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## Taking an Independent Look at the Air Carrier Access Act: Why No Private Right of Action Exists

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**TAKING AN INDEPENDENT LOOK AT THE  
AIR CARRIER ACCESS ACT: WHY NO PRIVATE RIGHT  
OF ACTION EXISTS**

MADISON GAFFORD\*

**I**N *STOKES V. SOUTHWEST AIRLINES*,<sup>1</sup> the Fifth Circuit was forced to overturn its own precedent in order to determine that there is no independent private right of action to enforce the Air Carrier Access Act (ACAA) of 1986.<sup>2</sup> This was due to a controversial case, *Alexander v. Sandoval*, where the U.S. Supreme Court held that no private right of action existed to enforce disparate-impact regulations that were created under Title VI of the Civil Rights Act of 1964.<sup>3</sup> The Supreme Court emphasized that “private rights of action to enforce federal law must be created by Congress” and that “[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.”<sup>4</sup> The Fifth Circuit recognized that this undermined its previous reasoning that an implied private right of action existed under the ACAA and overturned its past precedent.<sup>5</sup> The Fifth Circuit correctly held that no private right of action exists because there was no congressional intent to create a private right of action under the ACAA, and due deference must be given to the Department of Transportation (DOT) in order to balance necessary safety concerns and troublesome discrimination claims.

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<sup>1</sup> 887 F.3d 199 (5th Cir. 2018).

<sup>2</sup> *Id.* at 203–04; *see* 49 U.S.C. § 41705 (2012).

<sup>3</sup> *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001).

<sup>4</sup> *Id.* at 286.

<sup>5</sup> *Stokes*, 887 F.3d at 203–04.

Kellie Stokes, the mother of an autistic child, brought a suit against Southwest Airlines alleging that agents prevented Stokes and her family from boarding a flight.<sup>6</sup> The supposed reason was that the Southwest agents “considered her son’s behavior disruptive.”<sup>7</sup> Stokes claimed that “her son suffered ‘great physical emotional and mental pain and anguish’ as a result of these experiences.”<sup>8</sup>

In Stokes’s original suit, she alleged claims under Texas law and the Americans with Disabilities Act (ADA).<sup>9</sup> After suit was filed, Southwest Airlines filed a motion to dismiss that led Stokes to substitute her ADA claim with an ACAA claim.<sup>10</sup> Southwest Airlines then filed another motion to dismiss, “arguing that the state-law claims were preempted and that only the federal government may sue to enforce the ACAA in district court.”<sup>11</sup> The district court granted Southwest Airlines’s motion to dismiss in part and, after a motion to reconsider, “held that the ACAA confers no right of action to private litigants” and “declined to exercise supplemental jurisdiction over the remaining state-law claims.”<sup>12</sup> The district court then dismissed the case, and Stokes appealed the district court’s holding that there is no private right of action enforceable under the ACAA.<sup>13</sup>

In *Stokes*, the Fifth Circuit had to determine “whether private persons can sue in federal district court to enforce the [ACAA] of 1986.”<sup>14</sup> The Fifth Circuit ultimately answered this question in the negative.<sup>15</sup> To reach this conclusion, the court had to first address previous precedent that affirmatively held that private persons did have the right to sue in federal district court to enforce the ACAA.<sup>16</sup> In *Shinault v. American Airlines*, the Fifth Circuit admitted that “[t]he ACAA does not provide for a private cause of action.”<sup>17</sup> However, the Fifth Circuit indicated that it may imply private remedies even though the ACAA did not ex-

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<sup>6</sup> *Id.* at 201.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 200.

<sup>15</sup> *Id.* at 203–04.

<sup>16</sup> *Id.*; *Shinault v. American Airlines, Inc.*, 936 F.2d 796, 800 (5th Cir. 1991).

