵ See *Policies by Airlines*, *supra* note 85.

¹¹⁶ See *id.*; see also *Customers with Disabilities: Peanut Dust Allergies*, SOUTHWEST, <https://www.southwest.com/html/customer-service/unique-travel-needs/customers-with-disabilities-pol.html> [<https://perma.cc/2BS2-4RS4>] (follow "Peanut Dust Allergies" hyperlink); *Travelers with Disabilities: Special Concerns—Peanut Allergies*, DELTA, http://www.delta.com/content/www/en_US/traveling-with-us/special-travel-needs/disabilities.html [<https://perma.cc/E8FG-Z4YB>] (follow "Special Concerns" hyperlink; then follow "Peanut Allergies" hyperlink).

¹¹⁷ See, e.g., *Customers with Disabilities: Peanut Dust Allergies*, *supra* note 116; *Customers with Peanut Allergies*, UNITED, <https://www.united.com/web/en-US/content/travel/specialneeds/needs/peanut-allergies.aspx> [<https://perma.cc/6BF5-J7CA>]; *Special Meals and Nut Allergies*, AMERICAN AIRLINES, <https://www.aa.com/>

Additionally, flying private is not an option for most passengers. An estimation of the flight for Gleason, the plaintiff in the case referenced at the beginning of this article, would be between \$2,060 and \$44,020 one-way.¹¹⁸

A recent survey of those who had experienced a reaction to peanuts while aboard a commercial aircraft illustrates this lack of alternatives.¹¹⁹ In spite of experiencing a reaction to peanuts while flying commercially, more than 50% of respondents did not change their flying behavior, about 25% no longer consume food served on board, about 25% clean their personal seating area, and 20% request an allergen-free flight (despite little success); but a mere 12% were discouraged enough by a past reaction to no longer fly commercially.¹²⁰

IV. WHY HAS THE DEPARTMENT OF TRANSPORTATION NOT PROTECTED PEANUT ALLERGY SUFFERERS ON COMMERCIAL FLIGHTS?

With the risks and lack of alternatives for food allergy sufferers traveling commercially, one would think that the DOT might step in to offer protection for those individuals. However, history has shown that political pressures will never permit the DOT to offer such protection.¹²¹

In 1998, the DOT proposed a regulation that would require the ten major commercial airlines to provide “peanut-free zones” for allergic passengers.¹²² The Air Transportation Association, a trade organization for major U.S. airlines, strongly resisted the proposed regulation.¹²³ On September 11, 1998, Senators Coverdell and Shelby, who submitted Senate Resolution 117, called the establishment of peanut-free zones “excessive regulation” for three reasons: (1) regulations on peanuts

i18n/travelInformation/duringFlight/dining/special-meals.jsp [https://perma.cc/AND4-BFF6]; *Travelers with Disabilities: Special Concerns—Peanut Allergies*, *supra* note 116.

¹¹⁸ See *Private Jet Flight Search*, PRIVATE FLY, <http://www.privatefly.com/us/private-jet-charter/estimate-prices?flightSearch=2911908> [https://perma.cc/C2MA-USX5] (returning an estimate of between \$2,060 and \$44,020 for a one-way flight from Chicago O’Hare Airport to any airport in Orlando, Florida).

¹¹⁹ See Greenhawt et al., *supra* note 79, at 599.

¹²⁰ *Id.* at 598.

¹²¹ James, *supra* note 15, at 25 (describing the political backlash to the DOT’s proposed regulation to mandate the ten major U.S. airlines to provide “peanut-free zones”).

