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## Biometrics Takes Off—Fight Between Privacy and Aviation Security Wages On

Alexa N. Acquista

*Southern Methodist University, Dedman School of Law, [aacquista@smu.edu](mailto:aacquista@smu.edu)*

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**BIOMETRICS TAKES OFF—FIGHT BETWEEN PRIVACY  
AND AVIATION SECURITY WAGES ON**

ALEXA N. ACQUISTA\*

ABSTRACT

In the last two decades, the Department of Homeland Security (DHS) has implemented a variety of new screening and identity verification methods in U.S. airports through its various agencies such as the Transportation Security Administration (TSA) and Customs and Border Protection (CBP). In particular, biometric technology has become a focal point of aviation security advances. TSA, CBP, and even private companies have started using fingerprint, iris, and facial scans to verify travelers' identities, not only to enhance security but also to improve the travel experience.

This Comment examines how DHS, its agencies, and private companies are using biometric technology for aviation security. It then considers the most common privacy concerns raised by the expanded use of biometric technology: data breaches, function creep, and data sharing. As biometric technology is new and continually developing, the scope and extent of privacy threats cannot be completely quantified. However, a combination of new legislation, technological solutions, and independent oversight may be an effective way to protect both biometric data and traveler privacy while maintaining the benefits of enhanced security.

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\* J.D. Candidate, SMU Dedman School of Law, 2021; B.A. Politics, University of Dallas, 2018.

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I. INTRODUCTION

**A**IR TRAVEL IS AN increasingly common way to travel. In 2018, the Transportation Security Administration (TSA) screened more than 804 million aviation passengers—a 5% increase from the previous year.<sup>1</sup> Millions of those Americans have been willing to trade their biometric information for the prom-

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<sup>1</sup> *About Face: Examining the Department of Homeland Security’s Use of Facial Recognition and Other Biometric Technologies: Hearing Before the H. Comm. on Homeland Sec., 116th Cong. 33 (2019)* (prepared statement of Austin Gould, Assistant Administrator, Requirements and Capabilities Analysis), <https://www.tsa.gov/news/press/testimony/2019/07/10/use-biometric-technology-department-homeland-security> [<https://perma.cc/ZUQ6-2UKG>] [hereinafter *Biometric Technology Hearing*].

ise of shorter airport security lines, safer flights, and a better flying experience.<sup>2</sup> However, biometric data collection raises serious questions about data security and traveler privacy.

Biometrics is the science used to identify or verify an individual's identity "using physiological or behavioral characteristics."<sup>3</sup> Biometric technology is not limited to government use. Many companies have started integrating biometric technology into their products for both security and convenience.<sup>4</sup> The consumer industry integrated biometrics into Americans' everyday lives.<sup>5</sup> For example, iPhone users can now unlock their phones with their fingerprint or their face instead of a traditional alphanumeric password.<sup>6</sup>

While increased use of biometric security measures can benefit airports in a multitude of ways, the rapid expansion of biometric technology has raised privacy concerns from both sides of the political aisle.<sup>7</sup> Privacy advocates question the government's storage and use of biometric data.<sup>8</sup> However, privacy and security are not mutually exclusive—Congress and the private sector can strike the proper balance between security and privacy. An effective solution might include federal legislation, improved technological protections, increased independent oversight, or more effective opt-out procedures.

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<sup>2</sup> See Press Release, U.S. Transp. Sec. Admin., TSA PreCheck Reaches Milestone With 10 Million Members (Mar. 2, 2020), <https://www.tsa.gov/news/press/releases/2020/03/02/tsa-prechecktm-reaches-milestone-10-million-members> [<https://perma.cc/N7CU-M27K>].

<sup>3</sup> JOHN R. VACCA, BIOMETRIC TECHNOLOGIES AND VERIFICATION SYSTEMS 589 (2007).

<sup>4</sup> Nasir Memon, *How Biometric Authentication Poses New Challenges to Our Security and Privacy*, 34 IEEE SIGNAL PROCESSING MAG., July 11, 2017, at 194, 196, <https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=7974880&tag=1> [<https://perma.cc/64M2-CCA2>].

<sup>5</sup> *Id.* at 196.

<sup>6</sup> *Id.*; Samuel Gibbs & Alex Hern, *Apple Unveils iPad Air and iPad Mini With Touch ID Fingerprint Scanner*, GUARDIAN (Oct. 16, 2014), <https://www.theguardian.com/technology/2014/oct/16/apple-unveils-new-powerful-ipad-air-ipad-mini-touch-id-fingerprint-scanner> [<https://perma.cc/75DA-KWAC>]; Sam Rutherford, *Touch ID Will Reportedly Return to iPhones in 2021 With Apple's New In-Screen Fingerprint Sensor*, GIZMODO (Aug. 5, 2019), <https://gizmodo.com/touch-id-will-reportedly-return-to-iphones-in-2021-with-1836973588> [<https://perma.cc/NWE5-B9E8>].

<sup>7</sup> See, e.g., Letter from Sen. Edward Markey and Sen. Mike Lee to Kevin McAleenan, Acting Sec'y of Homeland Sec. (July 26, 2019), <https://www.markey.senate.gov/imo/media/doc/DHS%20Biometric%20Report.pdf> [<https://perma.cc/LV3P-PM6K>].

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

Part II of this Comment will discuss biometrics generally and the Department of Homeland Security's (DHS) application of biometric technology to aviation security. Part III will summarize the federal laws authorizing the use of biometric technology and the federal data privacy laws limiting these technologies. Part IV will discuss the primary privacy concerns biometric security technology poses, and Part V will analyze solutions that promote security while preserving privacy.<sup>9</sup>

## II. HISTORY

### A. GENERAL HISTORY OF BIOMETRIC TECHNOLOGY

The U.S. government has been collecting Americans' biometric data since the early 1900s.<sup>10</sup> Law enforcement agencies first started biometric collection by manually recording physical characteristics, often called "soft biometrics,"<sup>11</sup> "such as hair color, eye color, height and weight."<sup>12</sup> Eventually, law enforcement began using fingerprinting to identify criminal suspects.<sup>13</sup> The Federal Bureau of Investigation's (FBI) national fingerprint collection program dates back to 1924,<sup>14</sup> and its database contains "almost 72 million criminal fingerprints, more than 50 million civil fingerprints, [and] more than 51 million facial images."<sup>15</sup> Biometric data is now largely automated<sup>16</sup> and includes everything from "fingerprints, DNA samples, iris or retinal scans, [and] voice recordings, [to] walking gait, typing pattern of the fingers, 3D facial scans, and other forms of hand geometry data."<sup>17</sup> In wide-scale public use applications, the best

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<sup>9</sup> The possible constitutional implications of biometric technology are outside the scope of this Comment.

<sup>10</sup> ELS J. KINDT, *PRIVACY AND DATA PROTECTION ISSUES OF BIOMETRIC APPLICATIONS: A COMPARATIVE LEGAL ANALYSIS* 18 (Pompeu Casanovas & Giovanni Sartor eds., 2013).

<sup>11</sup> *Id.* at 35 & n.75.

<sup>12</sup> Haydn Evans, *The State of Biometrics Technology: The Uses, the Concerns*, LAW360 (Aug. 8, 2017), <https://www.law360.com/articles/950365/the-state-of-biometrics-technology-the-uses-the-concerns> [<https://perma.cc/ZA3T-FQJ2>].

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

<sup>14</sup> Carra Pope, Comment, *Biometric Data Collection in an Unprotected World: Exploring the Need For Federal Legislation Protecting Biometric Data*, 26 J.L. & POL'Y 769, 774–75 (2018) (citing *Fingerprints and Other Biometrics*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/fingerprints-and-otherbiometrics/> [<https://perma.cc/FQ45-HMR8>]).

<sup>15</sup> U.S. DEP'T OF JUSTICE, CRIM. JUSTICE INFO. SERVS., *CJIS ANNUAL REPORT 2016*, at 16 (2017).

<sup>16</sup> KINDT, *supra* note 10, at 18.

<sup>17</sup> Pope, *supra* note 14, at 773–74.

biometric identifiers are “accurate, non-invasive, capable of accommodating large amounts of information, and accepted by the general public.”<sup>18</sup> Because these characteristics are “universal” to all human beings, “persistent” and unchanging over time, and “unique” or distinctive to each individual, biometrics are an incredibly useful security tool.<sup>19</sup>

### 1. *How Biometric Systems Work*

Biometric data can be used for either verification or identification.<sup>20</sup> All biometric systems, however, “start with an enrollment stage followed by a matching stage.”<sup>21</sup> Enrollment involves a person presenting an identifier (such as a passport) and linking a biometric identifier (like a fingerprint) to that identity.<sup>22</sup>

Verification—also called a “one-to-one comparison”<sup>23</sup>—uses a person’s presented biometric identifier to verify his claimed identity by matching it to a previously submitted and stored biometric template in a database.<sup>24</sup> Essentially, verification confirms a person is who he says he is.<sup>25</sup> This process can take only a few seconds.<sup>26</sup> Although biometric databases can contain data “from dozens to millions of enrolled templates[, they] are always predicated on matching an individual’s presented biometric against his or her reference template.”<sup>27</sup> Thus, biometric data systems can verify one’s identity almost instantaneously.

By contrast, identification—also called a “one-to-many” comparison<sup>28</sup>—compares a person’s presented biometric identifier “with all previously submitted and stored biometric characteristic[s] in one or more database(s) through a search.”<sup>29</sup> A

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<sup>18</sup> Eric P. Haas, Comment, *Back to the Future? The Use of Biometrics, Its Impact on Airport Security, and How This Technology Should Be Governed*, 69 J. AIR L. & COM. 459, 475 (2004).

<sup>19</sup> KINDT, *supra* note 10, at 20–23.

<sup>20</sup> *Id.* at 36–37.

<sup>21</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-785T, AVIATION SECURITY: CHALLENGES IN USING BIOMETRIC TECHNOLOGIES 3 (2004).

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

<sup>23</sup> KINDT, *supra* note 10, at 36.

<sup>24</sup> *Id.* at 36–37.

<sup>25</sup> *Id.*; Paul Rosenzweig, Alane Kochems & Ari Schwartz, *Report: Biometric Technologies: Security, Legal, and Policy Implications*, HERITAGE FOUND. (June 21, 2004), <https://www.heritage.org/homeland-security/report/biometric-technologies-security-legal-and-policy-implications> [<https://perma.cc/H6Y7-LRPA>].

<sup>26</sup> KINDT, *supra* note 10, at 732.

<sup>27</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 21, at 4.

<sup>28</sup> Rosenzweig et al., *supra* note 25.

<sup>29</sup> KINDT, *supra* note 10, at 37.

“[p]ositive identification system” is used “to ensure [a person’s] biometric *is* enrolled in the [particular] database.”<sup>30</sup> In contrast, a “[n]egative identification system” is used “to ensure a person’s biometric information is *not* present in a [certain] database<sup>31</sup>—like the No Fly List, for example.<sup>32</sup>

Identification systems and verification systems have different databases. For identification to work, a database of stored biometric data is always necessary.<sup>33</sup> With verification, storage of only a single biometric characteristic is necessary.<sup>34</sup> The biometric data may be stored in a database or stored locally<sup>35</sup>—for example, on an identification card.

## 2. *The Government’s Database*

Biometric data collection is “only as useful as” the government’s ability to organize and access it quickly; thus, the effectiveness—and invasiveness—of this data collection “is directly correlated to . . . the underlying database.”<sup>36</sup> The Office of Biometric Identity Management (OBIM) maintains DHS’s biometric database.<sup>37</sup> OBIM “supplies the technology for matching, storing, and sharing biometric data.”<sup>38</sup> OBIM’s database, the Automated Biometric Identification System (IDENT), is the “largest biometric repository in the U.S. government.”<sup>39</sup> According to DHS, IDENT currently holds over 260 million “unique identities and processes more than 350,000 biometric transactions per day.”<sup>40</sup> State and local law enforcement submit many of these transactions.<sup>41</sup> The stored information is used for a variety of

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<sup>30</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 21, at 4 (emphasis added).

<sup>31</sup> *Id.*

<sup>32</sup> U.S. DEP’T OF HOMELAND SEC., REPORT ON EFFECTS ON PRIVACY AND CIVIL LIBERTIES 4–5 (2006).

<sup>33</sup> KINDT, *supra* note 10, at 37–38.

<sup>34</sup> *Id.* at 38–39.

<sup>35</sup> *Id.* at 37–38.

<sup>36</sup> John J. Brogan, *Facing the Music: The Dubious Constitutionality of Facial Recognition Technology*, 25 HASTINGS COMM. & ENT. L.J. 65, 69 (2002); Haas, *supra* note 18, at 478.

<sup>37</sup> U.S. DEP’T HOMELAND SEC., 2019 PRIVACY OFFICE ANNUAL REPORT TO CONGRESS (FOR THE PERIOD JULY 1, 2018–JUNE 30, 2019) 23, 47 (2019), [https://www.dhs.gov/sites/default/files/publications/dhs\\_privacy\\_office\\_2019\\_annual\\_report-final-10-22-2019.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_privacy_office_2019_annual_report-final-10-22-2019.pdf) [<https://perma.cc/ZD5V-YSRP>].

<sup>38</sup> *Biometrics*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/biometrics> [<https://perma.cc/EA3F-4T9V>].

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

<sup>40</sup> *Id.*

<sup>41</sup> Pope, *supra* note 14, at 778.

purposes: “national security, law enforcement, immigration and border management, intelligence, and other background investigative purposes.”<sup>42</sup> Further, IDENT allows interoperability and data sharing between various federal agencies including the Department of Defense (DoD), Department of Justice (DoJ), Department of State (State Department), and other agencies within DHS including TSA and Customs and Border Protection (CBP).<sup>43</sup>

## B. BIOMETRIC TECHNOLOGY IN AVIATION SECURITY

The DoD’s use of biometric technology for aviation security is relatively new, and technology is still developing in this area. TSA itself was created less than twenty years ago in response to the September 11, 2001 (9/11) terror attacks.<sup>44</sup> TSA is the DHS agency primarily responsible for airline safety,<sup>45</sup> however, CBP also employs biometric technology in its programs for travelers exiting and entering the United States.<sup>46</sup> Additionally, TSA and CBP are currently working together to bring facial recognition to airports across the nation.<sup>47</sup> Private companies also play a role in biometric aviation security by establishing their own biometric authentication systems or partnering with DHS on existing programs.<sup>48</sup> This Part will discuss the various aviation security programs that currently utilize biometric data.

### 1. TSA PreCheck

TSA PreCheck (PreCheck) is one of TSA’s “Trusted Traveler” programs.<sup>49</sup> It is a voluntary, “expedited screening program” for

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<sup>42</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-46, TSA MODERNIZATION: USE OF SOUND PROGRAM MANAGEMENT AND OVERSIGHT PRACTICES IS NEEDED TO AVOID REPEATING PAST PROBLEMS 24 (2017).

<sup>43</sup> *Biometrics*, *supra* note 38; Pope, *supra* note 14, at 777 n.40.

<sup>44</sup> Chase Hilton, Comment, *Fingerprints: A New Means of Identification in Airport Security Screening*, 81 J. AIR L. & COM. 561, 567 (2016).

<sup>45</sup> *Id.* at 590.

<sup>46</sup> *See infra* Part II.B.4.

<sup>47</sup> *Biometrics Technology*, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/biometrics-technology> [<https://perma.cc/SAH9-R5VS>].

<sup>48</sup> *See infra* Part II.B.5.

<sup>49</sup> DHS offers several other Trusted Traveler programs similar to PreCheck that allow expedited screening for air and land travel. *Trusted Traveler Programs*, U.S. DEP’T OF HOMELAND SEC., <https://tp.dhs.gov/> [<https://perma.cc/ST6R-LC5C>]. Global Entry allows expedited entry into the United States from international locations, NEXUS allows expedited entry to the United States from Canada, and Sentri allows expedited entry into the United States from Mexico. *Id.*

“known and trusted travelers”<sup>50</sup> that, according to TSA, serves the dual purpose of enhancing security and providing “a better travel experience.”<sup>51</sup> TSA introduced PreCheck in 2011,<sup>52</sup> and currently, seventy-three airlines and over two hundred airports participate in the program.<sup>53</sup> Air travelers can apply for PreCheck by filling out an online application, paying an \$85 application fee, and providing personal identification documentation (such as a passport) and their fingerprints.<sup>54</sup> The traveler’s biometrics—fingerprints—are then linked to their identity.<sup>55</sup> After approval, travelers are issued a “known traveler number,” which they can add to their flight reservations.<sup>56</sup> This in turn prints a PreCheck indicator on the traveler’s boarding pass, and grants the traveler access to expedited boarding lanes.<sup>57</sup>

Travelers’ fingerprints are not only used for background checks at for enrollment, however. The fingerprints collected are also enrolled in IDENT, and according to DHS, will be used for “recurrent immigration, law enforcement, and intelligence checks,” which includes checking enrolled prints against prints associated with unsolved crimes.<sup>58</sup> Further, the personally identifiable information collected, including fingerprints, may also be shared with “other federal, state and local government, and private sector entities.”<sup>59</sup>

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<sup>50</sup> *Transportation Security Timeline*, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/timeline> [<https://perma.cc/RE4X-KZRU>].

<sup>51</sup> *TSA PreCheck Factsheet*, U.S. TRANSP. SEC. ADMIN., [https://www.tsa.gov/sites/default/files/resources/tsaprecheck\\_factsheet.pdf](https://www.tsa.gov/sites/default/files/resources/tsaprecheck_factsheet.pdf) [<https://perma.cc/YX67-5S2M>].

<sup>52</sup> *Transportation Security Timeline*, *supra* note 50.

<sup>53</sup> *TSA PreCheck Factsheet*, *supra* note 51.

<sup>54</sup> *TSA PreCheck FAQ*, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/precheck/faq> [<https://perma.cc/D558-B8PM>].

<sup>55</sup> U.S. DEP’T OF HOMELAND SEC., DHS/TSA/PIA-041(A), PRIVACY IMPACT ASSESSMENT UPDATE FOR THE TSA PRE✓<sup>®</sup> APPLICATION PROGRAM 4 (2016), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-041-a-tsa%20precheck%20application%20program-february2016.pdf> [<https://perma.cc/7QMB-9THZ>].

<sup>56</sup> *TSA PreCheck FAQ*, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> U.S. DEP’T OF HOMELAND SEC., *supra* note 55, at 4.

<sup>59</sup> U.S. DEP’T OF HOMELAND SEC., DHS/TSA/PIA-041, PRIVACY IMPACT ASSESSMENT FOR THE TSA PRE✓<sup>™</sup> APPLICATION PROGRAM 8 (2013), [https://www.dhs.gov/sites/default/files/publications/privacy\\_pia\\_041\\_tsa%20precheck%20application%20program\\_september%202013\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy_pia_041_tsa%20precheck%20application%20program_september%202013_0.pdf) [<https://perma.cc/AEB9-3X8N>].