<sup>17</sup> *Shinault*, 936 F.2d at 800.

plicitly create such remedies.<sup>18</sup> The Fifth Circuit explained that it had made its decision in *Shinault* based on legislative history, practice, and because the ACAA does not specifically prohibit private rights of action.<sup>19</sup> For these reasons, the court in *Shinault* inferred the right for private actions enforceable under the ACAA.<sup>20</sup>

The Fifth Circuit noted in *Stokes* that its analysis usually stops when its own precedent is applicable.<sup>21</sup> However, because “the Supreme Court disavow[ed] the mode of analysis on which [its] precedent relied,” the Fifth Circuit was forced to take a longer look at its precedent to determine if it needed to be overruled.<sup>22</sup> In between *Shinault* and *Stokes*, the Supreme Court held in *Sandoval* that private rights of action cannot be found when Congress does not explicitly set forth a private remedy.<sup>23</sup> The Fifth Circuit recognized that *Sandoval* completely undermined its reasoning set forth in *Shinault*.<sup>24</sup> Thus, the Fifth Circuit overruled *Shinault* and held that “the ACAA ‘is enforceable only by the agency charged with administering it’”<sup>25</sup> and that “[n]o private right of action exists to enforce the ACAA in district court.”<sup>26</sup>

In *Stokes*, the court correctly applied the Supreme Court’s legal reasoning in *Sandoval* and therefore reached the correct conclusion in holding that the ACAA does not allow for a private right of action. While the Fifth Circuit did not go through a thorough textual analysis of the ACAA in reaching its conclusion, it did indicate that the ACAA does not explicitly provide for a private right of action.<sup>27</sup> However, a thorough analysis of the wording of the ACAA clearly shows that Congress did not intend to provide for a private right of action.<sup>28</sup> The language of the ACAA provides:

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<sup>18</sup> *Id.*

<sup>19</sup> *Stokes*, 887 F.3d at 204.

<sup>20</sup> *Shinault*, 936 F.2d at 800.

<sup>21</sup> *Stokes*, 887 F.3d at 203–04.

<sup>22</sup> *Id.* at 204.

<sup>23</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

<sup>24</sup> *See id.*; *Stokes*, 887 F.3d at 204.

<sup>25</sup> *Stokes*, 887 F.3d at 205 (quoting *Horne v. Flores*, 557 U.S. 433, 456 n.6 (2009)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 204.

<sup>28</sup> *See* 49 U.S.C. § 41705 (2012); *Love v. Delta Air Lines*, 310 F.3d 1347, 1354 (11th Cir. 2002).

In providing air transportation, an air carrier . . . may not discriminate against an otherwise qualified individual on the following grounds:

- (1) the individual has a physical or mental impairment that substantially limits one or more major life activities.
- (2) the individual has a record of such an impairment.
- (3) the individual is regarded as having such an impairment.<sup>29</sup>

The ACAA states that individuals with disabilities alleging claims for discrimination may file the complaint directly with the DOT.<sup>30</sup> This phrasing alone makes it unlikely that Congress intended to create a private right of action enforceable under the ACAA. The Massachusetts District Court indicated that the ACAA “provides an administrative mechanism to compel compliance but not to compensate parties injured by a violation.”<sup>31</sup>

Additionally, there are other aspects of the ACAA that lend themselves to the interpretation that Congress did not intend for individual litigants to bring ACAA claims in federal district court. Specifically, the ACAA sets up a systematic, detailed internal investigation scheme that purports to set up the entire method for redress of discrimination claims.<sup>32</sup> One provision indicates that the investigations of complaints will be handled internally by the Secretary of the DOT in accordance with the ACAA.<sup>33</sup> Additionally, the statute requires the Secretary to publish data related to disability complaints “in a manner comparable to other consumer complaint data”<sup>34</sup> and to “regularly review all complaints received by air carriers alleging discrimination on the basis of disability and [ ] report annually to Congress on the results of such review.”<sup>35</sup>

The verbiage of the ACAA and the specifics of its investigatory method make it clear that the main purpose of the ACAA is to create an internal way for the DOT and Congress to handle discrimination claims.<sup>36</sup> The Eleventh Circuit noted that the text of the ACAA and its related “statutory and regulatory structure create an elaborate and comprehensive enforcement scheme that

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<sup>29</sup> 49 U.S.C. § 41705(a).