¹²² *Id.*

¹²³ *Id.*

would “unfairly single[] out [one] product while ignoring all other allergens”; (2) regulation would infringe on the “rights of the 99.9[%] of the traveling public who are not allergic to peanuts”; and (3) peanut-free zones “might needlessly establish allergen-free zones for all public transportation.”¹²⁴ Consequently, Congress enacted Public Law 106-69, an appropriations bill *prohibiting* the use of funds to carry out regulations that “provide peanut-free buffer zone[s] . . . or . . . restrict the distribution of peanuts.”¹²⁵

Not to be deterred, in 2010, the DOT tested the strength of the appropriations bill by soliciting public comment on a series of new regulations under the umbrella of “Enhancing Passenger Safety Protections,” including, among many other issues, greater protection for peanut allergy sufferers.¹²⁶ The vast majority of the public comments received focused on proposed protections for peanut allergies with most consumers preferring a complete ban of peanut products on flights.¹²⁷ But, despite public concern over allergic reactions to peanuts while aboard a commercial aircraft, the DOT expressly declined to take action on peanut regulation, noting the limitations placed on them by the earlier appropriations bill.¹²⁸ Considering that the DOT cannot pass even minimal regulations for allergic reaction prevention even with public approval, it is unlikely that the DOT will ever be able to address any food allergies.

V. WHAT IS THE LEGAL FRAMEWORK FOR SERVICE PREEMPTION?

So, if the DOT cannot offer its protection to peanut allergy sufferers, do those individuals have any legal remedies? As illustrated by *Gleason*, passengers suffering from peanut allergies may have very little recourse after experiencing a severe reac-

¹²⁴ S. Res. 117, 105th Cong. (1998) (enacted).

¹²⁵ Appropriations, 2000—Department of Transportation and Related Agencies, Pub. L. No. 106-69, § 346, 113 Stat. 986, 1023–24 (The funds cannot be used for such purposes until Congress receives a “peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft.”).

¹²⁶ See 75 Fed. Reg. 32318 (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, and 399).

¹²⁷ See 76 Fed. Reg. 23110 (to be codified at 14 C.F.R. pts. 244, 250, 253, 259, and 399).

¹²⁸ *Id.*

tion on board a commercial aircraft.¹²⁹ The ADA requires that “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or *service* of an air carrier”¹³⁰ So, is it all but impossible to sue an airline? Although the court in *Gleason* determined that all of Gleason’s claims were preempted by this provision,¹³¹ the U.S. Supreme Court has held that breach of contract claims are allowable,¹³² and, more importantly for this discussion, the question remains open as to what qualifies as a service for the purpose of determining preemption under the ADA.¹³³

A. SUPREME COURT PRECEDENT

The Supreme Court has addressed the preemption provision of the ADA and the implications for the airline industry in three major cases.¹³⁴ In the Court’s first case to interpret the preemptive scope of the ADA, *Morales v. Trans World Airlines, Inc.*, the Court found that the ADA preemption provision expressly prohibits states from enforcing laws against airlines for deceptive advertising and trade practices.¹³⁵ The Court found that the states were not only forbidden from *regulating* rates, routes, and services, but also forbidden from imposing *any regulations “relating to”* rates, routes, and services, per the plain meaning of the preemption provision.¹³⁶ The Court rejected the argument that state laws could avoid the preemptive effect of the ADA if they were laws of general applicability not tailored to the airline industry, and it similarly rejected the argument that state laws could coexist with federal laws if the two were consistent.¹³⁷ *Morales* set the stage for expansive preemption.

When the Court again confronted the ADA preemption provision in *American Airlines v. Wolens*,¹³⁸ the Court reversed an Illinois Supreme Court decision inasmuch as it permitted state

¹²⁹ See *Gleason v. United Airlines*, No. 2:13-CV-01064-MCE-DAD, 2015 WL 2448682, at *2 (E.D. Cal. May 20, 2015).

¹³⁰ 49 U.S.C. § 41713(b)(1) (emphasis added).

¹³¹ *Gleason*, 2015 WL 2448682, at *2.

¹³² See, e.g., *Am. Airlines v. Wolens*, 513 U.S. 219, 226 (1995).

¹³³ See *Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1059 (2000) (O’Connor, J., dissenting to a denial of a writ of certiorari).

¹³⁴ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Wolens*, 513 U.S. at 219.

¹³⁵ *Morales*, 504 U.S. at 391.

¹³⁶ *Id.* at 385.