## 2. *Traveler Verification Service*

In 2018, TSA partnered with CBP to implement a number of pilot programs in airports across the country to test the Traveler Verification Service (TVS).<sup>60</sup> TVS is a biometric entry and exit program that uses facial recognition technology to verify passengers' information as they enter or exit the country.<sup>61</sup> TVS works by checking "traveler[s'] live facial scans against their passport photo to ensure they match."<sup>62</sup> If a traveler is verified as a U.S. citizen, that person is "removed from the exit screening and their photo is to be removed from the file."<sup>63</sup> However, DHS does not disclose exactly how long it retains the facial data.<sup>64</sup> CBP says that "the photo is discarded after a short period of time,"<sup>65</sup> as the agency is "committed to protecting the privacy of all travelers."<sup>66</sup> But some critics point out that because regulation is lacking, "there is no guarantee that the government will destroy the biometric data in a timely manner, or at all."<sup>67</sup>

According to DHS, private companies, airlines, and airport authorities, in partnership with DHS, may use their own technology to "facilitate identity verification."<sup>68</sup> The agency claims that it does not allow these private companies to save the photos collected, and it requires that the photos are deleted immediately after "transmittal and identity verification."<sup>69</sup> However, DHS allows partners to elect to take photos with their own equipment, so long as the photos are not retained "for their own business purposes"<sup>70</sup> and so long as the company provides

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<sup>60</sup> *Biometric Technology Hearing*, *supra* note 1; Pope, *supra* note 14, at 778; *see also Biometric Exit Frequently Asked Questions (FAQs)*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/biometrics/biometric-exit-faqs> [<https://perma.cc/M5UJ-KXTS>].

<sup>61</sup> U.S. DEP'T OF HOMELAND SEC., DHS/CBP/PIA-056, PRIVACY IMPACT ASSESSMENT FOR THE TRAVELER VERIFICATION SERVICE (TVS) 1, 15 (2018), [https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-november-2018\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-november-2018_2.pdf) [<https://perma.cc/6DVZ-CTKJ>].

<sup>62</sup> Pope, *supra* note 14, at 778.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Press Release, U.S. Customs & Border Prot., CBP Deploys Biometric Exit Technology to Chicago O'Hare International Airport (July 11, 2017), <https://www.cbp.gov/newsroom/national-media-release/cbp-deploys-biometric-exit-technology-chicago-o-hare-international> [<https://perma.cc/B2MG-4A47>].

<sup>66</sup> *Id.*

<sup>67</sup> Pope, *supra* note 14, at 778.

<sup>68</sup> *Biometric Exit Frequently Asked Questions (FAQs)*, *supra* note 60.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

“a separate public notice, such as signage, which does not link that particular process to CBP.”<sup>71</sup> While TVS and private partnerships are still in their early stages, DHS is focused on rapid expansion of facial recognition technology—in April 2019, the agency said it intends to scan 97% of departing passengers’ faces within the next four years.<sup>72</sup>

### 3. *Secure Flight*

Secure Flight and the No Fly List are TSA-created lists that operate together to track individuals deemed to be a threat to national security by U.S. intelligence agencies.<sup>73</sup> The No Fly List is an actual compilation of names of individuals who cannot fly because they are deemed a security risk.<sup>74</sup> Secure Flight is a “watchlist match[ing]” program that prevents “the misidentification of passengers who have names similar to actual people on the government watchlists,” such as the No Fly List.<sup>75</sup> As of July 2019, TSA reported that it was assessing the benefits of combining the facial recognition identification results from TVS with Secure Flight to “further improve the identity verification process.”<sup>76</sup>

### 4. *Arrival and Departure Information System*

The Arrival and Departure Information System (ADIS) is another government database maintained by CBP that matches biographic and biometric data to entry and exit information in order to catch visa overstays,<sup>77</sup> although the agency has since expanded the program “for all traveler encounters regardless of citizenship.”<sup>78</sup> In 2003, DHS created the United States Visitor

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<sup>71</sup> *Id.*

<sup>72</sup> U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2018 ENTRY/EXIT OVERSTAY REPORT 4 (2018), [https://www.dhs.gov/sites/default/files/publications/19\\_0417\\_fy18-entry-and-exit-overstay-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf) [<https://perma.cc/3X8G-4TQC>].

<sup>73</sup> Hilton, *supra* note 44, at 567.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 567–68 (citing Bob Burns, *Secure Flight: TSA Now Performing 100% Watchlist Matching for Domestic Flights*, TRANSP. SEC. ADMIN. BLOG (June 11, 2010), <http://blog.tsa.gov/2010/06/secure-flight-tsa-now-performing-100.html> [<https://perma.cc/PD4A-NFUX>]).

<sup>76</sup> *Biometric Technology Hearing*, *supra* note 1.

<sup>77</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-269R, DEPARTMENT OF HOMELAND SECURITY: REVIEW OF THE FISCAL YEAR 2017 ENTRY/EXIT OVERSTAY REPORT 18 (2019).

<sup>78</sup> U.S. DEP’T OF HOMELAND SEC., DHS/CBP/PIA-024(C), PRIVACY IMPACT ASSESSMENT FOR ARRIVAL AND DEPARTURE INFORMATION SYSTEM (ADIS) 1 (2020),

and Immigrant Status Indicator Technology (US-VISIT) program that collected digital photos and fingerprints of all persons entering and exiting the United States—not only at border crossings but also at airport terminals.<sup>79</sup> US-VISIT managed ADIS until 2013, when OBIM replaced US-VISIT.<sup>80</sup> ADIS compiles information from “a variety of federal systems to create a complete travel profile of an individual using his or her travel history.”<sup>81</sup> IDENT provides biometric information to populate an ADIS record that includes fingerprints and facial images.<sup>82</sup>

### 5. *Private Companies*

CLEAR is a company that offers a biometric authentication system similar to PreCheck. In 2010, DHS first certified the privately-held CLEAR under the Safety Act to implement its system in airports around the country.<sup>83</sup> CLEAR professes to replace travelers’ “ID[s] with [their] eyes and fingertips.”<sup>84</sup> During enrollment, CLEAR collects travelers’ personal information and biometric data (images of travelers’ faces, irises, and fingerprints) and transforms it into a unique “encrypted code.”<sup>85</sup> Then, at the airport, passengers bypass the TSA document checkpoint using the CLEAR system that matches their live fingerprints and irises to their “unique code” to verify their identity.<sup>86</sup> CLEAR and PreCheck are separate systems that can be used together: “CLEAR speeds up the travel document check process, [and]

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<https://www.dhs.gov/sites/default/files/publications/privacy-pia-024c-adis-january2020.pdf> [<https://perma.cc/5CNM-ULGQ>].

<sup>79</sup> Pope, *supra* note 14, at 776.

<sup>80</sup> U.S. DEP’T OF HOMELAND SEC., *supra* note 78, at 2.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 4–5.

<sup>83</sup> *Approved Technologies*, SAFETY ACT, <https://www.safetyact.gov/lit/at/aa> (search in keyword bar for “Alclear, LLC”) (last visited Oct. 12, 2020). The Safety Act is part of the Homeland Security Act. Support Anti-terrorism by Fostering Effective Technologies Act of 2002, Pub. L. No. 107-296, 116 Stat. 2238 (2002). The goal of the Safety Act is to “encourage the development and deployment of effective anti-terrorism products and services by providing liability protections” for providers of Qualified Anti-Terrorism Technologies. SAFETY ACT, <https://www.safetyact.gov/lit/h/p> [<https://perma.cc/8HCN-XTHV>].

<sup>84</sup> *How Does CLEAR Work?*, CLEAR ME, <https://www.clearme.com/support/getting-started/how-does-clear-work> [<https://perma.cc/P7SP-MLD5>].

<sup>85</sup> *How It Works*, CLEAR ME, <https://www.clearme.com/how-it-works> [<https://perma.cc/3RLJ-EFXU>].

<sup>86</sup> *Id.*

TSA PreCheck expedites the physical screening process.”<sup>87</sup> After CLEAR verifies a traveler’s identity, that traveler may enter the PreCheck line for expedited screening.<sup>88</sup> Although it is unclear how the program’s database is operated and protected, CLEAR’s privacy policy maintains that it protects biometric data with “encryption, firewalls, and intrusion detection and prevention systems.”<sup>89</sup>

Airports around the country are also using biometric identification to regulate employees’ access. Both San Francisco International Airport and Ohio’s Toledo Airport have used hand geometry devices to protect access to certain secure areas of the airport.<sup>90</sup> The Federal Aviation Administration (FAA) has been testing biometric access control in airports since the late 1990s.<sup>91</sup> And TSA also administers the Transportation Worker Identification Credential, which is a “common credential for all transportation workers requiring . . . access to secure areas of the national transportation system,” including airports.<sup>92</sup> Use of this technology does not come without legal risk to employers, however. Major airline companies, including Southwest Airlines and United Airlines, have recently faced lawsuits by airline employees for improperly storing and collecting their biometric data without their consent in violation of state privacy laws.<sup>93</sup>

### III. CURRENT STATE OF THE LAW

#### A. LEGAL AUTHORIZATION OF BIOMETRIC TECHNOLOGY

After 9/11, Congress took a variety of measures to enhance aviation security, passing a myriad of laws and creating TSA and DHS.<sup>94</sup> However, several laws dating back to 1996 authorize the various programs that allow DHS to collect biometric information at the border and at airports.<sup>95</sup> For example, the Illegal Im-

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<sup>87</sup> *How Does CLEAR Work With TSA PreCheck?*, CLEAR ME, <https://www.clearme.com/support/tsa-precheck/how-does-clear-work-with-tsa-precheck> [https://perma.cc/E2DS-TUG3].

<sup>88</sup> *Id.*

<sup>89</sup> *Privacy Policy*, CLEAR ME, [https://www.clearme.com/privacy\\_policy](https://www.clearme.com/privacy_policy) [https://perma.cc/L3R9-DKNX].

<sup>90</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 21, at 14.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Dave Embree, *Southwest Airlines Latest Company to Face Suit Over Use of Biometric Data*, 35:21 WESTLAW J. AVIATION 4, at \*1 (2017), Westlaw WJAVIA.

<sup>94</sup> Haas, *supra* note 18, at 459.

<sup>95</sup> These laws include: Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Enhanced Border Security

migration Reform and Immigrant Responsibility Act (IIRIRA), passed in 1996, was one of the first laws that authorized federal agencies to collect biographical information on persons entering and exiting the country.<sup>96</sup> IIRIRA authorization was supplemented in 2004 by the Intelligence Reform and Terrorism Prevention Act, which integrated biometric technology for the first time.<sup>97</sup> Further, the Homeland Security Act of 2002 (Homeland Security Act) gave DHS broad authority to collect and analyze personally identifiable information and to share this intelligence information with other federal agencies.<sup>98</sup> However, some question the government's authority to use its facial recognition programs on American citizens at the border.<sup>99</sup> One report notes that "Congress has passed legislation at least nine times concerning authorization for the collection of biometric data from foreign nationals, but no law directly authorizes DHS to collect the biometrics of *Americans* at the border."<sup>100</sup>

More recently, President Trump added to DHS's biometric mandate by signing two executive orders urging DHS to make biometrics a priority and to expedite biometric development in an entry-exit tracking system.<sup>101</sup> Additionally, in 2018, Congress

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and Visa Entry Reform Act, Pub. L. No. 107-173, 116 Stat. 543 (2002); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007). U.S. DEP'T OF HOMELAND SEC., *supra* note 61, at 1 & nn.1-4.

<sup>96</sup> Mark Skerry, Note, *Protect America by Being Unique: How Changes in Biometric Data Collection Procedures Can Improve US-VISIT*, 2 CASE W. RESERVE J.L. TECH. & INTERNET 71, 73 (2011).

<sup>97</sup> *Id.* at 74.

<sup>98</sup> Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 465 n.323 (2012) (citing 6 U.S.C. § 121(a)-(d)).

<sup>99</sup> HARRISON RUDOLPH, LAURA M. MOY & ALVARO M. BEDOYA, GEO. L. CTR. ON PRIVACY & TECH., NOT READY FOR TAKEOFF: FACE SCANS AT AIRPORT DEPARTURE GATES 2 (2017), [https://www.airportfacescans.com/sites/default/files/Biometrics\\_Report\\_Not\\_Ready\\_For\\_Takeoff.pdf](https://www.airportfacescans.com/sites/default/files/Biometrics_Report_Not_Ready_For_Takeoff.pdf) [<https://perma.cc/EB4D-GFJ6>].

<sup>100</sup> *Id.* at 7.

<sup>101</sup> Christopher Reynolds, *Airport Facial Recognition Tech Sparks Privacy Concerns*, GOVTECH (Aug. 23, 2019), <https://www.govtech.com/data/Airport-Facial-Recognition-Tech-Sparks-Privacy-Concerns.html> [<https://perma.cc/WX75-YJME>]; Exec. Order No. 13,769, 82 Fed. Reg. 8977 § 7 (Jan. 27, 2017); *see also* U.S. DEP'T OF HOMELAND SEC., *supra* note 61, at 1; Exec. Order No. 13,780, 82 Fed. Reg. 13209 § 8 (Mar. 6, 2017); Press Release, U.S. Customs & Border Prot., CBP Meets with Privacy Groups to Discuss Biometric Exit (Feb. 2, 2018), <https://www.cbp.gov/newsroom/national-media-release/cbp-meets-privacy-groups-discuss-biometric-exit-0> [<https://perma.cc/YZ2G-9ZTQ>].

passed the FAA Reauthorization Act,<sup>102</sup> which incorporated the TSA Modernization Act.<sup>103</sup> The TSA Modernization Act not only included authority for biometrics expansion but also added reporting and compliance requirements, placing a limit on such expansion.<sup>104</sup> Although some argue that lack of funding will be the real constraint on biometric technology's expansion<sup>105</sup> because the recent congressional mandates impose new costs without supplying extra funding, TSA will not be able to roll out this technology as fast as they would otherwise like.<sup>106</sup> Further, "the new law requires considerable evaluation of the efficacy, privacy issues, and expanded use of biometrics by TSA which must first be detailed in reports to Congress—meaning Congress will be the final arbiter of TSA's biometric deployment plans, and what gets fully funded or doesn't."<sup>107</sup>

## B. FEDERAL DATA PRIVACY LAWS

Four major federal laws provide the privacy framework for agency biometric data collection: (1) the Privacy Act of 1974 (Privacy Act);<sup>108</sup> (2) the E-Government Act of 2002 (E-Government Act);<sup>109</sup> (3) the Freedom of Information Act of 1966 (FOIA);<sup>110</sup> and (4) the Implementing the Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act).<sup>111</sup> This Section summarizes the relevant parts of each statute and discusses how each relates to the government's use of biometric technology.

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<sup>102</sup> FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186 (2018).

<sup>103</sup> *Id.* § 1901; Anthony Kimery, *TSA's 'Biometric Roadmap' May Need More Funding Under New Law, Former Deputy Administrator Says*, BIOMETRIC UPDATE (Oct. 23, 2018), <https://www.biometricupdate.com/201810/tsas-biometric-roadmap-may-need-more-funding-under-new-law-former-deputy-administrator-says> [https://perma.cc/5CAG-ED4Q].

<sup>104</sup> Kimery, *supra* note 103.

<sup>105</sup> *Id.* (quoting John Halinski, Former TSA Deputy Administrator).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Pub. L. No. 93-579 (1974) (codified at 5 U.S.C. § 552a).

<sup>109</sup> Pub. L. No. 107-347, 116 Stat. 2899 (2002).

<sup>110</sup> Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552).

<sup>111</sup> Pub. L. No. 110-53, 121 Stat. 266 (2007).

### 1. *Privacy Act of 1974*

Currently, DHS, TSA, and CBP are operating under the Privacy Act,<sup>112</sup> which is the only comprehensive federal data privacy protection law; however, the Privacy Act does not explicitly cover biometric data.<sup>113</sup> Rather, it regulates federal agencies' "collection, use, dissemination, and maintenance"<sup>114</sup> of personally identifiable information, which has been interpreted to apply to biometric information including fingerprints and facial scans.<sup>115</sup> This law is the closest applicable law to regulating the government's collection of biometric data. Otherwise, the use of "biometrics data . . . is largely unregulated"<sup>116</sup> and is "one of the most unprotected areas of our personal identity."<sup>117</sup>

The Privacy Act has four main requirements applicable to biometric technology. First, it mandates that each agency publish in the Federal Register a system of records notice for each database of personally identifiable information it maintains.<sup>118</sup> A description of the character, categories, and uses of the information collected is required.<sup>119</sup> However, this requirement only applies to data contained in a "system of records"—defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some . . . other identifying particular assigned to the individual."<sup>120</sup> Second, the Privacy Act limits the circumstances under which agencies can share personally identifiable information with other agencies and third parties by requiring an agency to identify a particular enumerated condition of disclosure and state the authority that authorizes "the solicitation of the information and whether disclosure of such information is mandatory or voluntary."<sup>121</sup> However, the enumerated conditions are relatively broad—information may be disclosed for routine agency use,

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<sup>112</sup> 5 U.S.C. § 552a(a), (e).

<sup>113</sup> Michael Monajemi, *Privacy Regulation in the Age of Biometrics That Deal With a New World Order of Information*, 25 U. MIA. INT'L & COMP. L. REV. 371, 395 (2018).

<sup>114</sup> *Id.*

<sup>115</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 21, at 23.

<sup>116</sup> Evans, *supra* note 12.

<sup>117</sup> Pope, *supra* note 14, at 770.

<sup>118</sup> Katie Cristina, Comment, *The TSA's New PreCheck is Beginning to Look a Lot Like CAPPS II: The Privacy Implications of Reviving the Tenets of the Failed Predecessor*, 78 J. AIR L. & COM. 617, 635 (2012); Donohue, *supra* note 98, at 470.

<sup>119</sup> Cristina, *supra* note 118, at 635 (citing 5 U.S.C. § 552a(e)(4)).

<sup>120</sup> 5 U.S.C. § 552a(5); Donohue, *supra* note 98, at 469.