<sup>30</sup> See 14 C.F.R. § 382.159 (2018).

<sup>31</sup> Gill v. JetBlue Airways Corp., 836 F. Supp. 2d 33, 47 (D. Mass. 2011).

<sup>32</sup> See *id.*

<sup>33</sup> 49 U.S.C. § 41705(c)(1).

<sup>34</sup> *Id.* § 41705(c)(2).

<sup>35</sup> *Id.* § 41705(c)(3).

<sup>36</sup> See Gill, 836 F. Supp. 2d at 47.

belies any congressional intent to create a private remedy.”<sup>37</sup> Simply put, whether a statute should be enforceable in federal district court is “fundamentally up to Congress.”<sup>38</sup> As the Fifth Circuit has stated, “Courts are bound to follow Congress’s choices in this arena and bound to ascertain those choices through the tools of statutory interpretation.”<sup>39</sup> For practical reasons, courts must look to Congress’s intent when faced with interpreting legislation the body has chosen to implement.

The holding in *Stokes* is correct because Congress did not intend to create a private right of action when it enacted the ACAA. For courts to ignore Congress’s decision to not include a private right of action would violate the principle of separation of powers.<sup>40</sup> It is the role of the legislature to create law; the judiciary merely interprets the law.<sup>41</sup> Courts should not overstep their role and find an implied private right of action when the words of the legislature clearly do not include such right, even if it would be more just to infer such a right.<sup>42</sup> The Supreme Court has emphasized the importance of maintaining these separate roles: “The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”<sup>43</sup> Therefore, the Fifth Circuit made the correct decision in overturning its past precedent, now recognizing that the ACAA does not provide a private right of action.<sup>44</sup>

While the Fifth Circuit correctly interpreted and followed Supreme Court precedent, the holding that there is no private right of action under the statute is also appropriate because safety concerns require deference to the DOT. As previously discussed, the structure of the ACAA allows for an internal review and report process.<sup>45</sup> This procedure aims to curtail discrimination against people with disabilities when they are in airports and on airplanes.<sup>46</sup> However, due to safety concerns, it is impor-

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<sup>37</sup> *Love v. Delta Air Lines*, 310 F.3d 1347, 1354 (11th Cir. 2002).

<sup>38</sup> *Stokes v. Sw. Airlines*, 887 F.3d 199, 201 (5th Cir. 2018).

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *United States v. Nixon*, 418 U.S. 683, 704–05 (1974).

<sup>42</sup> *See INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>43</sup> *Id.*

<sup>44</sup> *See Stokes*, 887 F.3d at 205.

<sup>45</sup> *See* 49 U.S.C. § 41705(c).

<sup>46</sup> *See Raina Urton, Trouble in the Skies: The ACAA’s Failure to Protect Passengers with Disabilities*, 31 LAW & INEQ. 437, 447 (2013) (discussing the purpose of the ACAA).

tant that this purpose does not take away from the DOT's ability to protect airline passengers. Internal review allows an agency with industry expertise to effectuate the ACAA's purpose, to limit discrimination and difficulties for people with disabilities, while accommodating legitimate safety concerns.<sup>47</sup> On the other hand, if the ACAA did allow private rights of action, this deference would be greatly limited by courts hearing individual claims of discrimination.

One counterargument is that a private right of action must exist in order to truly deter airlines from discriminating against those with disabilities. Many critics of the line of cases stemming from the Supreme Court's decision in *Sandoval* have expressed significant concerns about only having an internal process for reviewing discrimination claims.<sup>48</sup> Admittedly, courts independently reviewing these claims could have more of an impact on airlines' propensity to discriminate. However, this criticism does not consider that airlines are entirely responsible for their passengers' safety. When passengers are flying, they are forced to completely rely on the airlines and their staff to keep them safe.<sup>49</sup> This is why it is necessary that the airlines and DOT are given deference when it comes to making safety decisions.