¹³⁷ *Id.* at 386.

¹³⁸ *Wolens*, 513 U.S. at 219.

consumer fraud act claims,¹³⁹ but it affirmed the decision in that it allowed plaintiffs' breach of contract action to proceed.¹⁴⁰ In *Wolens*, the plaintiffs, all members of American Airlines' frequent flyer program, sued for an injunction and monetary damages under the Illinois Consumer Fraud and Deceptive Business Practices Act after American Airlines changed their frequent flyer program and retroactively applied the modifications to the plaintiffs.¹⁴¹

Without the benefit of reading the *Morales* opinion, the Illinois Supreme Court found that the state Consumer Fraud Act and breach of contract claims could proceed.¹⁴² After the issuance of the *Morales* opinion, American Airlines petitioned for certiorari, arguing that the Illinois Supreme Court's decision narrowly construed the preemption provision of the ADA, which deviated from the *Morales* analysis.¹⁴³ After the Supreme Court vacated the judgment of the Illinois Supreme Court and remanded "to allow the court to reconsider its opinion in light of the recent *Morales* decision, the Illinois Supreme Court held fast to its prior judgment, finding that frequent flyer programs are "peripheral to the operation of an airline" and, therefore, not subject to preemption.¹⁴⁴

The Supreme Court again considered the case and reversed the Illinois Supreme Court decision to the extent that it allowed the survival of the Consumer Fraud Act claims, but it affirmed the decision insofar as plaintiffs were allowed to proceed with their breach of contract claims.¹⁴⁵ The Court noted that the purpose of the ADA is for airlines to cater their services to passengers with "maximum reliance on competitive market forces"¹⁴⁶ and that "Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws."¹⁴⁷ However, the Court justified keeping breach of contract claims outside the scope of

¹³⁹ *Id.* at 226.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 224–25 (suing under 815 Ill. Comp. Stat. 505 (1992)).

¹⁴² *Id.* at 225.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 226 (quoting *Wolens v. Am. Airlines, Inc.*, 157 Ill. 2d 466, 472 (1993)).

¹⁴⁵ *Id.*

¹⁴⁶ 49 U.S.C. § 40101(a)(6); see *Wolens*, 513 U.S. at 230 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

¹⁴⁷ *Wolens*, 513 U.S. at 228 (alteration in original) (quoting Brief for Petitioner at 27, *Wolens*, 513 U.S. 219 (No. 93-1286)).

the preemption provision by observing, in agreement with the United States as amicus curiae, that “[t]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.”¹⁴⁸ This case illustrates that the Court maintains a broad view of preemption under the ADA, but it leaves room for some exceptions.

Most recently, in *Northwest, Inc. v. Ginsberg*, the Court held that the ADA does not just preempt state law enacted by the legislature, but also preempts state law developed by the courts.¹⁴⁹ Again, conflict arose in the context of a passenger disgruntled by modifications in an airline’s frequent flyer program.¹⁵⁰ Northwest terminated Ginsberg’s membership in its WorldPerks program based on a provision that allowed Northwest, within its sole discretion, to discontinue a membership upon a determination that the member was abusing the program.¹⁵¹ Ginsberg brought four claims against Northwest: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation.¹⁵² The district court dismissed the breach of contract claim without prejudice and dismissed the remaining claims as preempted by the ADA.¹⁵³ Ginsberg appealed the dismissal of the breach of implied covenant of good faith and fair dealing claim.¹⁵⁴ Relying on circuit precedent prior to the *Wolens* opinion, the Ninth Circuit reversed the dismissal, finding that the breach of implied covenant of good faith and fair dealing claim was “too tenuously connected to airline regulation to trigger preemption under the ADA.”¹⁵⁵

The U.S. Supreme Court reversed the Ninth Circuit decision that would have breathed new life into the breach of implied covenant of good faith and fair dealing claim.¹⁵⁶ The Court reasoned that exempting common law causes of action from preemption would cut against the language of the statute that

¹⁴⁸ *Id.* at 230 (quoting Brief for United States as Amicus Curiae Supporting Respondents at 23, *Wolens*, 513 U.S. 219 (No. 93-1286)).