<sup>121</sup> 5 U.S.C. § 552a(b)(4)–(5), (e)(3)(A); Margaret Hu, *The Ironic Privacy Act*, 96 WASH. U. L. REV. 1267, 1278–79 (2019).

civil or criminal law enforcement purposes, or to achieve other administrative objectives.<sup>122</sup> Third, every time an agency changes its system of records or wants to use its system in a new way, the Privacy Act mandates that the agency publish a notice in the Federal Register and allow interested persons an opportunity to submit comments to the agency.<sup>123</sup> Finally, the Privacy Act provides civil remedies and authorizes civil lawsuits against the government for violations.<sup>124</sup>

Privacy advocates argue that the Privacy Act does not adequately protect citizens' biometric data because it contains several broad exemptions.<sup>125</sup> First, it does not regulate state or local governments, so the Privacy Act does not protect any biometric information they collect.<sup>126</sup> Second, the Privacy Act does not apply to private entities or private companies.<sup>127</sup> This is potentially problematic for two reasons: "First, there is no uniform federal statute directed toward a private entity's collection, use, and storage of biometric information."<sup>128</sup> Second, DHS has partnerships with private companies, but it "has not published any guidelines for or agreements with its private partners."<sup>129</sup> Nonetheless, DHS and its agencies acknowledge that the Privacy Act remains the primary statute protecting government-collected biometric data.

## 2. *E-Government Act of 2002*

The E-Government Act requires any agency "collecting personal information [to] issue a [Privacy Impact Assessment (PIA)] prior to developing or procuring technologies that collect, maintain, or disseminate personally identifiable information from or about members of the public."<sup>130</sup> Each time DHS

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<sup>122</sup> Hu, *supra* note 121, at 1278–79 (citing 5 U.S.C. § 552a(b)(1), (3), (7)).

<sup>123</sup> *Id.* at 1279 (citing § 552a(e)(4), (11)).

<sup>124</sup> *Id.* at 1278 (citing § 552a(g)(1)(D), (g)(4)(A)).

<sup>125</sup> CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *WIRETAPPING & EAVESDROPPING* § 31:26, Westlaw (database updated Nov. 2019); Donohue, *supra* note 98, at 470–71.

<sup>126</sup> Donohue, *supra* note 98, at 471 (citing 5 U.S.C. § 552a(d)(2)(A)).

<sup>127</sup> *Id.* (citing 5 U.S.C. § 552a(a)(2)).

<sup>128</sup> See Natasha Kohne, Isabelle Gold & Kamran Salour, *Unique Biometric Data Creates Unique Privacy Concerns*, N.Y. L.J. (Feb. 22, 2016), <https://www.law.com/newyorklawjournal/almID/1202749996053/Unique-Biometric-Data-Creates-Unique-Privacy-Concerns/?slreturn=20200919124114> [https://perma.cc/HZU7-8TPY].

<sup>129</sup> RUDOLPH ET AL., *supra* note 99, at 14–15.

<sup>130</sup> Donohue, *supra* note 98, at 476.

creates a new program, it must issue a new PIA.<sup>131</sup> PIAs are required to describe the “nature and source” of the collected information, the reasons for collection, and the “intended use” of data collected.<sup>132</sup> PIAs must also address how the information will be shared, whether individuals may consent, and whether the initiative falls under the Privacy Act.<sup>133</sup> However, like the Privacy Act, the E-Government Act contains exemptions—one of the most notable being that “public dissemination of the PIA” may be protected as classified or suspended for national security reasons.<sup>134</sup>

### 3. *Freedom of Information Act*

The FOIA works in conjunction with the Privacy Act. In the biometric data context, airline passengers may file complaints or seek access to records about themselves to ensure the accuracy of the information collected.<sup>135</sup> One goal of the Privacy Act is to ensure that individuals can verify the accuracy of their records.<sup>136</sup> To that end, the Privacy Act allows an individual to request their own records through FOIA.<sup>137</sup> However, insofar as the Privacy Act relies on such requests to refine biometric records, the process has been underutilized—from June 2018 to June 2019, DHS received only thirty-one total requests.<sup>138</sup>

### 4. *Implementing the Recommendations of the 9/11 Commission Act of 2007*

The Homeland Security Act created the “first statutorily created privacy office in the Federal Government,”<sup>139</sup> headed by a Chief Privacy Officer (CPO), who is appointed by the Secretary.<sup>140</sup> The Homeland Security Act was amended by the 9/11 Commission Act “to give new authorities to the Chief Privacy Officer.”<sup>141</sup> The CPO is responsible for DHS’s privacy policy, which includes ensuring compliance with the Privacy Act, coor-

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 477.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> U.S. DEP’T OF HOMELAND SEC., *supra* note 59, at 9.

<sup>136</sup> *See* 5 U.S.C. § 552a(d)(1).

<sup>137</sup> *Id.* § 552a(d)(2).

<sup>138</sup> U.S. DEP’T HOMELAND SEC., *supra* note 37, at 47 fig.6.

<sup>139</sup> *Id.* at 8.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 5.

dinating with the Officer for Civil Rights and Civil Liberties to address privacy concerns, and ensuring Congress receives reports on civil liberties and privacy considerations.<sup>142</sup> This office is also responsible for responding to complaints submitted by employees, other agencies, and the public.<sup>143</sup> The CPO is also responsible for DHS's FOIA policy.<sup>144</sup> According to DHS's 2019 Privacy Report, DHS's FOIA Program "receives the largest number of FOIA requests of any federal department or agency, more than 40 percent of all requests within the Federal Government."<sup>145</sup>

#### IV. PRIVACY CONCERNS

Biometric characteristics themselves are privacy neutral and have been accepted for years; however, privacy concerns arise in how biometrics are used and how technological advancement affects such use.<sup>146</sup> DHS promises passengers that it is "ensuring appropriate privacy and cybersecurity safeguards are in place."<sup>147</sup> However, the rapid expansion of biometric technology in the last decade has raised serious concerns among privacy critics about how biometric data is stored and safeguarded. Unaddressed privacy concerns even have some airports banning the use of facial recognition technology until proper privacy policies are created and implemented.<sup>148</sup> Privacy advocates have generally focused their concern in three major areas (1) data breaches; (2) "function creep"; and (3) data sharing.<sup>149</sup>

##### A. DATA BREACHES

In the last decade, the number and scale of cyberattacks have been on the rise—"more than doubling between 2006 and 2012

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<sup>142</sup> 6 U.S.C. § 142(a)(2), (5), (6).

<sup>143</sup> U.S. DEP'T HOMELAND SEC., *supra* note 37, at 45.

<sup>144</sup> *Id.* at 54.

<sup>145</sup> *Id.* at 55.

<sup>146</sup> Steven C. Bennett, *Privacy Implications of Biometrics*, 53:3 PRAC. LAW. 13, 13 (2019), Westlaw PRACLAW.

<sup>147</sup> *Biometric Technology Hearing*, *supra* note 1, at 34 (prepared statement of Austin Gould, Assistant Administrator, Requirements and Capabilities Analysis).

<sup>148</sup> Christopher Reynolds, *LAX Embraces Facial Recognition Tech, But Sea-Tac Airport Hits the Brakes*, L.A. TIMES (Dec. 12, 2019), <https://www.latimes.com/travel/story/2019-12-12/lax-airports-facial-recognition-seattle-ban> [<https://perma.cc/S7XK-8HH4>].

<sup>149</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 21, at 23. Fourth Amendment and other generalized constitutional privacy concerns are beyond the scope of this Comment.

and leveling since.”<sup>150</sup> The frequency of cyber breaches is approximate because so many are either “undetected or . . . intentionally unreported.”<sup>151</sup> Data breaches have a variety of causes, including “accidental publication; insider jobs; lost or stolen computers or media; and patently malfunctioning security measures.”<sup>152</sup> However, hacking has proved to be the most common and most damaging cause of breaches, as hacking “results in more stolen or compromised records than all other categories combined.”<sup>153</sup>

The threat of a biometric data breach is not just a hypothetical fear—it is reality. In 2015, the Office of Personnel Management (OPM) suffered a data breach where 5.6 million employees’ fingerprints were stolen.<sup>154</sup> In June 2019, CBP suffered a similar data breach where “hackers had stolen an undisclosed number of license-plate images and travelers’ ID photos from a subcontractor.”<sup>155</sup> *Vice*, a Canadian-American magazine, and *The Register*, a United Kingdom outlet, reported finding “traveler data on the dark web in the hours after that breach, including financial information, photos, and location information.”<sup>156</sup> According to an official, this breach, unlike the OPM breach,<sup>157</sup> did not involve a foreign actor.<sup>158</sup> The CBP breach prompted Senators Mike Lee and Edward Markey to write to

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<sup>150</sup> Marian K. Riedy & Barłomiej Hanus, *Yes, Your Personal Data is at Risk: Get Over It!*, 19 SMU SCI. & TECH. L. REV. 3, 11 (2016); see also *2015 Data Protection & Breach Readiness Guide*, INTERNET SOC’Y (May 16, 2016), <https://www.internetsociety.org/resources/ota/2016/2015-data-protection-breach-readiness-guide/> [<https://perma.cc/XK95-AQKG>] (“Victims included nearly every segment of the population including consumers, government employees, and children.”).

<sup>151</sup> Riedy & Hanus, *supra* note 150, at 11.

<sup>152</sup> *Id.* at 12–13.

<sup>153</sup> *Id.* at 13, 15 (“[H]acking accounts for . . . an estimated 70% of all breaches.”).

<sup>154</sup> Pope, *supra* note 14, at 770.

<sup>155</sup> Sidney Fussell, *This Is Exactly What Privacy Experts Said Would Happen*, ATLANTIC (June 11, 2019), <https://www.theatlantic.com/technology/archive/2019/06/travelers-images-stolen-attack-cbp/591403/> [<https://perma.cc/C8U7-5HXE>].

<sup>156</sup> *Id.*

<sup>157</sup> Evan Perez, *FBI Arrests Chinese National Connected to Malware Used in OPM Data Breach*, CNN (Aug. 24, 2017), <https://www.cnn.com/2017/08/24/politics/fbi-arrests-chinese-national-in-opm-data-breach/index.html> [<https://perma.cc/YLB7-CMH2>].

<sup>158</sup> Drew Harwell & Geoffrey A. Fowler, *U.S. Customs and Border Protection Says Photos of Travelers Were Taken in a Data Breach*, WASH. POST (June 10, 2019), <https://www.washingtonpost.com/technology/2019/06/10/us-customs-border-protection-says-photos-travelers-into-out-country-were-recently-taken-data-breach/> [<https://perma.cc/QL7R-D2FR>].

DHS requesting the immediate issuance of a “report to Congress on the viability of DHS’s biometric identification technology.”<sup>159</sup> Both Senators had previously called for DHS to “pause” progress on biometric technology until DHS issued “formal rules that address critical privacy and security concerns” including who has access to the data, how long it will be held, and how it will be safeguarded.<sup>160</sup>

Biometric data security is also a concern across the globe. India has one of the world’s largest national biometric databases, Aadhaar, which contains the biometric identifiers of more than one billion people.<sup>161</sup> Enrollment in the database is required for citizens to receive government benefits, and India even requires citizens to link their bank accounts to the database.<sup>162</sup> In 2017, the database was breached, and according to reports, approximately 130 million Indians’ Aadhaar numbers were exposed,<sup>163</sup> highlighting the vulnerabilities of these systems. Similarly, in Argentina, hackers gained access to the Argentina Federal Police’s database and leaked 700 gigabytes (GB) of data, which included the biometric information of numerous police officers.<sup>164</sup>

These few examples highlight the reality of the risk to all databases, not only from bad actors of foreign governments but also from sophisticated cybercriminals who seek to exploit data for financial gain.<sup>165</sup> DHS itself has recognized that the aggregation of information located in IDENT makes it an attractive target.<sup>166</sup> However, the potential uses of stolen biometric data are largely unknown, as this technology is still in its beginning

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<sup>159</sup> Letter from Sen. Edward Markey and Sen. Mike Lee to Kevin McAleenan, Acting Sec’y of Homeland Sec., *supra* note 7, at 1.

<sup>160</sup> *Id.*

<sup>161</sup> Pope, *supra* note 14, at 786.

<sup>162</sup> *Id.*

<sup>163</sup> Dell Cameron, *130 Million at Risk of Fraud After Massive Leak of Indian Biometric System Data*, GIZMODO (May 3, 2017), <https://gizmodo.com/130-million-at-risk-of-fraud-after-massive-leak-of-indi-1794856154> [<https://perma.cc/62D4-7AJC>].

<sup>164</sup> Eugenia Lostri, *Hackers Leaked Sensitive Government Data in Argentina—And Nobody Cares*, LAWFARE (Aug. 21, 2019), <https://www.lawfareblog.com/hackers-leaked-sensitive-government-data-argentina-and-nobody-cares> [<https://perma.cc/YS7Q-QNLP>].

<sup>165</sup> Riedy & Hanus, *supra* note 150, at 15.

<sup>166</sup> U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT) 4 (2006), [https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_usvisit\\_ident\\_final.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf) [<https://perma.cc/3BW9-PPQ4>].

stages.<sup>167</sup> In the aftermath of the OPM breach, OPM stressed that it believed “the ability to misuse fingerprint data [was] limited,” but recognized that “this probability could change over time as technology evolves.”<sup>168</sup> Besides identity theft, some have suggested that a person who has had their biometric data exposed or stolen in a breach “could be discriminated against or lose out on a job opportunity because their information cannot be considered secure.”<sup>169</sup> The consequences of a massive breach are potentially far-reaching and damaging, but it is ultimately too soon to tell.

Finally, in the event of a data breach, the remedies available to those impacted are limited—some have attempted to sue the federal government for violating the Privacy Act; however, these actions are largely unsuccessful and cannot satisfy the standing requirement due to the difficulty of proving actual harm.<sup>170</sup>

## B. FUNCTION CREEP

Another common concern of critics and privacy advocates is commonly referred to as “function creep.”<sup>171</sup> Function creep is the possibility of misuse or re-use of collected information—an agency using data for purposes other than for which it was originally collected.<sup>172</sup> This too is no hypothetical fear—there are examples of function creep already taking place. For example, IDENT was created in 1994 as a system for the Immigration and Naturalization Service (INS), and DHS itself says that “the intended use of IDENT has expanded beyond that for which it was initially designed.”<sup>173</sup> Further, according to its 2018 Biometrics Roadmap, TSA plans to expand the use of fingerprints by “supplement[ing] data of currently enrolled” PreCheck travelers with that of other Trusted Traveler programs, including CBP

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<sup>167</sup> Allison Grande, *OPM Fingerprint Hack Exposes Liabilities in Biometric Data*, LAW360 (Sept. 24, 2015), <https://www.law360.com/articles/707030/opm-fingerprint-hack-exposes-liabilities-in-biometric-data> [<https://perma.cc/K4XH-6WEA>].

<sup>168</sup> Press Release, U.S. Off. of Personnel Mgmt., Statement by OPM Press Secretary Sam Schumach on Background Investigations Incident (Sept. 23, 2015), <https://www.opm.gov/news/releases/2015/09/cyber-statement-923/> [<https://perma.cc/67VF-8XPJ>].

<sup>169</sup> Grande, *supra* note 167.

<sup>170</sup> *Id.*

<sup>171</sup> KINDT, *supra* note 10, at 377.

<sup>172</sup> *Id.*

<sup>173</sup> U.S. DEP’T OF HOMELAND SEC., *supra* note 166, at 2.

and State Department data.<sup>174</sup> In the private, nongovernment context, CLEAR has now expanded its services to sports venues.<sup>175</sup> Spectators can now use their “face or fingerprints” as their ticket to enter select baseball stadiums.<sup>176</sup> These are only a few of many examples of how function creep can easily morph one application of data into another.

While the advancement of biometric technology potentially keeps aviation safer and technological advancement is generally a good thing, practical concerns remain. As biometric technology improves, there is a concern that DHS could go beyond its legislative mandate by expanding particular uses of biometric technology without explicit congressional authorization.<sup>177</sup> For instance, a report by Georgetown University’s Center on Privacy and Technology suggests that the TVS biometric entry and exit program may be beyond the scope of DHS’s mandate; although Congress has authorized the collection of biometric data from foreign nationals, it “has never explicitly authorized biometric collections from Americans at the border.”<sup>178</sup> Thus, the report argues that DHS needs a new congressional mandate granting express permission before it may collect data in new ways and from American citizens.<sup>179</sup>

### C. DATA SHARING

The federal government’s collection of biometric data through a number of federal agencies—not limited to DHS—raises concerns about how these agencies share information, not only with each other but also with private contractors.

First, data sharing between agencies, or interoperability, has been emphasized by both Congress and the Executive.<sup>180</sup> A fragmented system of incomplete information hurts the ultimate purpose of biometric systems—enhanced security—and leaves agencies unable to “connect the dots” in intelligence data. However, even DHS recognizes that a system with so many sharing

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<sup>174</sup> U.S. TRANSP. SEC. ADMIN., TSA BIOMETRICS ROADMAP FOR AVIATION SECURITY & THE PASSENGER EXPERIENCE 13 (Sept. 2018), [https://www.tsa.gov/sites/default/files/tsa\\_biometrics\\_roadmap.pdf](https://www.tsa.gov/sites/default/files/tsa_biometrics_roadmap.pdf) [<https://perma.cc/NYH3-VGS7>].

<sup>175</sup> *You Are Your Ticket*, CLEAR ME, <https://www.clearme.com/ticketing> [<https://perma.cc/9K3V-NWD3>].

<sup>176</sup> *Id.*

<sup>177</sup> RUDOLPH ET AL., *supra* note 99, at 7.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 16.

<sup>180</sup> *See* Donohue, *supra* note 98, at 454.

partners presents a risk of data sharing with entities that do not have appropriate authority or an actual need for the data.<sup>181</sup> For example, IDENT users include CBP; Immigration and Customs Enforcement; the U.S. Coast Guard; U.S. Citizenship and Immigration Services; the State Department; the DoD; the DoJ; federal, state, and local investigative agencies; and even “[f]oreign government law enforcement, intelligence, and criminal agencies, as well as international entities (such as the International Criminal Police Organization (INTERPOL)).”<sup>182</sup> One of the main criticisms of interoperability is that it “reflects diffuse accountability . . . [because] no one committee is tasked with considering the implications of the overall system.”<sup>183</sup> Thus, overall accountability is lacking.

Interoperability also increases the probability that the application of biometric systems will be expanded—by “link[ing] bits and pieces of behavioral information about individuals enrolled in widely different applications.”<sup>184</sup> Some argue that, already, without this biometric information, the government has the resources to monitor citizens in their daily lives with “omnipresent video cameras; extensive databases replete with medical, financial, and criminal information; and facial matching technology.”<sup>185</sup> Adding biometric data to this list presents additional concerns to those who already fear an eventual surveillance state.<sup>186</sup>

Second, in expanding its use of biometric technologies, DHS has increasingly relied on private contractors, leaving travelers vulnerable to tracking and data misuse by private companies. For an example of these partnerships, the biometric entry and exit program relies on “airlines and technology vendors for central components” of the program.<sup>187</sup> To operate biometric exit for JetBlue flights, DHS partnered with JetBlue and a private air travel vendor.<sup>188</sup> And while DHS entered into a Memorandum

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<sup>181</sup> U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT) 8 (2012), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-december2012.pdf> [<https://perma.cc/Y2LB-3B9M>].