The Fifth Circuit's holding in *Stokes* joined the Second,<sup>50</sup> Tenth,<sup>51</sup> and Eleventh Circuits<sup>52</sup> in finding no private cause of action enforceable under the ACAA.<sup>53</sup> *Stokes*, though, is especially noteworthy because it made the Fifth Circuit the first circuit court to overrule its own precedent that was contrary to the Supreme Court's holding in *Sandoval*.<sup>54</sup> Additionally, since *Stokes*, the Ninth Circuit has also held that the ACAA does not create a private cause of action.<sup>55</sup> *Stokes* and *Segalman v. Southwest Airlines*, the two most recent cases to come to this conclusion, indicate that the remaining circuits will continue to follow this

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<sup>47</sup> See 49 U.S.C. § 41705(c).

<sup>48</sup> See, e.g., Erin M. Kinahan, *Despite the ACAA, Turbulence is Not Just in the Sky for Disabled Travelers*, 4 DEPAUL J. HEALTH CARE L. 397, 421–22 (2001) (discussing why the ACAA is not efficient at eliminating discrimination for individuals with disabilities).

<sup>49</sup> See *Bethel v. N.Y. City Transit Auth.*, 92 N.Y.2d 348, 355 (N.Y. 1998).

<sup>50</sup> See *Lopez v. Jet Blue Airways*, 662 F.3d 593, 600 (2d Cir. 2011).

<sup>51</sup> See *Boswell v. Sw. Airlines, Inc.*, 361 F.3d 1263, 1271 (10th Cir. 2004).

<sup>52</sup> See *Love v. Delta Air Lines*, 310 F.3d 1347, 1359 (11th Cir. 2002).

<sup>53</sup> See *Stokes v. Sw. Airlines*, 887 F.3d 199, 205 (5th Cir. 2018).

<sup>54</sup> See *id.*

<sup>55</sup> *Segalman v. Sw. Airlines Co.*, 895 F.3d 1219, 1229 (9th Cir. 2018).

trend.<sup>56</sup> With no decisions contrary to *Stokes* and other circuits' similar holdings, it appears that courts will continue to disallow private rights of action to be brought under the ACAA.

As stated above, in applying the *Sandoval* analysis, the Fifth Circuit was the first to overrule its own precedent regarding private rights of action under the ACAA.<sup>57</sup> However, the Fifth Circuit's holding was the predictable next step in aligning with the Supreme Court's reasoning in *Sandoval*.<sup>58</sup> While the Fifth Circuit followed precedent by joining its sister courts, it missed an opportunity to provide a policy explanation for its decision. Many critics believe the ACAA should be enforceable through private rights of action,<sup>59</sup> so this would have been the perfect opportunity for the Fifth Circuit to express the practical reasons for disallowing an independent judicial review process. While many circuits have emphasized that Congress did not intend to create a private right of action, the courts have not delved deeper into the reasoning as to why Congress may have not provided for one.<sup>60</sup> Due to the prevalent safety concerns when flying, one reasonable explanation is to defer to the DOT when balancing alleged discrimination and passenger safety. This task would be even more difficult if the courts were involved. Therefore, despite this lack of policy analysis, the Fifth Circuit made the correct ruling by holding that the ACAA does not provide for an independent private right of action.

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<sup>56</sup> See *id.*; *Stokes*, 887 F.3d at 205.

<sup>57</sup> See *Stokes*, 887 F.3d at 205.

<sup>58</sup> See *id.*

<sup>59</sup> See Urton, *supra* note 46, at 451–57; Kinahan, *supra* note 48, at 422.

<sup>60</sup> See *Stokes*, 887 F.3d at 205; *Lopez v. Jet Blue Airways*, 662 F.3d 593, 600 (2d Cir. 2011); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1271 (10th Cir. 2004); *Love v. Delta Air Lines*, 310 F.3d 1347, 1359 (11th Cir. 2002).