¹⁴⁹ *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1426 (2014).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1427.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1428 (quoting *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 879 (9th Cir. 2012)).

¹⁵⁶ *Id.* at 1433–34.

expressly preempts any “law, regulation, or provision having the force and effect of law.”¹⁵⁷ Additionally, the Court recognized that placing common law claims outside the scope of the preemption provision would negate the central purpose of the provision—to ensure that states would not undo the deregulation of the airline industry that Congress sought to accomplish.¹⁵⁸ Once the Court had determined that common law claims fell comfortably within the realm of preemption, the Court found that the implied covenant claim was not just limited to obligations that the parties voluntarily assumed, but also was subject to state-imposed standards, primarily because the implied covenant could not be contracted out of an agreement between the parties.¹⁵⁹ Thus, the implied covenant claim was subject to the full preemptive effect of the ADA.¹⁶⁰ The Court did note Ginsberg’s “claim of ill treatment by Northwest might have been vindicated if he had pursued his [breach of contract] claim,” rather than voluntarily giving up on that claim.¹⁶¹

All three of the U.S. Supreme Court cases addressing the preemptive effect of the ADA have claimed broad preemption through application of the ADA but have left the door open for passengers to pursue breach of contract claims.¹⁶² The Court’s determination that breach of contract claims fall outside the scope of preemption should have allowed Gleason’s case to go forward because she had orally contracted with an employee of the airline to make an announcement asking passengers to refrain from eating peanuts aboard her flight.¹⁶³

But what if a passenger requests an announcement but receives no assurances? The answer is unclear because the Court has not yet definitively answered the most important question for protecting passengers with peanut allergies—what is the definition of services for the purpose of preemption under the ADA?¹⁶⁴

¹⁵⁷ *Id.* at 1428.

¹⁵⁸ *Id.* at 1430.

¹⁵⁹ *Id.* at 1432.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1433.

¹⁶² *Id.*; *Am. Airlines v. Wolens*, 513 U.S. 219, 226 (1995).

¹⁶³ *See Gleason v. United Airlines, Inc.*, No. 2:13-CV-01064-MCE-DAD, 2015 WL 2448682, at *1 (E.D. Cal. May 20, 2015).

¹⁶⁴ *See Wolens*, 513 U.S. at 226 (finding that “access to flights and class-of-service upgrades” were included under service preemption but declining to further define services).

B. CIRCUIT SPLIT OVER THE DEFINITION OF SERVICE

The U.S. Supreme Court has not definitively outlined what is included in services for purposes of preemption.¹⁶⁵ But the circuit courts have addressed the subject with mixed results.¹⁶⁶

Some circuit courts have opted for a narrow definition of services and, therefore, limited preemption.¹⁶⁷ The Ninth Circuit, beginning in *Charas v. Trans World Airlines, Inc.*, determined that services included only “the prices, schedules, origins[,] and destinations of the point-to-point transportation of passengers, cargo, or mail,” but it also held that Congress did not intend to preempt personal injury claims related to “in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.”¹⁶⁸ The Ninth Circuit reasoned that “in enacting the ADA, Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry.”¹⁶⁹

The First and Third Circuits have elaborated on the reasons supporting a narrow definition of services.¹⁷⁰ The Third Circuit explained that if the service preemption barred personal injury claims and other tort claims, the preemption provision would negate the effectiveness and policy behind the Federal Aviation Administration’s savings clause, 49 U.S.C. § 40120(c),¹⁷¹ and its mandated insurance coverage provision, 49 U.S.C. § 41112(a).¹⁷² The Third Circuit also noted that it was “highly unlikely that Congress intended to deprive passengers of their common law rights to recover for death or personal injuries sus-

¹⁶⁵ *Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1059 (2000) (O’Connor, J., dissenting to a denial of a writ of certiorari).