<sup>182</sup> *Id.* at 3–5.

<sup>183</sup> Donohue, *supra* note 98, at 454.

<sup>184</sup> DAVIDE MALTONI, DAVIO MAIO, ANIL K. JAIN & SALIL PRABHAKAR, HANDBOOK OF FINGERPRINT RECOGNITION 46 (2006).

<sup>185</sup> Brogan, *supra* note 36, at 67.

<sup>186</sup> Rosenzweig et al., *supra* note 25.

<sup>187</sup> RUDOLPH ET AL., *supra* note 99, at 14.

<sup>188</sup> *Id.* at 15.

of Understanding with JetBlue, neither the memorandum “nor any other agreement governing private entities’ use of biometric exit data has been made public.”<sup>189</sup> Congress encourages these partnerships—the TSA Modernization Act required TSA to partner with at least two private sector entities to provide enrollment services for Precheck.<sup>190</sup> It is unclear what impact these partnerships have on data privacy; however, TSA says that private systems will be reviewed “to ensure they meet the latest cybersecurity requirements.”<sup>191</sup> Data stolen in the CBP breach was taken from a CBP subcontractor, making concerns about agency partnerships with subcontractors a reality.<sup>192</sup>

## V. STRIKING THE SECURITY–PRIVACY BALANCE: POSSIBLE SOLUTIONS

The choice between security and privacy is not binary. The United States can strike a balance between privacy and security with the right measures. Among the possible solutions to this balance are (1) technological solutions; (2) legislative solutions; (3) independent oversight; and (4) an increased focus on traveler notice and consent. A combination of these solutions may also be the most effective. This Part first considers the preliminary question of whether biometric systems are actually keeping the skies safer. It then considers each of the possible solutions to the data privacy concerns and the possible efficacy of each.

### A. EFFICACY OF BIOMETRIC SYSTEMS

There is strong evidence that the biometric technology keeps Americans safer. For example, CBP’s biometric exit, facial recognition “technology has enabled CBP to interdict more than 200 individuals who illegally attempted to enter the United States by using the genuine travel documents of persons whom they resemble.”<sup>193</sup> One of the biggest threats to aviation security

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<sup>189</sup> *Id.*

<sup>190</sup> Press Release, U.S. Transp. Sec. Admin., Additional Vendors to Provide TSA PreCheck™ Enrollment for Travelers (Jan. 9, 2020), <https://www.tsa.gov/news/press/releases/2020/01/09/additional-vendors-provide-tsa-prechecktm-enrollment-travelers> [<https://perma.cc/MT3U-PZBG>].

<sup>191</sup> *Id.*

<sup>192</sup> Fussell, *supra* note 155.

<sup>193</sup> Press Release, U.S. Customs & Border Prot., CBP and Privacy Groups Discuss Biometric Entry-Exit Mandate (Dec. 4, 2019) [hereinafter CBP Press Release], <https://www.cbp.gov/newsroom/national-media-release/cbp-and-privacy-groups-discuss-biometric-entry-exit-mandate> [<https://perma.cc/HWG5-5RST>].

is allowing falsely identified passengers through TSA security, and there is evidence to suggest that people's—more specifically, TSA agents'—ability to correctly match an individual to a presented photo identification is “incredibly fallible with error rates between 10 and 20 percent under ideal laboratory-induced conditions.”<sup>194</sup> Thus, facial recognition technology is a promising way to reduce that error rate and increase security.

However, Senator Mike Lee of Utah and others have expressed concerns about the accuracy of facial recognition technology, arguing that even if this technology works 96% of the time, one in twenty-five travelers would still be misidentified.<sup>195</sup> A growing fear is that “gender and ethnicity increase the likelihood of being improperly flagged.”<sup>196</sup> DHS has recognized these concerns, and claims that “[t]he accuracy of facial recognition systems has improved significantly in recent years”; according to a 2018 report by the National Institute of Standards and Technology, “with good quality portrait photos, the most accurate algorithms have ‘error rates below 0.2%.’”<sup>197</sup> Congress should keep in mind the efficacy of biometric technology and its important role in aviation security while addressing privacy concerns.

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<sup>194</sup> Hilton, *supra* note 44, at 564 (quoting Matthew Pryce, *Dr. Megan Papesh, Louisiana State University – Flaws of Facial Recognition Tech*, WAMC NORTHEAST PUB. RADIO (June 3, 2014), <https://www.wamc.org/post/dr-megan-papesh-louisiana-state-university-flaws-facial-recognition-tech> [<https://perma.cc/34WL-MG6B>]).

<sup>195</sup> Mike Lee, *Invasive New Airport Screenings May Put Privacy at Risk*, DAILY SIGNAL (Dec. 28, 2017), [https://www.dailysignal.com/2017/12/28/invasive-new-airport-screenings-may-put-privacy-risk/?mc\\_cid=d4c99ccc1c&mc\\_eid=7f301efaba](https://www.dailysignal.com/2017/12/28/invasive-new-airport-screenings-may-put-privacy-risk/?mc_cid=d4c99ccc1c&mc_eid=7f301efaba) [<https://perma.cc/4U3X-KNDL>].

<sup>196</sup> *Id.*; see also Larry Hardesty, *Study Finds Gender and Skin-Type Bias in Commercial Artificial-Intelligence Systems*, MIT NEWS (Feb. 11, 2018), <http://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212> [<https://perma.cc/NDA5-MLX2>]; Drew Harwell, *Amazon Facial-Identification Software Used By Police Falls Short on Tests for Accuracy and Bias, New Research Finds*, WASH. POST (Jan. 25, 2019), <https://www.washingtonpost.com/technology/2019/01/25/amazon-facial-identification-software-used-by-police-falls-short-tests-accuracy-bias-new-research-finds/> [<https://perma.cc/5S5F-HW88>].

<sup>197</sup> DATA PRIV. & INTEGRITY ADV. COMM., U.S. DEP'T HOMELAND SEC., REP. 2019-01, PRIVACY RECOMMENDATIONS IN CONNECTION WITH THE USE OF FACIAL RECOGNITION TECHNOLOGY 8 (2019), [https://www.dhs.gov/sites/default/files/publications/Report%202019-01\\_Use%20of%20Facial%20Recognition%20Technology\\_02%2026%202019.pdf](https://www.dhs.gov/sites/default/files/publications/Report%202019-01_Use%20of%20Facial%20Recognition%20Technology_02%2026%202019.pdf) [<https://perma.cc/32ER-PNMP>] (quoting PATRICK GROTH, MEI NGAN & KAYEE HANAOKA, NAT'L INST. OF STANDARDS & TECH., 8238, ONGOING FACE RECOGNITION VENDOR TEST (FRVT) PART 2: IDENTIFICATION 2 (2018), <https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8238.pdf> [<https://perma.cc/MS9E-2G2X>]).

## B. TECHNOLOGICAL SOLUTIONS

Blockchain-based systems may be one way DHS can improve its data storage to address hacking concerns.<sup>198</sup> Companies such as International Business Machines (IBM)<sup>199</sup> and Zamna,<sup>200</sup> a blockchain startup, have already posed blockchain systems as a solution. Zamna explains that the blockchain acts as a middleman between data sources and allows passengers' biometric information to be verified without having to share the data with third parties.<sup>201</sup> Blockchain alone would not address all privacy concerns; however, a blockchain system could be part of a larger plan to address hacking and some data sharing concerns.

Currently, DHS is in the process of moving its biometric data from IDENT to a new system: the Homeland Advanced Recognition Technology System (HART).<sup>202</sup> This new system will be located within Amazon Web Services' GovCloud; other agencies, such as the DoD, Central Intelligence Agency, and the National Aeronautics and Space Administration, already use HART to store some of the government's most sensitive data.<sup>203</sup> Part of the reason for this switch is "perceived security improvements"<sup>204</sup> over the original IDENT system, which is now almost twenty-five years old.<sup>205</sup> To put that into perspective, the first

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<sup>198</sup> Jeremy Epstein, *A Massive Biometric Breach Is Only a Matter of Time*, VENTUREBEAT (Mar. 16, 2019), <https://venturebeat.com/2019/03/16/a-massive-biometric-breach-is-only-a-matter-of-time/> [https://perma.cc/47KT-SFTB].

<sup>199</sup> Kalonji Bankole, *Implement an Automated Airport Security Control System*, IBM DEVELOPER (May 13, 2019), <https://developer.ibm.com/patterns/blockchain-implement-automated-airport-security-control-system/> [https://perma.cc/HW2Y-UBTK].

<sup>200</sup> Mike Butcher, *Zamna Raises \$5M to Automate Airport Security Checks Between Agencies Using Blockchain*, TECHCRUNCH (Oct. 26, 2019), <https://techcrunch.com/2019/10/26/zamna-raises-5m-to-automate-airport-security-checks-between-agencies-using-blockchain/> [https://perma.cc/VG4B-H5VB].

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

<sup>202</sup> Jack Corrigan, *DHS to Move Biometric Data on Hundreds of Millions of People to Amazon Cloud*, NEXTGOV (June 19, 2019), <https://www.nextgov.com/it-modernization/2019/06/dhs-move-biometric-data-hundreds-millions-people-amazon-cloud/157837/> [https://perma.cc/LP9D-ZQ4E].

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*; see also Jack Corrigan, *CIA Official: Cloud Is More Secure Than Old Tech, Less 'Soul-Crushing'*, NEXTGOV (June 22, 2018), <https://www.nextgov.com/it-modernization/2018/06/cia-official-cloud-more-secure-old-tech-less-soul-crushing/149211/> [https://perma.cc/3WJ9-DCRK].

<sup>205</sup> Jack Corrigan, *Legacy Systems Held DHS' Biometrics Programs Back. Not Anymore.*, NEXTGOV (Oct. 3, 2019), <https://www.nextgov.com/it-modernization/2019/10/legacy-systems-held-dhs-biometrics-programs-back-not-anymore/160347/> [https://perma.cc/G9UP-FTQT].

iPhone was released thirteen years ago, and since then there have been transformative updates, demonstrating how rapidly technology changes.<sup>206</sup> To keep Americans safe and protect their privacy and civil liberties, the government must keep its biometric technology and its security mechanisms up to date with modern-day capabilities.

### C. LEGISLATIVE SOLUTIONS

Although the Privacy Act covers the personally identifiable information collected by the government, there is no law that regulates how private companies may use and store biometric data.<sup>207</sup> In the absence of such legislation, many states have enacted their own biometric data privacy protection statutes.<sup>208</sup> While a comprehensive federal law regulating private companies' use of biometric data may alleviate some concerns surrounding the federal government's partnerships with private companies, federal legislation may not be the most efficient or useful solution. Even the most comprehensive data privacy statute would almost certainly be inapplicable to regulate informa-

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<sup>206</sup> Compare Press Release, Apple, Apple Reinvents the Phone with iPhone (Jan. 9, 2007), <https://www.apple.com/newsroom/2007/01/09Apple-Reinvents-the-Phone-with-iPhone/> [<https://perma.cc/Z6TY-7HJD>] (describing the first iPhone with a two megapixel (MP) camera and up to eight GBs of storage), with Press Release, Apple, Apple Announces iPhone 12 and iPhone Mini: A New Era for iPhone with 5G (Oct. 13, 2020), <https://www.apple.com/newsroom/2020/10/apple-announces-iphone-12-and-iphone-12-mini-a-new-era-for-iphone-with-5g/> [<https://perma.cc/UK9Z-GV26>] (describing the latest iPhone with professional-grade twelve MP photography and video systems and up to 256 GBs of storage).

<sup>207</sup> Ashley Deeks & Shannon Togawa Mercer, *Facial Recognition Software: Costs and Benefits*, LAWFARE (Mar. 27, 2018), <https://www.lawfareblog.com/facial-recognition-software-costs-and-benefits> [<https://perma.cc/5VQY-64C2>]; Frank Ready, *Privacy Laws Could Provide Blueprint for Approach to Facial Recognition Legislation*, L. TECH. NEWS (Dec. 12, 2018), <https://www.law.com/legaltechnews/2018/12/12/privacy-laws-could-provide-blueprint-for-approach-to-facial-recognition-legislation/> [<https://perma.cc/P6LM-Z7JZ>].

<sup>208</sup> Illinois, Texas, Washington, California, New York, and Arkansas have biometric data legislation. Natalie A. Prescott, *The Anatomy of Biometric Laws: What U.S. Companies Need to Know in 2020*, NAT'L L. REV. (Jan. 15, 2020), <https://www.natlawreview.com/article/anatomy-biometric-laws-what-us-companies-need-to-know-2020> [<https://perma.cc/2RU7-UTG4>]. There are several other states (and even one municipality—New York City) considering passing laws of their own including Florida, Massachusetts, and Arizona. Molly K. McGinley, Kenn Brotman & Erinn L. Rigney, *The Biometric Bandwagon Rolls On: Biometric Legislation Proposed Across the United States*, NAT'L L. REV. (Mar. 25, 2019), <https://www.natlawreview.com/article/biometric-bandwagon-rolls-biometric-legislation-proposed-across-united-states> [<https://perma.cc/W7YN-UZES>].

tion collected for intelligence or national security purposes.<sup>209</sup> Instead, clear legislative standards for data sharing between the government and private companies should be pursued to allow the government to partner with private companies for innovative advancements while protecting privacy and increasing confidence in the system. Further, renewed—and more specific—authorization from Congress for new biometric programs involving American citizens may prove to be an effective component of future reform, as it could require Congress to gather and study more information on data privacy measures.<sup>210</sup>

#### D. INDEPENDENT OVERSIGHT

In order to guard against misuse, all biometric systems, and the federal government's use of these programs as a whole, should have stronger audit and oversight protections.<sup>211</sup> Several oversight mechanisms within DHS are responsible for issuing reports on the various DHS programs and the privacy impact of those programs. These include: (1) the Privacy Officer created by the Homeland Security Act; (2) the E-Government Act's public PIA requirement, which also invites notice and comment; and (3) the Privacy Act's System of Records Notice requirements.<sup>212</sup> The Office of Management and Budget (OMB) assumes the primary "responsibility for overseeing implementation of the Privacy Act and the PIAs."<sup>213</sup> However, the OMB "has been extremely deferential to agencies exercising their powers of exemption," and there is no recourse to the courts.<sup>214</sup> Therefore, the public may benefit from an increased oversight role by independent committees or agencies. However, Congress should not overburden DHS and its agencies with excessive reporting and oversight requirements.

There are two independent bodies not located within DHS that currently provide some oversight. The first is the Privacy

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<sup>209</sup> Deeks & Mercer, *supra* note 207.

<sup>210</sup> See RUDOLPH ET AL., *supra* note 99, at 17 ("[The program] may implicate serious privacy concerns. . . . If DHS persists with the program, significant reforms are vitally necessary.")

<sup>211</sup> Rosenzweig et al., *supra* note 25.

<sup>212</sup> See *supra* Part III; Lee Kair, *Biometrics Can Protect our Borders—Along With Our Privacy*, HILL (May 9, 2019), <https://thehill.com/opinion/national-security/442722-biometrics-can-protect-our-borders-along-with-our-privacy> [<https://perma.cc/X5GK-5WAY>].

<sup>213</sup> Donohue, *supra* note 98, at 477.

<sup>214</sup> *Id.* at 477–78.

and Civil Liberties Oversight Board (PCLOB).<sup>215</sup> The PCLOB is an independent executive agency, established by the 9/11 Commission Act and composed of a bipartisan five-member board. Current oversight activities are limited, however.<sup>216</sup> In June 2019, the PCLOB voted to begin a new oversight project that will examine “the use of facial recognition and . . . biometric technologies in aviation security.”<sup>217</sup> As of October 2019, the PCLOB is also planning to review the pilot program at the Las Vegas McCarran International Airport.<sup>218</sup> This could be an important step toward meaningful privacy protections due to the independent and bipartisan nature of the PCLOB.

Second, the Government Accountability Office (GAO), a legislative agency within Congress, has issued a number of reports and has previously found that the FBI—another federal law enforcement agency that uses biometric technology—had insufficient oversight over its use of facial recognition technology.<sup>219</sup> However, the GAO covers a wide range of issues from fiscal policy to healthcare and energy.<sup>220</sup> Thus, oversight by a more focused entity like the PCLOB may yield the most promising results.

#### E. NOTICE AND CONSENT

Some argue that an increased focus on notice and consent may be more effective than new legislation or oversight.<sup>221</sup> This approach emphasizes the importance of putting travelers on notice that their biometric information is being collected and stored, as well as providing meaningful opportunities for travelers to withhold consent. While some programs like PreCheck

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<sup>215</sup> *History and Mission*, PRIV. & C.L. OVERSIGHT BD., <https://www.pcllob.gov/About/HistoryMission> [<https://perma.cc/Q89Y-FZ7P>].

<sup>216</sup> *Id.*

<sup>217</sup> Press Release, Priv. & C.L. Oversight Bd., “From Booking to Baggage Claim:” Privacy and Civil Liberties Oversight Board to Examine Use of Facial Recognition and Other Biometric Technologies in Aviation Security (June 26, 2019), [https://documents.pcllob.gov/prod/Documents/EventsAndPress/eb140554-4fc7-4700-88d2-197d7fe45770/New%20projects%20announcement%20June\\_25\\_%202019%20Final.pdf](https://documents.pcllob.gov/prod/Documents/EventsAndPress/eb140554-4fc7-4700-88d2-197d7fe45770/New%20projects%20announcement%20June_25_%202019%20Final.pdf) [<https://perma.cc/MX26-ZHKE>].

<sup>218</sup> Mick Akers, *Facial Recognition Technology Tested At Las Vegas Airport*, LAS VEGAS REV. J. (Sept. 29, 2019), <https://www.reviewjournal.com/local/local-las-vegas/facial-recognition-technology-tested-at-las-vegas-airport-1859441/1/> [<https://perma.cc/WW4R-SM2X>].

<sup>219</sup> Deeks & Mercer, *supra* note 207.

<sup>220</sup> *Key Issues*, U.S. GOV’T ACCOUNTABILITY OFF., [https://www.gao.gov/key\\_issues/overview#t=1](https://www.gao.gov/key_issues/overview#t=1) [<https://perma.cc/L7AV-M8YG>].

<sup>221</sup> Ready, *supra* note 207.

are voluntary, withholding consent of the facial recognition at the airport may not even be possible. At best, “[o]pting out is complicated” because there are multiple checkpoints at airports: airlines use facial recognition “as a boarding pass,” CBP uses facial recognition when a traveler exits the country, and TSA uses facial recognition to verify photo identification.<sup>222</sup> At worst, an opt-out feature may render the security purpose of biometric technology inoperable; therefore, some argue that it is necessary for DHS to make biometric data collection a condition for participation.<sup>223</sup> On the other hand, increased notice to participants could be a valuable oversight method—the value of an informed citizenry and the power of public opinion should not be discounted.