¹⁶⁶ *Compare Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010) (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc)), with *Malik v. Cont’l Airlines, Inc.*, 305 F. App’x 165, 168 (5th Cir. 2008) (citing *Hodges v. Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)).

¹⁶⁷ *See, e.g., Ventress*, 603 F.3d at 682.

¹⁶⁸ *Charas*, 160 F.3d at 1261.

¹⁶⁹ *Id.*

¹⁷⁰ *See Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 93 (1st Cir. 2013); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 87 (1st Cir. 2011); *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 127 (3d Cir. 2010).

¹⁷¹ 49 U.S.C.S. § 40120(c) (“A remedy under this part is *in addition to* any other remedies provided by law.” (emphasis added)).

¹⁷² *See Taj Mahal Travel v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998); *see also Charas*, 160 F.3d at 1265.

tained in air crashes.”¹⁷³ The Third Circuit justified a constrained reading of preemption of tort law by pointing out that “‘the [DOT] has neither the authority nor the apparatus required to superintend’ tort disputes.”¹⁷⁴

In contrast, the majority of circuit courts have found a much broader definition of services for preemption purposes.¹⁷⁵ In accordance with the broad preemptive purpose of the ADA, the Fifth Circuit held that:

“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.¹⁷⁶

The First, Second, Seventh, Tenth, and Eleventh Circuits have all similarly read a broad definition of services into the ADA’s preemption provision.¹⁷⁷ Presumably, if these circuit courts include “provision of food and drink” in their definition of services, personal injury claims stemming from a reaction to food or drink provided by the airline would be preempted by the ADA. The Supreme Court has held that the preemption in-

¹⁷³ *Elassaad*, 613 F.3d at 126 (internal quotation marks omitted) (quoting *Taj Mahal Travel*, 164 F.3d at 194).

¹⁷⁴ *Id.* at 127 (quoting *Taj Mahal Travel*, 164 F.3d at 194).

¹⁷⁵ See *Air Transp. Ass’n of Am. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008).

¹⁷⁶ *Malik v. Cont’l Airlines, Inc.*, 305 F. App’x 165, 168 (5th Cir. 2008) (quoting *Hodges v. Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)).

¹⁷⁷ *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 453 (1st Cir. 2014) (citing *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 93–95, 98 (1st Cir. 2013)); *Cuomo*, 520 F.3d at 223 (holding that claims arising from provisions for passengers during lengthy ground delays relate to services of an air carrier and were therefore preempted); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003) (finding the arguments for a broader definition of services more compelling than the alternative); *Arapahoe Cty. Pub. Airport Auth. v. Fed. Aviation Admin.*, 242 F.3d 1213, 1222 (10th Cir. 2001) (finding that a ban on scheduled passenger service related to both routes and services and was thus preempted); *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (adopting the *Hodges* definition of services).

cludes all claims *related to* a service, even if those claims are based on state standards, either from statutory or common law.¹⁷⁸ And personal injury from an allergic reaction to food would be related to food and beverage service, and negligence is a state common law standard.

A few circuits have opted for a middle ground between the two more extreme definitions.¹⁷⁹ In *Smith v. Comair, Inc.*, the Fourth Circuit found that boarding procedures were included as services to the extent that airlines needed broad discretion in denying boarding to a potentially dangerous passenger.¹⁸⁰ However, to the extent that a plaintiff's claims are based on tortious conduct unrelated to boarding procedure, the claims are not preempted.¹⁸¹ Additionally, although the Third Circuit adopted a broader definition of services, it did observe that safety of an airline's operations is not a matter to be preempted.¹⁸² The Third Circuit opined that in writing the preemption provision of the ADA, Congress intended for airlines to compete against one another to attract passengers through differentiated "rates, routes, and services," but safety is a necessity for all airlines that should not be left to competition.¹⁸³

The numerous circuit court cases have left passengers and airlines trying to navigate a patchwork of regulation to find whether a personal injury or similar tort claim is preempted by the service preemption provision of the ADA.¹⁸⁴ A peanut allergy sufferer seeking recourse after suffering a reaction aboard an airplane has two main hurdles to jump through to avoid dismissal of her claim. First, a passenger must rely on her circuit's definition of services to determine if nearly all of her claims are preempted under the broadest definition or almost none under the narrowest definition.¹⁸⁵ Then, if her circuit adheres to a broad definition of services, a passenger must navigate the convoluted case law, including a differentiation between common law claims and individual agreements of the parties indepen-

¹⁷⁸ *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429 (2014).