#### F. LOOKING OUTSIDE BIOMETRICS

Biometric security may not be the only way forward for aviation security. Others have even suggested that the United States look in a completely new direction for airport security.<sup>224</sup> Israel, a country that faces a significant number of terrorist threats, uses “behavioral profiling,” which involves questioning passengers at airports to isolate those exhibiting suspicious behavior.<sup>225</sup> Those passengers are then subjected to a more “targeted interrogation and search.”<sup>226</sup> This “profiling” is “conducted in a neutral manner” and “focuses on data such as how a passenger bought their ticket, their past travels, recent actions, and behaviors.”<sup>227</sup> However, some argue that volume, costs, and concerns about ethnic and religious profiling prevent this from being an effective alternative security solution.<sup>228</sup>

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<sup>222</sup> Jason Kelley, *Fighting Back Against Face Surveillance in the Skies: 2019 Year in Review*, ELEC. FRONTIER FOUND. (Dec. 27, 2019), <https://www EFF.ORG/deeplinks/2019/12/fighting-back-against-face-surveillance-skies-year-review-2019> [<https://perma.cc/7SZ7-3LE4>].

<sup>223</sup> Rosenzweig et al., *supra* note 25.

<sup>224</sup> Cole Antolak, Comment, *Airport Security: Over-Reaching New Heights*, 18 U. PITT. J. TECH. L. & POL'Y 59, 77 (2018).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Ariel Schalit, *Our View on Airport Screening: Why Israel's Air Security Model Wouldn't Work in the USA*, USA TODAY (Dec. 22, 2010), [https://usatoday30.usatoday.com/news/opinion/editorials/2010-12-22-editorial22\\_ST\\_N.htm](https://usatoday30.usatoday.com/news/opinion/editorials/2010-12-22-editorial22_ST_N.htm) [<https://perma.cc/3D3U-CW3P>].

## VI. CONCLUSION

The concerns posed by privacy advocates about data sharing, function creep, hacking, and inaccuracies are serious and reasonable concerns. DHS appears to take those privacy concerns seriously—it has issued numerous, detailed PIAs for its various programs that use biometric information. It has also begun a series of meetings with privacy and industry experts to discuss the biometric exit mandate, and these meetings have already resulted in CBP instituting new privacy measures.<sup>229</sup> However, DHS and Congress ought to look beyond internal reporting requirements and institute additional measures either through technology or independent oversight to strengthen and bolster privacy protections and increase government accountability.

Even though biometric technology seems to be the way of the future, it is still in its infancy. The scope and severity of the consequences of mass biometric data collection are yet unknown. Biometric technology, and the government's implementation of such, may be moving faster than privacy solutions can keep up. Biometric technology has the potential to revolutionize aviation security; however, more study and consideration should be given to the privacy implications and possible solutions in order to protect data privacy adequately.

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<sup>229</sup> CBP Press Release, *supra* note 193.



## **BET ON THE FIELD: WHY FIELD PREEMPTION SHOULD APPLY TO THE FEDERAL AVIATION ACT**

JACK MILLIGAN\*

### **ABSTRACT**

One of the primary challenges facing the American aviation industry is the issue of federal preemption. Although Congress has a long history of heavy involvement in regulating the aviation industry, the Federal Aviation Act (FAAct) does not include an express preemption provision, leaving states, courts, and industry members with little guidance about the proper reach of federal and state regulations. The circuit courts are sharply divided on their approaches and answers to this question. The issue of preemption is especially important in the context of aviation manufacturing, where the federal government has prescribed a litany of different safety standards, but state law product liability claims continue to be governed by state law standards of care. Manufacturers are therefore subjected to a variety of potential requirements across each state, which is problematic for a number of reasons.

Exacerbating the issue, the Supreme Court recently declined to hear two cases regarding FAAct preemption, each from a different side of the circuit split. Until this split is resolved, in the interest of uniformity and certainty, undecided circuits should adopt the Second Circuit's field preemption approach and reject the Third Circuit's conflict preemption approach. Field preemption is more consistent with both the intended purpose of the FAAct and the unique nature of the aviation industry.

This Comment will analyze the differing approaches taken by the circuit courts and will make the argument that the federal design regulations establish a standard of care which should be integrated into various state law claims. Uniformity is necessary

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\* J.D. Candidate, SMU Dedman School of Law, 2021. B.S., Economics, Texas A&M University, 2018. Special thanks go to my family, friends, and colleagues for their help and support along the way.

for the aviation industry given its interconnection with interstate commerce and will provide clarity for both manufacturers and courts. Finally, this Comment will explain why and how other circuit courts should adopt the field preemption approach while awaiting Supreme Court guidance.

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#### I. INTRODUCTION

**T**HE AVIATION INDUSTRY IS a vital sector of interstate commerce in America, transporting millions of people and products across the country every day. Although inherently national in scale, the industry is still subject to a variety of state laws and regulations, particularly within the field of aviation safety. Circuit courts are currently split on the issue of whether the Federal Aviation Act (FAAct) preempts only conflicting state laws or the entire field of aviation safety.<sup>1</sup> While the Third Circuit applied principles of conflict preemption to the FAAct, the Second Circuit held that the FAAct preempts the entire field of state aviation safety.<sup>2</sup> The Supreme Court has declined to hear either case,<sup>3</sup> adding further uncertainty to the aviation industry. The Court will likely resolve the issue within the near future, but in the meantime, other circuits must choose between the two competing approaches to FAAct preemption. Because the Second Circuit's decision in *Tweed* allows for a uniform federal standard of care for aircraft manufacturers, other circuits should follow suit and hold that the FAAct impliedly preempts the entire field

<sup>1</sup> Compare *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 708–09 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 495 (2016) (limiting the FAA rules application), with *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 75 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2508 (2020) (finding the FAA's determination overruled state law).

<sup>2</sup> See *Sikkelee*, 822 F.3d at 708–9; *Tweed*, 930 F.3d at 75.

<sup>3</sup> *Tweed-New Haven Airport Auth.*, 140 S. Ct. 2508; *Sikkelee*, 137 S. Ct. 495.

of aviation safety. This Comment will begin by explaining the historical background of both federal aviation regulation and preemption law in Part II. Next, Part III discusses the current state of federal preemption law with respect to the FAA Act and its amendments and analyzes the circuit split over the FAA Act's preemption powers. Part IV begins by explaining why the FAA Act should be interpreted to preempt the entire field of aviation safety and concludes by explaining how other circuit courts should incorporate *Tweed* into their own preemption analyses.

## II. HISTORICAL BACKGROUND

### A. FEDERAL AVIATION REGULATION

The federal government's history of aviation regulation began in 1926 with the passage of the Air Commerce Act.<sup>4</sup> This legislation gave the Department of Commerce oversight over (1) air commerce; (2) issuance and enforcement of traffic rules; (3) licensing and certification; and (4) airway control.<sup>5</sup> Over the next decade, as air travel became more prevalent, it became clear that the federal government needed to exercise more control over aviation safety.<sup>6</sup>

In 1938, President Roosevelt signed the Civil Aeronautics Act, which established both the Civil Aeronautics Authority (CAA) and later the Civil Aeronautics Board (CAB).<sup>7</sup> The CAA was responsible for air traffic control, certifications, safety enforcement, and airway development—making it the predecessor of the modern Federal Aviation Administration (FAA).<sup>8</sup> The Second World War ushered in significant improvements in aviation technology, such as jet engines, making aviation safety even more of a pressing concern for the federal government.<sup>9</sup> Although air traffic had more than doubled in the decade follow-

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<sup>4</sup> Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

<sup>5</sup> *Id.* §§ 2–3, 5.

<sup>6</sup> *A Brief History of the FAA*, FED. AVIATION ADMIN. (Jan. 4, 2017), [https://www.faa.gov/about/history/brief\\_history/](https://www.faa.gov/about/history/brief_history/) [<https://perma.cc/W4AV-PKWN>]. Interestingly, the death of legendary Notre Dame football coach Knute Rockne was one of the primary catalysts for the sweeping changes made in the aviation safety field. *Id.* Rockne was killed in a plane crash in 1931, and the resulting public outcry prompted the federal government to take its oversight of aviation more seriously. *Id.*

<sup>7</sup> *Id.*; see 49 U.S.C. § 1131. CAB was the predecessor to the National Transportation Safety Board and was largely responsible for accident investigation, administrative rulings, and economic regulation. *A Brief History of the FAA*, *supra* note 6.

<sup>8</sup> *A Brief History of the FAA*, *supra* note 6.

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

ing World War II, “little had been done to mitigate the risk of midair collisions.”<sup>10</sup>

The Federal Aviation Agency (FAAgency) was established in 1958 with the passage of the FAAAct.<sup>11</sup> In creating the FAAgency, Congress stated that its intention was “to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft.”<sup>12</sup> In a later amendment, the FAAgency was also given “exclusive sovereignty of airspace of the United States.”<sup>13</sup> As the Second Circuit noted several years into the FAAgency’s existence, the agency’s purpose was to “centraliz[e] in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nation’s airspace.”<sup>14</sup> The FAAgency was transferred to the newly created Department of Transportation (DoT) in 1966, and was renamed the FAA.<sup>15</sup> Its role has only expanded since then, and today, the FAA is responsible for many aspects of aviation safety.<sup>16</sup> Among other duties, the FAA currently oversees aircraft licensing and certification; airport regulations; air traffic control; aircraft noise control and other environmental programs; commercial space regulation; aviation research; and the testing and training of personnel across the industry.<sup>17</sup>

For the purposes of this Comment, it is necessary to explain the FAA’s regulatory control over aircraft manufactures. Under the FAAAct, aircraft manufacturers must first obtain three certificates: a type certificate,<sup>18</sup> a production certificate,<sup>19</sup> and an airworthiness certificate.<sup>20</sup> The type certificate certifies that the design of an aircraft or its parts performs properly and meets the safety standards defined in FAA regulations.<sup>21</sup> The FAA has a baseline standard for certification for each type of product,

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

<sup>11</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958).

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

<sup>13</sup> 49 U.S.C. § 40103(a)(1).

<sup>14</sup> *Air Line Pilots Ass’n, Int’l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960).

<sup>15</sup> *A Brief History of the FAA*, *supra* note 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 14 C.F.R. §§ 21.11–.55 (2020).

<sup>19</sup> *Id.* §§ 21.131–.150.

<sup>20</sup> *Id.* §§ 21.171–.199; 49 U.S.C. §§ 44704(d), 44711(a)(1).

<sup>21</sup> 49 U.S.C. § 44704(a); 14 C.F.R. § 21.31.

which designates all of the regulations and safety standards required to receive the type certification—essentially a standard of care for manufacturers.<sup>22</sup> Once a manufacturer has received a type certificate for an aircraft or component, it must receive a production certificate, certifying that a duplicate of the aircraft or part will conform to the design certified in the type certificate.<sup>23</sup> Finally, the FAA issues an airworthiness certificate for each aircraft, which certifies that the aircraft conforms to its design and is safe for flight.<sup>24</sup>

The FAA also maintains regulatory control over the safety of an aircraft for the duration of its operational life, which is accomplished primarily in three ways. First, the FAA regulates the training and certification of mechanics and other maintenance personnel.<sup>25</sup> Second, manufacturers who have been issued a type certificate cannot deviate from the certified design without FAA approval.<sup>26</sup> Third, if the FAA becomes aware of an unsafe condition on a previously certified aircraft, it may correct the problem by issuing an “airworthiness directive,” which manufacturers must comply with.<sup>27</sup>

## B. FEDERAL PREEMPTION

The doctrine of preemption allows Congress to avoid conflicts between federal and state laws and is a vital part of ensuring that the federal system runs smoothly. Preemption is widely assumed to be rooted in the Supremacy Clause in Article VI of the Constitution, although this assumption has been disputed.<sup>28</sup> Though written about less frequently than other constitutional law topics, it is perhaps the most commonly used constitutional law doc-

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<sup>22</sup> See 14 C.F.R. §§ 21.16–.17.

<sup>23</sup> *Id.* §§ 21.131–.150.

<sup>24</sup> *Id.* § 21.183.

<sup>25</sup> *Id.* § 65.81.

<sup>26</sup> *Id.* §§ 21.91–.101.

<sup>27</sup> *Id.* § 39.5.

<sup>28</sup> U.S. CONST. art. VI., cl. 2; see also Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI., cl. 2. Gardbaum argues that preemption is not a product of the Supremacy Clause, but rather a means of effectuating Congress’s enumerated powers under the Necessary and Proper Clause. Gardbaum, *supra*, at 781–82.

trine in practice.<sup>29</sup> Congress can preempt state laws either expressly or implicitly by indicating its intent to occupy a given field to the exclusion of state or local laws, which is known as field preemption.<sup>30</sup> Such intent can be inferred when the pervasiveness of federal regulation precludes additional regulation by the states, when the federal government's interest in the field is sufficiently dominant, or when the objective of federal regulation aligns with the character of the obligations it imposes.<sup>31</sup> The Constitution's Tenth Amendment creates a presumption against preemption in areas of the law which states have traditionally occupied, and in the absence of a clear and manifest intent to occupy an entire field of the law, the Supreme Court has stated that state police powers should not be superseded by federal law.<sup>32</sup> Even absent a showing of intent, Congress can preempt state laws which conflict with federal law, either by making it impossible to comply with both laws or by creating an obstacle to the accomplishment of a congressional objective.<sup>33</sup> Unsurprisingly, congressional intent is the cornerstone of any preemption analysis, and preemption cases often involve intense scrutiny of the legislative history behind the statute in question.<sup>34</sup> Courts will also look at the language, structure, and purpose of a statute or regulation in order to develop an understanding of Congress's intent.<sup>35</sup>

The FAA Act employs both express and implied preemption. For example, Section 41713 states,

Except [for certain Alaskan intrastate air transportation], 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 any air carrier that may provide air transportation under this [subchapter IV].<sup>36</sup>

The General Aviation Revitalization Act, codified in an official note to the Federal Aviation Act, provides for an eighteen-year statute of repose for product liability claims against aircraft and

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<sup>29</sup> Gardbaum, *supra* note 28, at 768.

<sup>30</sup> *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299–300 (1988).

<sup>31</sup> *Id.* at 300.

<sup>32</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *see* U.S. CONST. amend. X.

<sup>33</sup> *Schneidewind*, 485 U.S. at 300.

<sup>34</sup> *See, e.g., Abdullah v. Am. Airlines*, 181 F.3d 363, 366 (3d Cir. 1999); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010).

<sup>35</sup> *See Medtronic*, 518 U.S. at 486.

<sup>36</sup> 49 U.S.C. § 41713(b)(1).

aircraft component manufacturers.<sup>37</sup> Finally, the FAA Act contains a “savings clause” designed to preserve state law remedies: “Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.”<sup>38</sup> Due to the FAA Act’s narrow express preemption provisions, its implied preemption powers are much more meaningful to the federal government. Any preemption of state aviation law outside of these provisions must be implied by courts.

An important distinction to understand is the difference between preemption of a standard of care and preemption of a claim. For example, there are four elements to a typical state law negligence claim: standard of care, breach, causation, and damages.<sup>39</sup> In FAA Act cases, preemption has recently centered around the standard of care.<sup>40</sup> Thus, while the standard of care may be preempted by federal regulations, the remaining three elements are still governed by state law.<sup>41</sup> In a negligence claim, the FAA has prescribed a standard of care, which courts have generally found to preempt any applicable state standard of care.<sup>42</sup> Similarly, the requirements for receiving a type, production, or airworthiness certificate create a standard of care which theoretically governs in product liability or defective design claims.<sup>43</sup> In practice, however, courts disagree about the extent to which these standards actually preempt any parallel state law standards.<sup>44</sup>

The Supreme Court has never spoken on the issue of negligence or products liability in an aviation law case. However, in *City of Burbank v. Lockheed Air Terminal*, the Court provided a framework through which lower courts could analyze FAA Act preemption cases.<sup>45</sup> In *City of Burbank*, the Court held that a city

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<sup>37</sup> General Aviation Revitalization Act, Pub. L. No. 103-298, § 3(3), 108 Stat. 1552, 1553 (1994).

<sup>38</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1106, 72 Stat. 731 (1958).

<sup>39</sup> See, e.g., *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 465–66 (6th Cir. 2012).

<sup>40</sup> Alexander T. Simpson, *Standard of Care vs. Claim Preemption Under the Federal Aviation Act*, 27 AIR & SPACE L. 4, 4 (2014).

<sup>41</sup> *Id.*

<sup>42</sup> See 14 C.F.R. § 91.13(a) (“No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”).

<sup>43</sup> See Simpson, *supra* note 40, at 4.

<sup>44</sup> See, e.g., *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 690 (3d Cir. 2016); *Abdullah v. Am. Airlines*, 181 F.3d 363, 365 (3d Cir. 1999).

<sup>45</sup> *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

noise prevention ordinance, which banned aircraft from taking off between 11 p.m. and 7 a.m., was preempted by the FAA Act, as amended by the Noise Control Act of 1972.<sup>46</sup> Although noise prevention was an environmental regulation traditionally left to states, the Court acknowledged the pervasive nature of the FAA's own aircraft noise regulation scheme and thus inferred congressional intent to occupy the entire area of the law.<sup>47</sup> The Court stated that the FAA Act required "a delicate balance between safety and efficiency,"<sup>48</sup> and "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."<sup>49</sup> While the FAA Act contained no express preemption provision on this subject, its legislative history coupled with the pervasiveness of the federal regulatory scheme led the Court to conclude it was intended to preempt state law.<sup>50</sup>

### III. CURRENT STATE OF THE LAW

There are two competing views on how the FAA Act interacts with state aviation safety laws under the doctrine of implied preemption. A court's view of the FAA Act's preemption powers depends largely on its interpretation of the Act's legislative history—some see a clear intent to exclude state regulations from the aviation safety field, while others see Congress exercising restraint.<sup>51</sup> The way a court defines the term "aviation safety" will also factor into its analysis.<sup>52</sup> The Second, Sixth, Ninth, and Tenth Circuits have each held that the FAA Act impliedly preempts the entire field of aviation safety law,<sup>53</sup> while both the

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<sup>46</sup> *Id.* at 633.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 638.

<sup>49</sup> *Id.* at 639.

<sup>50</sup> *Id.* at 636–37. The Senate version of the Noise Control Act contained an express preemption provision, but was never presented to the House. *Id.* at 636. Instead, the House version was presented with amendments. *Id.* (citing 18 CONG. REC. 35,886 (1972)). However, Rep. Harley Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, argued on the floor, "We have evidence that across America some cities and States are trying to pass noise regulations. Certainly, we do not want that to happen. It would harass industry and progress in America." *Id.* at 636–37 (citing 18 CONG. REC. 37,083 (1972)).