¹⁷⁹ *See, e.g., Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998).

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 373 (3d Cir. 1999).

¹⁸³ *See id.*

¹⁸⁴ *See Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1058 (2000).

¹⁸⁵ *Compare Malik v. Cont'l Airlines, Inc.*, 305 F. App'x 165, 168 (5th Cir. 2008) (quoting *Hodges v. Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)), with *Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010) (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc)).

dent of state law.¹⁸⁶ Although the Supreme Court has affirmatively stated that breach of contract claims are not subject to preemption,¹⁸⁷ not all courts abide by that ruling.¹⁸⁸

The Supreme Court should address this wide disparity between rulings to give certainty to claimants and the industry alike. But if the Court were to say something, what should it say? This article argues that the proper reading of service preemption in the ADA is a narrow one, constituting more limited preemption.

VI. WHY SHOULD THE SUPREME COURT ADOPT A NARROW INTERPRETATION OF SERVICE PREEMPTION?

Some of the most vulnerable of passengers, those with severe food allergies, do not have the luxury of relying on competitive market forces.¹⁸⁹ To combat this problem, this article argues that the Supreme Court should opt for a narrow reading of the word services, not only because it is a logical outgrowth of legislative intent and Supreme Court precedent, but also because it would offer much needed protection to food allergy sufferers.

A. LEGISLATIVE INTENT

First, the ADA is a product of the legislature, and a review of legislative intent behind the law reveals that Congress intended to keep safety measures in place despite deregulating the airline industry.¹⁹⁰ In its policy statement, Congress confirmed that “assigning and maintaining safety [is] the highest priority” in carrying out the ADA, with a commitment to “preventing deterioration in established safety procedures.”¹⁹¹

But that policy statement is not the only evidence that Congress intended to maintain high safety standards. Congress corroborated its intent with the Federal Aviation Administration’s Savings Clause, found in 49 U.S.C. § 40120(c), which asserts that

¹⁸⁶ See *Gleason v. United Airlines, Inc.*, No. 2:13-CV-01064-MCE-DAD, 2015 WL 2448682, at *1 (E.D. Cal. May 20, 2015).

¹⁸⁷ See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) (affirming the lower court’s decision “to the extent that it permit[ted] plaintiffs’ [breach of contract] action to proceed.”).

¹⁸⁸ See *Gleason*, 2015 WL 2448682, at *2.

¹⁸⁹ See 49 U.S.C. § 40101(a)(6); *Wolens*, 513 U.S. at 230 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

¹⁹⁰ See H.R. Res. 1758, 103rd Cong., 108 Stat. 745, 1094 (1994).

¹⁹¹ *Id.*

a “remedy under this part . . . is *in addition to* any other remedies provided by law.”¹⁹² Moreover, Congress mandates that airlines maintain insurance coverage “sufficient to pay . . . for bodily injury to, or death of, an individual . . . resulting from the operation or maintenance of the aircraft”¹⁹³ It would be odd indeed if Congress intended to preempt all claims relating to personal injury from an airline’s negligence in “ticketing, boarding procedures, provision of food and drink, and baggage handling,”¹⁹⁴ when, as noted above, they have expressed a commitment to safety and protection for passengers from personal injury.¹⁹⁵

B. SUPREME COURT PRECEDENT

Congress is not the only branch of government that has hinted at the proper reading of service preemption. Although the Supreme Court has declined to definitively define services in the ADA preemption provision,¹⁹⁶ a narrow reading of service preemption fits comfortably with what the Court has already said on the subject.