<sup>51</sup> Compare *Abdullah v. Am. Airlines*, 181 F.3d 363, 371 (3d Cir. 1999), with *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 683 (3d Cir. 2016).

<sup>52</sup> See, e.g., *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 127 (3d Cir. 2010).

<sup>53</sup> *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 75 (2d Cir. 2019), cert. denied, 140 S. Ct. 2508 (2020); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318,

Third and Eleventh Circuits have held that the Act only preempts conflicting state laws.<sup>54</sup>

Ironically, the Third Circuit is also the source of one of the most influential opinions applying field preemption to the FAA Act.<sup>55</sup> In *Abdullah v. American Airlines*, the Third Circuit found that the FAA Act impliedly preempted the entire field of aviation safety law, applying the federal standard of care to an aviation negligence claim brought under state law.<sup>56</sup> Although federal law preempted the state law standard of care, the court held that state damage remedies still existed for the violation of the federal standard of care.<sup>57</sup> The court determined that Congress intended for the FAA Act to occupy the field of aviation safety law to the exclusion of the states, basing its conclusion on both legislative history and persuasive authority from its sister circuits.<sup>58</sup> The court noted that Congress enacted the FAA Act in response to a series of “fatal air crashes between civil and military aircraft *operating under separate flight rules*.”<sup>59</sup> Further, Senate Reports indicated that Congress intended to vest authority for aviation safety solely in the FAA, not in the states.<sup>60</sup> The court went on to cite a number of cases in which other circuits found that the FAA Act preempted state or local regulations in a certain area, which it felt indicated the pervasiveness of the federal government’s regulatory control.<sup>61</sup> *Abdullah* also established that the federal standard of care in aviation-related claims preempted any state or

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1322 (10th Cir. 2010); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005).

<sup>54</sup> See *Sikkelee*, 822 F.3d at 683; *Pub. Health Tr. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993).

<sup>55</sup> See *Abdullah*, 181 F.3d at 364–65.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 365.

<sup>58</sup> *Id.* at 367.

<sup>59</sup> *Id.* at 368 (citing *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969)).

<sup>60</sup> S. REP. NO. 85-1811, at 5 (1958).

[A]viation is unique among transportation industries in its relation to the Federal Government—it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears *virtually complete responsibility* for the promotion and supervision of this industry in the public interest.

*Id.* (emphasis added).

<sup>61</sup> See *Abdullah*, 181 F.3d at 369–71 (citing *Air Line Pilots Ass’n, Int’l. v. Quesada*, 276 F.2d 892 (2d Cir. 1960); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d

local standards of care.<sup>62</sup> The court noted that FAA regulations created a catch-all standard of care in the operation of aircraft, and that it would be “illogical” for federal law to preempt state law in matters such as pilot licensing, but not regulations relating to flight itself.<sup>63</sup>

The Third Circuit later clarified the extent of *Abdullah*'s holding in *Elassaad v. Independence Air, Inc.*<sup>64</sup> In *Elassaad*, a passenger who was injured while disembarking from a plane brought a state law negligence claim,<sup>65</sup> which the court held was not preempted by the FAA Act.<sup>66</sup> *Abdullah*'s holding was not that common law negligence claims themselves were preempted, only that the state law standards of care used in those claims were preempted.<sup>67</sup> The court noted that the regulations cited in *Abdullah* established a standard of care for the operation of aircraft, but the injury in *Elassaad* occurred while disembarking after the plane had landed.<sup>68</sup> The court admitted that the FAA Act was designed to reduce accidents in air transportation, and that the FAA “has sole discretion in regulating *air safety*,” but limited the definition of air safety in *Abdullah* to in-flight operations.<sup>69</sup> Because federal regulations did not establish a standard of care for negligence outside of the operation of the aircraft either in-flight or while taxiing on the runway, the state law standard of care was not preempted.<sup>70</sup>

In *Tweed*, the Second Circuit recognized at the outset of its analysis that the FAA Act impliedly preempts all state aviation safety laws, then turned to whether the state law in question fell

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400 (7th Cir. 1974); *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977); *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989).

<sup>62</sup> *Abdullah*, 181 F.3d at 372.

<sup>63</sup> *Id.* at 371; 14 C.F.R. § 91.13(a) (2020).

<sup>64</sup> 613 F.3d 119, 121 (3d Cir. 2010).

<sup>65</sup> *Id.* at 122.

<sup>66</sup> *Id.* at 131.

<sup>67</sup> *Id.* at 125.

<sup>68</sup> *Id.* at 131.

<sup>69</sup> *Id.* at 126 (internal citations and quotations omitted).

<sup>70</sup> *Id.* at 127.

No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or property of another.

14 C.F.R. § 91.13(b).

within the scope of the FAA's preemption.<sup>71</sup> The state law at issue limited the length of an airport's runway, preventing the airport from attracting new airlines.<sup>72</sup> The airport claimed that the statute was preempted by the FAA, but was denied a declaratory judgment invalidating the statute by the district court.<sup>73</sup> The Second Circuit reversed, finding that a statute limiting the length of an airport's runway did fall within the scope of federal preemption "because of its direct impact on air safety."<sup>74</sup> The court found "localized, state-created limitation[s]" like the runway statute to be "incompatible with the FAA's objective of establishing a 'uniform and exclusive system of federal regulation' in the field of air safety."<sup>75</sup>

The Tenth Circuit employed a two-pronged preemption approach in *O'Donnell*, concluding that a state law regulating alcohol service on aircraft was preempted by the FAA.<sup>76</sup> Like the Second Circuit in *Tweed*, the court began its analysis with the presumption that the FAA impliedly preempts the entire field of aviation safety based on the pervasiveness of the federal regulatory scheme.<sup>77</sup> The first prong of the court's field preemption analysis was to identify the legislative field that the state law implicated.<sup>78</sup> While the district court viewed the state law as only regulating alcoholic beverage service on airplanes, the Tenth Circuit recognized that it "necessarily implicate[d] the field of airline safety."<sup>79</sup> The second prong of the test was to evaluate whether Congress intended to occupy that field to the exclusion of state regulations, and the court determined it did.<sup>80</sup> Sidestepping a prior ruling that the FAA did not preempt state tort remedies because they were not named in the Act's express preemption provision, the court acknowledged that such a provision does not exclude the possibility of implied preemption as well.<sup>81</sup> The court found that both the pervasiveness of the

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<sup>71</sup> *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2508 (2020).

<sup>72</sup> *Id.* at 69.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 74.

<sup>75</sup> *Id.* (quoting *Air Transp. Ass'n v. Cuomo*, 520 F.3d 218, 224 (2d Cir. 2008)).

<sup>76</sup> *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1325–26 (10th Cir. 2010).

<sup>77</sup> *Id.* at 1325.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1325–27.

<sup>81</sup> *Id.* at 1326 (discussing *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 (10th Cir. 1993)).

FAAct's regulations and its legislative history indicated a clear intent to regulate the aviation safety field exclusively, preempting the state alcohol regulations in question.<sup>82</sup>

In *Greene v. B.F. Goodrich Avionics Systems, Inc.*, the Sixth Circuit held that federal aviation standards preempted a state law duty to warn claim in a products liability case.<sup>83</sup> Like the Tenth Circuit in *O'Donnell* and the Third Circuit in *Abdullah*, the Sixth Circuit relied on the legislative history and pervasiveness of the FAAct, determining that it was intended to preempt the entire field of aviation safety.<sup>84</sup> The plaintiffs in *Greene* argued that the manufacturer breached its duty to warn aircraft users about manufacturing defects by failing to maintain a database tracking potential equipment malfunctions.<sup>85</sup> However, the plaintiffs made no claims under federal laws or regulations, and were unable point to any federal standard requiring a manufacturer to maintain such a database.<sup>86</sup> Therefore, the court found that the additional state-imposed duty to warn of manufacturing defects was invalid.<sup>87</sup>

The Third Circuit's more recent decision in *Sikkelee* is seemingly incompatible with *Abdullah's* holding that additional state-imposed standards of care in aircraft-related negligence cases are preempted by the FAAct.<sup>88</sup> In *Sikkelee*, the Third Circuit held that field preemption does not apply to state law aircraft products liability claims and that the FAAct did not preempt state-imposed standards of care in such claims.<sup>89</sup> Instead, the court determined that in aviation products liability cases, the FAAct only preempted conflicting state laws and regulations.<sup>90</sup> Like in *Ellassaad*, the court drew a line between "in-air operations" and the issuance of safety certificates to aircraft manufacturers, once again limiting *Abdullah's* broad holding.<sup>91</sup> The court pointed out that the regulations cited in *Abdullah* related only to actually operating an aircraft (i.e., flight), not its design or manufacture,

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<sup>82</sup> *Id.* at 1327.

<sup>83</sup> *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005).

<sup>84</sup> *Id.* at 794.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 372 (3d Cir. 1999).

<sup>89</sup> *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 683 (3d Cir. 2016).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 689.

which was at issue in *Sikkelee*.<sup>92</sup> The driving factor behind this distinction was the way the federal standard of care in *Abdullah* was articulated.<sup>93</sup> The in-flight negligence regulation in *Abdullah* sounded in common law tort, which the court felt made it comprehensive and practical to incorporate into state law claims.<sup>94</sup> The design and manufacture regulations, on the other hand, were much more technical and part-specific, making them “exceedingly difficult to translate into a standard of care that could be applied to a tort claim.”<sup>95</sup> In *Elassaad*, the Third Circuit noted that most of the FAA regulations concerned aspects of safety associated with flight, specifically mentioning the certification and airworthiness requirements for aircraft components.<sup>96</sup> This makes the court’s conclusion that the FAA certification process was unrelated to in-flight safety even more confusing. Although certification and airworthiness requirements may not govern in-flight operations, they clearly concern in-flight safety, which the court identified as the purpose of the FAA in *Elassaad*.<sup>97</sup> The folly of *Sikkelee*’s holding was further proven on remand, where the district court found the plaintiff’s state law claims to be conflict preempted, as it would be impossible for the manufacturer to comply with both state and federal regulations.<sup>98</sup>

*Sikkelee* formed the basis of a similar decision by the Washington Supreme Court, which held that the FAA created only minimum standards of care for aircraft manufacturers<sup>99</sup> and that state law remedies exceeding that standard of care were not preempted by the Act.<sup>100</sup> In *Estate of Becker*, the estate of a plane crash victim brought a state law design defect claim against the

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 694.

<sup>94</sup> *Id.* at 695.

<sup>95</sup> *Id.*

<sup>96</sup> See *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 128 (3d Cir. 2010).

<sup>97</sup> See *id.* at 126.

<sup>98</sup> *Sikkelee v. AVCO Corp.*, 268 F. Supp. 3d 660, 665 (M.D. Pa. 2017). However, the Third Circuit reversed on appeal, holding that federal law did not conflict preempt the state law claims. *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 704 (3d Cir. 2018), *cert. denied*, 140 S. Ct. 860 (2020). The court also reaffirmed its prior holding that the FAA certification process does not establish a federal standard of care for aircraft manufacturers. *Id.* at 717.

<sup>99</sup> 48 U.S.C. § 44701(a)(1) (“The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing . . . minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers.”).

<sup>100</sup> *Estate of Becker v. AVCO Corp.*, 387 P.3d 1066, 1069 (Wash. 2017).

manufacturer of a fuel system component in the aircraft.<sup>101</sup> The manufacturer claimed preemption as a defense, arguing that fuel system manufacturing was pervasively regulated by the federal government.<sup>102</sup> The court rejected the preemption argument, holding that the regulation in question was not designed to replace state law, but only to establish a minimum design standard.<sup>103</sup>

Like the Third Circuit, the Ninth Circuit has also issued conflicting opinions about the reach of the FAA's preemption powers.<sup>104</sup> In *Montalvo*, the court held that the FAA impliedly preempted the entire field of aviation safety, dismissing the plaintiffs' consolidated failure to warn claims brought under state law.<sup>105</sup> Fourteen plaintiffs each brought negligence claims against various airlines for failure to warn passengers about the risk of deep-vein thrombosis, which airlines were under no federal obligation to do.<sup>106</sup> The court recognized that in the absence of federal preemption of passenger warnings, each state could mandate a different set of warnings, which could lead to absurd outcomes.<sup>107</sup> In *Martin*, however, the Ninth Circuit limited *Montalvo's* holding to cases in which the federal regulations in the field are pervasive.<sup>108</sup> In *Martin*, the plaintiff brought a design defect claim against an aircraft manufacturer, claiming that the aircraft's stairs were defectively designed because they only had one handrail.<sup>109</sup> In comparison to the FAA's pervasive regulations on passenger warnings, the only federal regulation

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<sup>101</sup> *Id.* at 1067.

<sup>102</sup> *Id.* at 1068.

<sup>103</sup> *Id.* at 1069.

<sup>104</sup> *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *see also Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 811–12 (9th Cir. 2009).

<sup>105</sup> *See Montalvo*, 508 F.3d at 468.

<sup>106</sup> *Id.* at 467–68.

<sup>107</sup> *Id.* at 473.

Congress could not reasonably have intended an airline on a Providence-to-Baltimore-to-Miami run to be subject to certain requirements in, for example Maryland, but not in Rhode Island or Florida. It is equally as doubtful that Congress would have intended the sufficiency of the Airlines' warnings to hinge on where each passenger on each flight was likely to file suit.

*Id.* (internal citations omitted).

<sup>108</sup> *See Martin*, 555 F.3d at 811.

<sup>109</sup> *Id.* at 808.

of aircraft stairs prohibited designing them in a way which might block emergency exits.<sup>110</sup>

The Eleventh Circuit's analysis in *Lake Aircraft* was similar to that of the Tenth Circuit in *Cleveland*, relying almost exclusively on the FAA's express preemption provision.<sup>111</sup> The court determined that Congress did not intend for the FAA to preempt state laws on matters unrelated to airline rates, routes, or services, and therefore, the Act did not preempt state law design defect claims.<sup>112</sup> *Lake Aircraft* was one of the earliest cases on the subject, and circuit courts' preemption analyses have since centered around either the Second Circuit's field preemption approach or the Third Circuit's newer conflict preemption approach.<sup>113</sup>

#### IV. ANALYSIS

##### A. THE CASE FOR FIELD PREEMPTION

Of all the industries regulated by the federal government, aviation is arguably the most in need of a uniform set of laws and regulations. The aviation industry is so integral to interstate commerce<sup>114</sup> that it would be counterintuitive for it not to be governed by a uniform set of laws and regulations. The alternative to field preemption, in which aviation manufacturers are potentially subject to a patchwork of different state regulations and standards of care, is simply incompatible with the industry's structure.<sup>115</sup> There are several arguments to be made in favor of field preemption. First, the FAA's legislative history and purpose indicate a clear intent to exclude states from regulating

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<sup>110</sup> *Id.* at 812. "It's hard to imagine that any and all state tort claims involving airplane stairs are preempted by federal law. Because the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective." *Id.*

<sup>111</sup> Compare *Pub. Health Tr. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993), with *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir. 1993).

<sup>112</sup> *Lake Aircraft, Inc.*, 999 F.2d at 295.

<sup>113</sup> See *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 75 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2508 (2020); *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 709 (3d Cir. 2016).

<sup>114</sup> See generally *Data & Statistics*, AIRLINES FOR AM., <https://www.airlines.org/data/> (last visited Oct. 30, 2020).

<sup>115</sup> See *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007). "Aviation transportation requires more national coordination than any other public transportation and also poses the largest risks. Regulation on a national basis is required because air transportation is a national operation." *Id.* (internal citations omitted).

aviation safety.<sup>116</sup> Second, field preemption allows for a uniform federal standard of care without necessarily preempting state law claims and remedies.<sup>117</sup> Finally, field preemption is more consistent with related Supreme Court precedent and the preemption doctrine's constitutional roots.<sup>118</sup>

As previously mentioned, legislative intent is highly determinative of a federal law or regulation's preemption powers.<sup>119</sup> In addition to legislative history, congressional intent to occupy an entire field of law can be implied when federal regulation is sufficiently pervasive, when the federal interest in the field is sufficiently dominant, or when the objective of the federal regulation and the character of its obligations show such a purpose.<sup>120</sup> The sheer amount of regulations that the FAA has promulgated within the aviation safety field makes it difficult to understand how a court could view the FAA's regulations as anything but pervasive.<sup>121</sup> Another rule, which some courts seem to have ignored, is often cited to when arguing that the FAA only establishes a minimum standard for design and manufacture.<sup>122</sup> Section 44701(e) governs the FAA's acceptance of airworthiness directives issued by foreign governments, yet makes no mention of state governments.<sup>123</sup> The FAA may accept foreign airworthiness directives only in the event that its foreign counterpart has a certification system requiring an equivalent level of safety as the FAA does.<sup>124</sup> Allowing foreign aviation safety agencies, but not states, to certify airworthiness seems to indicate that Congress intended to create a system in which there are only two possible arbiters of aircraft safety—the FAA or its foreign counterpart.<sup>125</sup>

Legislative intent is further clarified by looking at the legislative history associated with the FAA Act. Congress emphasized the unique nature of the aviation industry, which naturally made it a federal concern:

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<sup>116</sup> See *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3d Cir. 1999).

<sup>117</sup> See *Tweed*, 930 F.3d at 75.

<sup>118</sup> See *supra* Part III.B.

<sup>119</sup> See *supra* notes 30–35 and accompanying text.

<sup>120</sup> See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988).

<sup>121</sup> See 14 C.F.R. §§ 1–1399.

<sup>122</sup> 49 U.S.C. § 44701(e).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* § 44701(e)(5)(A)(iii).

<sup>125</sup> *Id.* § 41302.

[A]viation is unique among transportation industries in its relation to the Federal Government—it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.<sup>126</sup>

The circumstances prompting the FAA's creation are also consistent with an intent to establish a uniform federal regulatory system. Congress passed the FAA in response to a series of "fatal air crashes between civil and military aircraft *operating under separate flight rules*."<sup>127</sup> It would make little sense for Congress to go to the trouble of passing such a comprehensive piece of legislation only to leave the very problem it sought to address unaddressed. In *City of Burbank*, the Supreme Court afforded significant weight to the legislative history of the FAA, which it felt was clearly designed to establish uniform regulations.<sup>128</sup> That the Court reached this conclusion even after acknowledging that noise control regulation was traditionally a state police power speaks volumes about the weight of the FAA's legislative history.<sup>129</sup>

One of the primary concerns with field preemption the Third Circuit expressed in *Sikkelee* was that it "would have the perverse effect of granting complete immunity from design defect liability to an entire industry."<sup>130</sup> However, because state law claims should still be available in conjunction with the FAA under field preemption, this fear is misguided. The majority of circuit courts have held that the federal standard of care in the operation of aircraft preempts any state law standards of care, while leaving remedies for state law claims intact.<sup>131</sup> Significantly, the FAA's savings clause states that "[n]othing contained in this [chapter] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this [chapter] are in addition to such remedies."<sup>132</sup> The language

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<sup>126</sup> S. REP. NO. 85-1811, at 5 (1958).

<sup>127</sup> *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969) (emphasis added).

<sup>128</sup> *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 634–40 (1973).

<sup>129</sup> *See id.* at 638.

<sup>130</sup> *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 695 (3d Cir. 2016).

<sup>131</sup> *See, e.g., Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999).

<sup>132</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1106, 72 Stat. 731, 798 (1958).

here necessarily implies the existence of state law claims, as a remedy could not exist without a claim.

Once again, it is important to remember the distinction between preempting a state law claim and a state law standard of care. As the Ninth Circuit noted in *Abdullah*, federal law can preempt the standard of care while leaving state tort remedies intact:

[W]e find no irreconcilable conflict between federal and state standards. Nor do we find that imposition of a . . . standard in a damages action would frustrate the objectives of the federal law. Quite to the contrary, it is evident in both the savings and the insurance clauses of the [FAAct] that Congress found state damage remedies to be compatible with federal aviation safety standards. The savings clause provides that a remedy under this part is in addition to any other remedies provided by law. Clearly, Congress did not intend to prohibit state damage remedies by this language.<sup>133</sup>

In *Ventress v. Japan Airlines*, the Ninth Circuit held that a plaintiff's state law claims were preempted by the FAAct, but did so in a manner consistent with the reasoning set forth in *Abdullah*.<sup>134</sup> In *Ventress*, the plaintiff failed to allege a violation of any applicable federal aviation safety standard, pleading only state law unlawful retaliation and constructive termination claims in response to his termination.<sup>135</sup> The court acknowledged that while state law claims and remedies were hypothetically available under *Abdullah's* holding, the plaintiff's failure to allege a claim under any applicable federal standard warranted preemption.<sup>136</sup> Similarly, the Sixth Circuit in *Greene* invalidated the entire failure to warn claim brought under state law because it hinged on the existence of a federal standard requiring manufacturers to maintain a malfunction database.<sup>137</sup> Had there been both federal and state law standards requiring such a database, the federal standard would have preempted the state standard. Even absent a federal equivalent, the state law standard was preempted because it was supplementary to the federal regulatory scheme.<sup>138</sup> In *Sikkelee*, the Third Circuit framed the issue as

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<sup>133</sup> *Abdullah*, 181 F.3d at 375 (internal quotations omitted).

<sup>134</sup> *Ventress v. Japan Airlines*, 747 F.3d 716, 723 n.7 (9th Cir. 2014).

<sup>135</sup> *Id.* at 719–20.

<sup>136</sup> *Id.* at 723 n.7.

<sup>137</sup> See *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 794–95 (6th Cir. 2005).

<sup>138</sup> *Id.* at 795.

whether the FAA Act preempted state law product liability *claims*, rather than just the standard of care.<sup>139</sup> However, the court also rejected arguments that federal regulations established an applicable standard of care for aircraft design and manufacturing.<sup>140</sup> Its primary reasoning was that the design certification process—type, production, and airworthiness certificates—only established the procedures for federal approval of aircraft and their components, lacking the comprehensiveness to supply the standard of care in a products liability case.<sup>141</sup>

The federal certification process does exactly that, however. The FAA's design safety standard is actually set forth through the type certification process.<sup>142</sup> In addition to type certificates, the FAA may issue special conditions to manufacturers if its standard regulations are inadequate for a product, such as a component the administration is unfamiliar with.<sup>143</sup> The standard for issuing a type certificate is exacting on manufacturers, and the language within the regulation purports to establish a standard for design:

Upon examination of the type design, and after completing all tests and inspections, that the type design and the product meet the applicable noise, fuel venting, and emissions requirements of this subchapter, and further finds that they meet the applicable airworthiness requirements of this subchapter or that any airworthiness provisions not complied with are compensated for by factors that provide an equivalent *level of safety*.<sup>144</sup>

Prior to this testing phase, an applicant for a type certificate must also show compliance with all applicable requirements.<sup>145</sup> Even if not explicitly, 14 C.F.R. §§ 21.20–21 seem to establish an across-the-board standard for aircraft design and manufacture. Had the Third Circuit recognized this distinction, it could have simply applied this federal standard of care to the state law claim, rather than relying on a state law standard requiring additional design considerations.

The Supreme Court has held that federal regulations establish a uniform standard of care in the design and manufacture

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<sup>139</sup> See *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 692 (3d Cir. 2016).

<sup>140</sup> *See id.* at 694.

<sup>141</sup> *Id.*

<sup>142</sup> Lauren L. Haertlein & Justin T. Barkowski, *Applying a Federal Standard of Care in Aviation Product Liability Actions*, 82 J. AIR L. & COM. 743, 760 (2017).

<sup>143</sup> *Id.*

<sup>144</sup> 14 C.F.R. § 21.21 (2020) (emphasis added).

<sup>145</sup> *Id.* §§ 21.20–21.

of oil tankers, which is governed by a regulatory scheme similar to that of the aviation industry.<sup>146</sup> In *Ray*, a Washington state law established safety standards exceeding those required by the Ports and Waterways Safety Act of 1972 (PWSA).<sup>147</sup> Much like the FAA, the DoT oversaw a pervasive regulatory system including certification of oil tanker design and inspections for ongoing compliance under the PWSA.<sup>148</sup> Especially significant is how the Court addressed the issue of “minimum standards” in the PWSA.<sup>149</sup> Courts that reject field preemption argue that federal regulations establish only a minimum standard for design and manufacture.<sup>150</sup> In *Ray*, however, the Court found that the pervasive nature of the PWSA regulatory scheme established more than just a minimum standard.<sup>151</sup> The Court noted that in addition to the power to promulgate safety standards, the PWSA gave the federal government authority to ensure compliance through certificates and inspections, prompting its conclusion that the PWSA preempted the entire field of marine safety regulations.<sup>152</sup>

This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements. In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary’s design and construction regulations . . . would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.<sup>153</sup>

The similarities between the two federal regulatory schemes are readily apparent: both establish a comprehensive certification process in design and manufacture, and federal control of American waters is analogous to federal control of American air-

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<sup>146</sup> See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978).

<sup>147</sup> *Id.* at 154.

<sup>148</sup> *Id.* at 161–62.

<sup>149</sup> *Id.* at 161. The Court noted the PWSA requires promulgation of “comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation” for certain vessels. *Id.*

<sup>150</sup> See *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 694 (3d Cir. 2016); *Estate of Becker v. AVCO Corp.*, 387 P.3d 1066, 1069 (Wash. 2017).

<sup>151</sup> *Ray*, 435 U.S. at 163.

<sup>152</sup> *Id.* at 162–63.

<sup>153</sup> *Id.* at 163–64.

ways.<sup>154</sup> Much like the Court observed in *Ray*, it would make little sense for aircraft meeting federal design standards to be subject to liability in certain states with more stringent standards. The Court cited the legislative history of the PWSA, which also indicated an intent to preempt state law: “The original Tank Vessel Act, amended by Title II, sought to effect ‘a reasonable and uniform set of rules and regulations concerning ship construction.’”<sup>155</sup> The FAA’s parallel aircraft certification system should therefore indicate an equal intent. The FAA Act and PWSA also mirror each other in their acceptance of foreign safety certifications.<sup>156</sup> The PWSA contains a nearly identical provision allowing the federal government alone to accept the safety certifications of foreign vessels,<sup>157</sup> which the Court also felt indicated congressional intent to preempt the entire field of maritime safety law.<sup>158</sup>

Given that the federal design certification process establishes a standard of care for design and manufacture, it is much harder to reconcile the Third Circuit’s distinction between in-air operations and pre- or post-flight regulations. The court noted in *Sikkelee* that the examples of the pervasive regulations it had cited in *Abdullah* only applied to in-air operations, leaving certain regulations, such as those applying to type certificates, outside the reach of the FAA Act’s preemption powers.<sup>159</sup> According to the court, the design regulations governing type certificates were not as comprehensive as those governing pilot certification and other aspects of in-flight operations, therefore the FAA Act established only minimum safety standards rather than a catch-all standard of care for design and manufacture.<sup>160</sup> Naturally, the court pointed out that the FAA Act grants the FAA the authority to prescribe “*minimum standards*” required “in the interest of safety” and “necessary for safety.”<sup>161</sup> The existence of “minimum” federal standards, however, does not necessarily imply that states have the power to supplement those standards. Rather, the use of the word “minimum” was intended to strike

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<sup>154</sup> Thomas J. McLaughlin, Mary P. Gaston, & Jared D. Hager, *Navigating the Nation’s Waterways and Airways: Maritime Lessons for Federal Preemption of Airworthiness Standards*, 23 AIR & SPACE LAW. no. 2, 2010, at 5, 9.

<sup>155</sup> *Ray*, 435 U.S. at 165–66 (quoting H.R. REP. NO. 74-2962, at 2 (1936)).

<sup>156</sup> McLaughlin, *supra* note 154, at 9.

<sup>157</sup> 46 U.S.C. § 3303.

<sup>158</sup> *See Ray*, 435 U.S. at 163.

<sup>159</sup> *See Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 689 (3d Cir. 2016).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 693; 49 U.S.C. § 44701(a) (emphasis added).

an optimal balance between adequately ensuring safety in aircraft design and manufacturing, and facilitating economic growth by avoiding overly burdensome regulations.<sup>162</sup> It would make little sense for the federal government to prescribe inadequate safety regulations and allow each state to decide whether to supplement them. If that were the case, Congress would be knowingly risking the lives of passengers on aircraft designed or manufactured in a state which declined to supplement the minimum federal standard of care. Such a result would be clearly inconsistent with Congress's stated goal of ensuring "maximum possible safety and efficiency" through the FAA Act.<sup>163</sup>

Field preemption is necessary in order to establish a uniform federal standard of care for aircraft manufacturers. This is the primary problem with the Third Circuit's holding in *Sikkelee*—the FAA Act does not prevent plaintiffs in product liability claims from also bringing state law claims supplying their own standards of care.<sup>164</sup> Allowing plaintiffs to bring tort claims under state laws applying different standards of care subjects aircraft manufacturers to a patchwork of different standards, making it impracticable—if not impossible—to realistically comply with each of them.<sup>165</sup> Because aircraft manufacturers have essentially zero control over where an aircraft goes after its sale, forcing them into compliance with both a federal design standard and potentially fifty different state standards is simply unreasonable.<sup>166</sup> Allowing state law to govern the standard of care in an aviation products liability claim is also problematic because it displaces the expertise of the FAA. The FAA employs a highly technical certification process which governs manufacture and design throughout the life of the aircraft.<sup>167</sup> In contrast, state standards of care developed through litigation allow the FAA's complex certification process to be second-guessed by expert witnesses, judges, and juries.<sup>168</sup>

Applying the federal standard of care to state law product liability claims provides more predictability for aircraft manufacturers, while also ensuring a more accurate outcome in each case. Under state law, the standard of care in a negligence claim

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<sup>162</sup> See Haertlein & Barkowski, *supra* note 142, at 759.

<sup>163</sup> H.R. REP. NO. 85-2360, at \*3747 (1958).

<sup>164</sup> See *id.*

<sup>165</sup> *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007).

<sup>166</sup> See Haertlein & Barkowski, *supra* note 142, at 757.

<sup>167</sup> *Id.* at 758.

<sup>168</sup> *Id.*

would be established primarily through expert testimony and a strict liability claim would hinge on whether the jury finds a design defect.<sup>169</sup> This usually involves weighing the feasibility of alternative designs, which may or may not be relevant to the specific issue being litigated.<sup>170</sup> A jury verdict against a manufacturer thus means that the product design was unsafe for operation, even though the design was approved by the FAA when it issued a type certificate.<sup>171</sup> Thus, the court supersedes the FAA's role in certifying aircraft and imposes a duty on the manufacturer to comply with a design standard which may be inconsistent with those prescribed by the FAA.<sup>172</sup> This lack of uniformity increases litigation costs due to the reliance on expert witnesses, while forcing manufacturers to spend more on insurance to protect themselves from such inconsistent standards.<sup>173</sup> Manufacturers will ultimately pass these higher costs along to consumers, negatively impacting both sides of the market.<sup>174</sup>

By integrating the federal standard of care set forth through the certification process into state law claims, the focus at trial instead becomes whether the product met the FAA's standards, rather than those established by expert witnesses.<sup>175</sup> The issuance of a type certificate would constitute prima facie evidence that no defect exists, shifting the burden to the plaintiff to show that the manufacturer failed to comply with the basis of its certification in that instance.<sup>176</sup> Although this may present a hurdle for plaintiffs, the federal standard of care provides a more accurate definition of a product defect, while also giving manufacturers more certainty from state to state.

As a starting point in any future Supreme Court case on the issue, the presumption against federal preemption should not be so powerful. The presumption primarily applies to the extent that Congress attempts to preempt state law in an area that the

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<sup>169</sup> *Id.* at 765–66.

<sup>170</sup> *Id.* at 766.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See Geoffrey M. Hand, *Should Juries Decide Aircraft Design?* *Cleveland v. Piper Aircraft Corp. and Federal Preemption of State Tort Law*, 29 U.S.F. L. REV. 741, 743 (1995).

<sup>174</sup> *Id.*

<sup>175</sup> See *id.* at 785–86.

<sup>176</sup> *Id.* at 802.

states have traditionally occupied.<sup>177</sup> This concern is typical to preemption cases, but is likely irrelevant in the aviation context. The Supreme Court has already acknowledged that the presumption against preemption does not apply to federal maritime safety regulation,<sup>178</sup> a field with a similar history of federal control. The Third Circuit in *Sikkelee* somehow failed to find a significant history of federal involvement in aviation safety regulation, stating that “aviation torts have been consistently governed by state law” before citing an aviation safety case decided under state law—in 1914.<sup>179</sup> While the court then cites to additional cases decided under state law, this line of jurisprudence—on its own—could hardly be considered convincing evidence that aviation law is an area of traditional state occupation. The federal government did not begin regulating aviation safety until 1926,<sup>180</sup> primarily because it was a fledgling industry. Since 1926, however, Congress has exhibited a marked interest in regulating American airways, and its regulatory schemes have shown an intent to exclude states from further regulation.<sup>181</sup>

From a constitutional perspective, when applied to the FAA Act, field preemption is more appropriate than conflict preemption. Regardless of the doctrine’s source—the Supremacy Clause or the Necessary and Proper Clause—field preemption seems to be the clear choice. The Supremacy Clause route is rather simple: Congress has spoken on the issue, therefore excluding states from further regulation. Under the Supremacy Clause, the Constitution and federal laws are the supreme law of the land.<sup>182</sup> If the FAA purports to establish standards for aircraft manufacture and design, as it has through its detailed certification system,<sup>183</sup> states should naturally be excluded from imposing additional standards. The FAA’s multi-level certification system establishes a comprehensive safety standard for not only the aircraft, but each of its components as well.<sup>184</sup> Therefore, allowing standards

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<sup>177</sup> See John C. Nettels, Jr. & Jerrick L. Irby, *Standard of Care Preemption in Aviation Litigation: Halting Steps to a Coherent Analysis*, 76 J. AIR. L. & COM. 327, 335 (2011).

<sup>178</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000) (“An assumption of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”).

<sup>179</sup> *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 690 (3d Cir. 2016).

<sup>180</sup> See Air Commerce Act, Pub. L. No. 69-254, 44 Stat. 568 (1926).

<sup>181</sup> See *A Brief History of the FAA*, *supra* note 6.

<sup>182</sup> U.S. CONST. art. VI, cl. 2.

<sup>183</sup> See *supra* Part II.A.

<sup>184</sup> Haertlein & Barkowski, *supra* note 142, at 764.

of care defined by states to govern in aviation product liability cases would undermine the federal regulatory scheme, which has already established a standard of care for aircraft design and manufacturing.<sup>185</sup> Relying on principles of conflict preemption would provide little clarity in comparison with the current regime—although federal law may preempt conflicting state statutes, it would be up to the courts to decide when exactly this preemption has occurred, which could lead to inconsistent outcomes.<sup>186</sup>

Though the Supreme Court has often stated that preemption is rooted in the Supremacy Clause,<sup>187</sup> preemption can also be viewed as a product of the Necessary and Proper Clause, as Professor Stephen A. Gardbaum argues.<sup>188</sup> The crux of his argument is that the supremacy of federal law means that when both state and federal law within a certain area are valid, the federal law overrides the state law.<sup>189</sup> Therefore, under the Supremacy Clause, state law still has full effect provided it avoids conflicting with federal law.<sup>190</sup> Preemption, on the other hand, means that states have *no* power to act in the given field, regardless of whether they conflict with any federal laws.<sup>191</sup> Gardbaum argues that under the Necessary and Proper Clause, preemption is simply a means of allowing Congress to effectively exercise its enumerated powers.<sup>192</sup> This often requires a uniform set of laws or regulations to accomplish, especially when regulating interstate commerce.<sup>193</sup> Aviation safety is no exception—as an integral part of interstate commerce,<sup>194</sup> it should be governed by a uniform set of laws and regulations. Aviation is a fundamental interstate industry which was quite literally invented to travel across state and national borders, making it uniquely suited for federal regulation. This is precisely what the Supreme Court made clear in *City of Burbank*: if the congressional objectives underlying the FAA Act are to be fulfilled, balancing safety and efficiency requires

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<sup>185</sup> *Id.*

<sup>186</sup> See *supra* Part II.B.

<sup>187</sup> See, e.g., *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 366 (3d Cir. 1999).

<sup>188</sup> U.S. CONST. art. I, § 8; Gardbaum, *supra* note 28, at 781–82.

<sup>189</sup> Gardbaum, *supra* note 28, at 770.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 771.

<sup>192</sup> *Id.* at 782.

<sup>193</sup> *Id.* at 781.

<sup>194</sup> *Data & Statistics*, *supra* note 114.

a uniform and exclusive system of federal regulation.<sup>195</sup> However one chooses to interpret the source of preemption, field preemption is more consistent with the Constitution when applied to the field of aviation safety.

#### B. APPLYING *Tweed* to Other Circuits

Given both the importance of uniform aviation regulation and the degree to which the circuits differ in their analysis of FAAAct preemption, the Supreme Court will likely speak on the issue in the near future. Although the denial of certiorari for *Tweed* was certainly disappointing for the aviation industry, the silver lining is that a future decision may provide more clarity than one tailored to *Tweed's* facts. The Second Circuit was clear in its view that the FAAAct was intended to preempt the entire field of aviation safety, but it never indicated whether that included the applicable standard of care for design and manufacture.<sup>196</sup> Thus, a Supreme Court decision in *Tweed* may have been limited to the runway statute at issue in the case rather than addressing the broader question of the FAAAct's overall preemption power.<sup>197</sup> Although *Tweed* will not be heard before the Supreme Court, its preemption analysis should guide other circuit courts.