To start, a broad reading of service preemption presents a conflict with the Court’s reasoning that personal injury claims are not preempted under the ADA.¹⁹⁷ In *Wolens*, the Court noted in passing that preemption did not encompass personal injury or wrongful death claims.¹⁹⁸ Consequently, a broad reading of services that includes food and beverage services would require dismissal of personal injury or wrongful death claims resulting from provisions of food and beverage,¹⁹⁹ a result that directly contradicts the Court’s reasoning in *Wolens*.²⁰⁰

Additionally, a broad reading of service preemption would invert the traditional common carrier standard. The common carrier standard, applied to those “who hold [themselves] out to

¹⁹² 49 U.S.C. § 40120(c) (emphasis added).

¹⁹³ Air Carrier Certificates, 49 U.S.C. § 41112 (2015).

¹⁹⁴ *Malik v. Cont’l Airlines, Inc.*, 305 F. App’x 165, 168 (5th Cir. 2008) (citing *Hodges v. Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995)) (finding a broad definition of services for preemptive purposes).

¹⁹⁵ See *supra* notes 191–92 and accompanying text.

¹⁹⁶ *Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1058 (2000) (O’Connor, J., dissenting to a denial of a writ of certiorari) (declining to resolve the circuit split over the definition of services).

¹⁹⁷ See *Am. Airlines v. Wolens*, 513 U.S. 219, 231 n.7, 234 n.9 (1995).

¹⁹⁸ *Id.*

¹⁹⁹ See *Malik*, 305 F. App’x at 168.

²⁰⁰ See *Wolens*, 513 U.S. at 231 n.7, 234 n.9.

the public as engaged in the business of transporting persons or property from place to place, for compensation, offering [their] services to the public generally,”²⁰¹ attaches a heightened standard of care to those individuals or companies.²⁰² And the Supreme Court has found that commercial airlines qualify as common carriers.²⁰³ It is doubtful that the Court will find that a heightened standard of care applies to commercial airlines and then turn around and preempt all claims involving an airline’s negligence.

Congress itself has recognized that food allergy sufferers are a minority,²⁰⁴ going up against powerful industries.²⁰⁵ For example, peanuts are “the 12th most valuable cash crop grown in the United States with a farm value of over one billion U.S. dollars.”²⁰⁶ The Supreme Court demonstrated a recognition of the unique role of the judiciary in protecting minorities when it remarked, “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”²⁰⁷ Accordingly, if the Court does address the limits of service preemption under the ADA, policy dictates that it take into account the unequal balance of power between individual passengers and influential industries.

VII. HOW WOULD A NARROW READING OF SERVICE PREEMPTION BE THE BEST SOLUTION FOR PROTECTING FOOD ALLERGY SUFFERERS?

If the Court were to adopt a narrow reading of service preemption, that ruling would offer much needed protection to food allergy sufferers—a solution that has not been achieved through other measures.

²⁰¹ D. E. Buckner, Annotation, *Air Carrier as Common or Private Carrier, and Resulting Duties as to Passenger’s Safety*, 73 A.L.R. FED. 2D 346 (1960).

²⁰² THOMAS A. DICKERSON, TRAVEL LAW § 2.05 (2016).

²⁰³ *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 872 (1998) (citing 45 U.S.C. § 181).

²⁰⁴ See S. Res. 117, 105th Cong. (1998) (enacted).

²⁰⁵ See *U.S. Peanut Supply*, AMERICAN PEANUT COUNCIL, <https://www.peanutsusa.com/about-peanuts/the-peanut-industry3/18-u-s-peanut-supply.html> [https://perma.cc/TRH9-227C].

²⁰⁶ *Id.*

²⁰⁷ *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1668 (2014) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

Up to this point, legal scholarship has exclusively focused on weighing the merits of potential DOT regulations for peanut restriction²⁰⁸ and considering the extent to which individuals can claim peanut allergies as a disability under the Air Carrier Access Act of 1986 or the Americans with Disabilities Act.²⁰⁹ However, not only do the corresponding solutions ignore all other food allergies, but also the solutions are not feasible. The DOT has its hands tied by congressional appropriations that forbid it to promulgate regulations restricting access to peanuts on airplanes,²¹⁰ so the merits of any DOT regulations are likely irrelevant. And although food allergies seemingly fit the medical definition of disability,²¹¹ courts have found that food allergies do not fit the *legal* definition of disability.²¹²

A narrow interpretation of service preemption under the ADA takes politics out of the equation, addresses the expressed concerns of Congress, and offers protection to food allergy sufferers. The Court, “shielded from political influence by life tenure, [is] more likely to withstand political pressures and render [its] decisions in a climate tempered by judicial reflection”²¹³ That allows the Court to ignore the demands of powerful industries, such as food production and airline industries, when making its decision.

Also, dealing with the concerns of allergic individuals through limiting the preemptive effect of the ADA addresses the concerns that Congress announced in Senate Resolution 117.²¹⁴ The Senators submitting that resolution pointed out that peanut regulations ignored the rights of the majority of airline passengers, “single[d] out” one product among many allergens, and might set a policy of having allergen-free zones in other forms of public transportation.²¹⁵ Here, a narrow interpretation of service preemption merely opens the door for claims against an

²⁰⁸ See Kari McWilliams, Comment, *Peanut-Free Buffer Zones: Has the Department of Transportation Gone Nuts?*, 65 J. AIR L. & COM. 189 (1999).

²⁰⁹ Browning, *supra* note 91, at 9–15, 27–30; Jonathan Bridges, *Suing for Peanuts*, 75 NOTRE DAME L. REV. 1269, 1283–88 (2000).

²¹⁰ See Appropriations 2000—Department of Transportation and Related Agencies, Pub. L. No. 106-69, 113 Stat. 986.

²¹¹ See Browning, *supra* note 91, at 34.

²¹² See *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999); see also *Slade v. Hershey Co.*, No. 1:09CV00541, 2011 WL 3159164, at *5 (M.D. Pa. July 26, 2011).

²¹³ *Chandler v. Roudebush*, 425 U.S. 840, 851 (1976).

²¹⁴ S. Res. 117, 105th Cong. (1998) (enacted).

²¹⁵ *Id.*

airline from any passenger who suffers a personal injury resulting from the airline's tortious conduct,²¹⁶ without singling out any products, passengers, airlines, or industries. And allowing tort claims would not have any effect on the standard of care applied to other public transportation services. Congressional concern over the effect of peanut regulation is eliminated with a narrow interpretation of service preemption under the ADA.

Most importantly, a narrow interpretation of service preemption offers much needed protection to food allergy sufferers in letting those individuals bring claims against airlines for personal injury. One key justification offered for imposing negligence liability on a party is that liability gives the party an incentive to engage in safer conduct in the future.²¹⁷ Additionally, changing the scope of preemption allows individuals afflicted with food allergies other than peanut allergies to fight for protection as well. Here, if airlines are subject to liability for personal injuries suffered by allergic passengers, they will be more likely to accommodate the needs of those passengers with reasonable measures, such as making an announcement asking other passengers to refrain from consuming reaction-producing products while a severely allergic individual is on board.

VIII. CONCLUSION

Food allergies leave individuals vulnerable, nowhere more so than on a commercial aircraft where allergens are in abundance and treatment is often unavailable or otherwise lacking. The current legal framework for food allergy sufferers who experience a severe allergic reaction while on board a commercial flight is confusing at best and useless at worst, based on varying interpretations of service preemption under the ADA.

If the Supreme Court addresses the existing circuit split over the definition of services in the preemption provision of the ADA, both legislative intent and Court precedent logically favor a narrow reading of services. In turn, that interpretation would offer much needed protection to some of the most vulnerable passengers among us, food allergy sufferers.

²¹⁶ See *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 127 (3d Cir. 2010) (citing *Taj Mahal, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998)).

²¹⁷ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 (AM. LAW INST. 2010).