The preemption analysis in *Tweed* is also much simpler than the Third Circuit's approach in *Sikkelee*, making it easier for other circuit courts to apply. The Second Circuit began by acknowledging its own precedent that the FAAAct impliedly preempted the entire field of aviation safety.<sup>198</sup> Thus, the question became whether the statute fell within the scope of preemption by having a direct impact on air safety.<sup>199</sup> The Third Circuit had also previously held that the FAAAct preempted the entire field of aviation safety in *Abdullah*,<sup>200</sup> but limited "aviation safety" to in-

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<sup>195</sup> See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638–39 (1973).

<sup>196</sup> See *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 75 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2508 (2020).

<sup>197</sup> See *Petition for a Writ of Certiorari, Tweed*, 930 F.3d 65 (No. 19-375). The question presented to the Court was "[d]oes the Federal Aviation Act preempt a state law limiting the length of an airport runway, thereby depriving a State from determining the size and nature of a local airport?" *Id.* at ii.

<sup>198</sup> See *Tweed*, 930 F.3d at 74 (citing *Goodspeed Airport, LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210–11 (2d Cir. 2011)).

<sup>199</sup> See *id.*

<sup>200</sup> See *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 376 (3d Cir. 1999).

flight operations in *Elassaad* and *Sikkelee*.<sup>201</sup> This narrow definition of aviation safety requires courts to perform a preemption analysis for any aviation safety law not directly governing in-flight operations. Under the *Tweed* approach, a court has only one question to answer: does the law directly impact aviation safety?

Of course, circuits yet to decide on the issue have little directly applicable precedent with which to start their FAAAct preemption analysis. In the interest of uniformity, these circuits should adopt the majority view that the FAAAct impliedly preempts the entire field of aviation safety law. These courts could undertake their own preemption analysis or simply side with the weight of persuasive authority, which the Second Circuit did in *Goodspeed*.<sup>202</sup> After adopting the majority view, the court need only determine whether the law in question falls within that field.

This simpler analysis is preferable for several reasons. First, analyzing aviation safety laws under the presumption of field preemption ensures more consistent application of the law nationwide. Analyzing congressional intent and the pervasiveness of regulation in every subset of aviation safety law runs the risk of contradicting the federal government's interest in uniformity. Second, the requirement that a state law must directly affect aviation safety in order to fall within the scope of preemption provides more certainty to state and local authorities about the extent of their regulatory power. This is especially important in the absence of a Supreme Court decision, as it will conserve state and local government resources which might otherwise be spent litigating preemption challenges brought by private parties. Finally, agreement among circuits will benefit the aviation industry by providing more geographic uniformity for manufacturers regarding design and manufacturing standards.

The *Tweed* analysis is also compatible with establishing a uniform federal standard of care for aircraft design and manufacturing. Preempting additional state-based standards of care would require proving that the federal regulations directly impact aviation safety, which is not too high a burden. FAA type certificate regulations require that aircraft and their compo-

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<sup>201</sup> *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 689 (3d Cir. 2016); *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 127 (3d Cir. 2010).

<sup>202</sup> *See Goodspeed*, 634 F.3d at 210 n.5.

nents meet a “level of safety,”<sup>203</sup> which seems to be an obvious case for preemption under *Tweed*. Imposing a uniform federal standard of care does not prevent plaintiffs from bringing product liability or design defect claims under state law. Rather, only state law standards of care would be preempted by the FAA regulations, as they directly impact aviation safety. The focus at trial then shifts from establishing a design defect through expert testimony to proving that the manufacturer failed in that instance to comply with the requirements of its FAA certification.<sup>204</sup> This should allow for a more accurate determination of whether a design defect actually exists. This also ensures aircraft manufacturers will not be subjected to different standards of care based on where an accident occurs, which is almost entirely out of their control.

## V. CONCLUSION

The American aviation industry requires a set of uniform laws and regulations in order to operate at maximum efficiency. As it stands, aircraft manufacturers are subject to a wide variety of safety standards governed by state tort law—a system which is simply incompatible with the nature of the aviation industry. Field preemption is more consistent with both the intended purpose of the FAA Act and the unique nature of the aviation industry. Unique as it is, the industry’s regulatory scheme is also very comparable to regulations on maritime safety, which has proven to be an industry suited for uniform federal control. Courts that have declined to apply field preemption to the FAA Act have done so in a misguided manner, either misinterpreting the purpose of the FAA Act or misunderstanding the nature of the aviation industry.

Integrating federal design and manufacturing standards into state law tort claims is the optimal regulatory approach for the aviation industry, as it would provide clarity and certainty for manufacturers while also simplifying the trial process in negligence and products liability claims. Insulating manufacturers from the patchwork of different standards of care will lower

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<sup>203</sup> 14 C.F.R. § 21.21(b)(1). The FAA may issue a type certificate if it “finds that they meet the applicable airworthiness requirements of this subchapter or that any airworthiness provisions not complied with are compensated for by factors that provide an equivalent *level of safety*.” *Id.* (emphasis added); see also *id.* § 21.21(b)(2) (requiring “that no feature or characteristic makes [an aircraft] unsafe”).

<sup>204</sup> See Hand, *supra* note 173, at 743.

both their litigation and insurance costs, savings which can be passed onto consumers. Uniform federal standards would also ensure that the subject matter experts, not judges and juries, decide whether an aircraft or component met the applicable design standards in each case.

Ideally, the Supreme Court will step in and resolve the circuit split in the near future. Until then, the Second Circuit's decision in *Tweed* should serve as a template for other circuit courts that have yet to decide on the issue. This will ensure maximum possible uniformity in federal aviation regulation and will benefit the judicial system, state and local governments, the aviation industry, and ultimately, the consumer.



**WHOSE RIGHTS ARE THEY ANYWAY? SOLVING THE  
PROBLEM OF EXTRATERRITORIAL ASSERTIONS OF  
AUTHORITY IN THE AVIATION INDUSTRY**

JOHN L. SASSO\*

ABSTRACT

The lack of a clear and consistent federal standard across the country harms both airline carriers and aviation employees—carriers who grapple with a myriad of regulations and airline employees who are unsure of their rights and how to exercise them. As states with expansive labor laws continue to assert extraterritorial authority to enforce their laws on airline workers who may only temporarily pass through their borders, the confusing thicket of conflicting state and federal laws only worsens. There is a clear need for an updated federal framework that takes into account the airline industry and the needs of workers in the present day; while the Railway Labor Act of 1926 (RLA) may have served its purpose in stabilizing the nascent airline industry in the 1930s, the aviation industry has outgrown its usefulness. To replace the RLA and standardize the labor rights of workers in the aviation industry, this Comment proposes amending Title 49 of the U.S. Code (Title 49) to include a chapter on labor. Because of the direct impact of the labor rights of airline workers on the safety of the aviation industry, legislation dealing with these rights falls squarely within the purview of the Federal Aviation Administration (FAA). Through the proposed amendment, the aviation industry will be made safer, workers will receive greater protections, and the squandering of judicial economy through needless litigation over the thicket of conflicting local, state, and federal law will cease.

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\* J.D. Candidate, SMU Dedman School of Law, 2021; B.S., Economics, Texas A&M University, 2018. Thank you to my parents, Matt and Susan, for their relentless encouragement and support in all that I do.

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## I. INTRODUCTION

**F**OR MOST EMPLOYEES, the question “Where do I work?” is not one that ever comes to mind. But for some workers, particularly those in the airline industry, a thicket of conflicting local, state, and federal laws, along with work that regularly takes them across state lines, raises serious questions about where exactly the work is being performed—and more importantly, what rights and protections apply. While workers can be certain that some federal laws like the Fair Labor Standards Act of 1938 (FLSA) or Railway Labor Act of 1926 (RLA) apply to them no

matter where they work in the country, the applicability of state and local labor laws that provide additional protections like California's wage and hour laws or New York City's paid sick leave law is much less certain. This confusion has only been magnified by some states' recent assertions of extraterritorial authority to apply their wage and hour laws to workers located outside of their borders. In light of this uncertainty and the growing number of cases stemming from it, there exists a clear need for legislative intervention to preempt conflicting state and local labor laws and to bring uniformity to the field.

Part II of this Comment provides the historical background of federal wage and labor law, with a particular focus on how it has developed for workers in the railway industry, and how that history shaped the field of airline labor law. Part III examines the current state of the conflicting federal, state, and local laws, the recent cases arising out of such conflict, and the assertions of extraterritorial authority. Part IV advocates for nationwide uniformity in labor law for aviation workers, divorcing the labor rights of airline workers from the RLA, and outlines the policy implications of letting the current thicket of conflicting laws worsen. Part V proposes an amendment to Title 49 of the U.S. Code (Title 49) that would grant the Federal Aviation Administration (FAA) the authority to regulate the labor of airline workers and establish a comprehensive framework of labor and wage laws that will preempt state and local regulations.

## II. HISTORICAL BACKGROUND

Though the development of labor law in the United States has a long and storied history dating back to the slave trade, the modern statutory framework finds its roots in several critical pieces of legislation in the early twentieth century. Prior to the passage of these seminal pieces of legislation, courts around the country were striking down protections for workers as unconstitutional, including laws limiting the number of hours an employee could work in 1905,<sup>1</sup> prohibiting conditioning employment on an agreement to not join a union in 1915,<sup>2</sup> prohibiting child labor in 1918,<sup>3</sup> and establishing minimum wage standards for women and children in 1923.<sup>4</sup> Subsequent

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<sup>1</sup> *Lochner v. New York*, 198 U.S. 45, 64 (1905).

<sup>2</sup> *Coppage v. Kansas*, 236 U.S. 1, 26 (1915).

<sup>3</sup> *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

<sup>4</sup> *Adkins v. Children's Hospital*, 261 U.S. 525, 561–62 (1923).

acts like the National Labor Relations Act of 1935 (NLRA)<sup>5</sup> and the FLSA<sup>6</sup> were radical grants of rights and protections to employees in a legal environment that had previously been inimical to them. These two acts built on the foundations of others like the RLA,<sup>7</sup> which provided much needed protections only to workers in certain industries—that is, the railroad industry, and later, airline industry. These acts, and the subsequent court decisions upholding them, signaled a sea change in American jurisprudence toward protecting the rights of workers and, to this day, serve as the foundation of labor law in the United States.

A. FOUNDATIONS OF AIRLINE WORKERS' RIGHTS IN THE UNITED STATES: THE INHERITED HISTORY OF RAILWAY WORKERS' COLLECTIVE BARGAINING

One of the first instances of collective bargaining and its subsequent suppression by the judiciary came out of Pennsylvania in the late 1700s. There, a group of shoemakers formed a proto-union to respond to the increasing labor hardships of an industrializing society and to secure fair wages for its members.<sup>8</sup> This union, however, did not have a long lifespan, and after just ten years, a suit was brought against members of the union for the criminal charge of conspiracy in *Commonwealth v. Pullis*.<sup>9</sup> Eight of the union's leaders were found guilty of the crime of illegally conspiring to raise their wages, effectively criminalizing unions in Pennsylvania.<sup>10</sup> The result of *Pullis* left the legal status of unions in question in other parts of the country, and there were at least eighteen other instances of early union members being prosecuted for conspiracy over the course of the next three decades.<sup>11</sup>

It would not be until 1842 that a court would declare that labor unions were in fact legal enterprises and not criminal conspiracies.<sup>12</sup> That case, *Commonwealth v. Hunt*, coincidentally also dealing with shoemakers, set the stage for the legality of collec-

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<sup>5</sup> National Labor Relations Act, 29 U.S.C. §§ 151–69.

<sup>6</sup> Fair Labor Standards Act, 29 U.S.C. §§ 201–03.

<sup>7</sup> Railway Labor Act, 45 U.S.C. §§ 151–88.

<sup>8</sup> Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 166–67 (1931).

<sup>9</sup> 3 Doc. Hist. 59 (Phila. Mayor's Ct. 1806); Omar Swartz, *Defending Labor in Commonwealth v. Pullis: Contemporary Implications for Rethinking Community*, 8 HOLY CROSS J.L. & PUB. POL'Y 79, 80 n.10 (2004).

<sup>10</sup> *Id.* at 80.

<sup>11</sup> Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 826 (1926).

<sup>12</sup> *Commonwealth v. Hunt*, 45 Mass. 111, 136 (1842).

tive bargaining in the United States,<sup>13</sup> and Chief Justice Shaw's majority opinion is widely regarded as "the Magna [Carta] of American trade-unionism."<sup>14</sup> In *Hunt*, Chief Justice Shaw made the distinction between the mere *concept* of a combination of workers seeking to use collective bargaining to regulate their wages—a union—and the *methods* a union might employ to secure higher wages or other protections.<sup>15</sup> By drawing such a line, Chief Justice Shaw reframed the debate from whether a union itself amounted to an illegal conspiracy to whether the objectives sought by the union and methods used to accomplish such objectives were themselves legal.<sup>16</sup> Though the debate over the precise demarcation of when union action crosses into illegal territory continues to this day, Chief Justice Shaw's formulation would prove highly influential, with only three conspiracy cases in the subsequent twenty years brought against workers.<sup>17</sup> Though Chief Justice Shaw laid the groundwork for the legality of unions and their ability to strike lawfully, his opinion would do little to stem oncoming tides of conflict between workers and their employers in an increasingly industrial society.<sup>18</sup>

Strikes would prove to be the tool of choice for American workers in combatting poor working conditions, low wages, and overall governmental hostility to the interests of workers.<sup>19</sup> The tensions between workers and their employers came to a head in 1877, when workers—frustrated with repeated pay cuts, shouldering the burden of an economic depression, and the efforts of employers to stifle the potency of unions—staged what would be the first nationwide strike in American history, with estimates of nearly 500,000 workers walking out from their jobs in July 1877.<sup>20</sup> Characterized as the "Great Strike" or the "Great Insurrection," the strikes of July 1877 began along America's extensive railroad system.<sup>21</sup> No longer constrained to a mere local group of disgruntled shoemakers like the unions in *Pullis* and *Hunt*, the Great Strike involved workers of the railroad corpora-

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

<sup>14</sup> LEONARD LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 183 (1957).

<sup>15</sup> Witte, *supra* note 11, at 828.

<sup>16</sup> *Id.*

<sup>17</sup> LEVY, *supra* note 14, at 206.

<sup>18</sup> Witte, *supra* note 11, at 828.

<sup>19</sup> MICHAEL A. BELLESILES, *1877: AMERICA'S YEAR FOR LIVING VIOLENTLY* 144 (2010).

<sup>20</sup> *Id.* at 145.

<sup>21</sup> *Id.*

tions—some of the largest and most influential corporations in America at the time—the same corporations that played a critical role in America’s rapid industrialization.<sup>22</sup>

The increased stakes and heightened impacts of the railway worker strikes resulted in an increase in the severity of the response—this time, rather than taking the striking unions to court, corporate leaders resorted to force almost immediately.<sup>23</sup> When local police forces and state militias—many of them holding sympathies to the cause of the striking workers<sup>24</sup>—were unable or *unwilling* to enact the will of corporate leaders, the leaders turned to recently inaugurated President Rutherford B. Hayes.<sup>25</sup> Indebted to the corporate leaders who had supported his presidential campaign, President Hayes authorized federal troops to suppress the strikes—a rarely used option—and the Great Strike marked the first time federal troops were used on a nationwide scale to quash a strike.<sup>26</sup>

President Hayes’s decision to acquiesce to the demands of railway corporations and authorize the use of federal force would ultimately end the strikes, but not without bloodshed,<sup>27</sup> destruction of property,<sup>28</sup> and the garnering of much public support for the unions.<sup>29</sup> The victory of the corporations would prove to be a Pyrrhic one, as the landscape of labor relations had been forever changed.<sup>30</sup> It had become clear to the workers that they could not rely on the current governmental institutions to side with their interests over those of the wealthy railway owners,<sup>31</sup> and it had become clear to the nation’s elite that the influence and power of a unified working class could have devastating results for the country.<sup>32</sup>

Responses to the new landscape were mixed; some industrialists raised wages in order to keep their workers happy and loyal,<sup>33</sup> while others like Andrew Carnegie saw only the dangerous aspects of unions and conditioned hiring workers on their

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<sup>22</sup> *Id.* at 145–46.

<sup>23</sup> *Id.* at 145.

<sup>24</sup> *Id.* at 149.

<sup>25</sup> *Id.* at 146.

<sup>26</sup> *Id.* at 145–46.

<sup>27</sup> *Id.* at 175.

<sup>28</sup> *Id.* at 155–58.

<sup>29</sup> *Id.* at 156.

<sup>30</sup> *Id.* at 190.

<sup>31</sup> *Id.* at 179.

<sup>32</sup> *Id.* at 175.

<sup>33</sup> *Id.* at 168.

agreement to not join one<sup>34</sup>—a practice that would later become known as a “yellow-dog contract.”<sup>35</sup> Workers who had lost faith in elected public officials turned to the ballot box in order to secure their rights.<sup>36</sup> And, having witnessed the existential threat that a striking railway workforce imposes on the country’s economy,<sup>37</sup> it became imperative for the political leaders to prevent such a massive strike from occurring again. The federal government’s early attempts to mediate the interests of the railway owners and workers would take place through a series of failed legislation that ultimately culminated in the still extant RLA in 1926.<sup>38</sup>

B. THE LEAD UP TO MODERN LAW GOVERNING AIRLINE  
EMPLOYEES: BACKGROUND TO THE RAILWAY LABOR ACT

Still hot on the heels of the Great Strike of 1877, political leaders in state governments had great incentive to encourage harmonious resolution of disputes between unions and employers. To facilitate such resolution, several states began passing legislation to arbitrate labor disputes as early as 1878, though the state statutes ultimately proved to be feckless.<sup>39</sup> However, these statutes provided the groundwork for a federal statute’s inception. Given the recent history of railway strikes and the railway industry’s susceptibility to such strikes, the impact those strikes had on the national economy, and the fact that railways were clearly engaged in interstate commerce, it is of little surprise that the first federal law on labor arbitration would arise in the context of railway labor disputes.<sup>40</sup> As a result, President Grover Cleveland signed into law the Arbitration Act of 1888 (Arbitration Act), which provided an arena for voluntary arbitration of railway labor disputes.<sup>41</sup> However, much like the previously ineffective state laws, voluntary arbitration failed to solve the disagreements between the unions and railway owners: in the Arbitration Act’s ten-year lifespan, voluntary arbitration was

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<sup>34</sup> *Id.* at 154.

<sup>35</sup> Joel I. Seidman, *The Yellow Dog Contract*, 46 Q.J. ECON. 348, 348 (1932).

<sup>36</sup> BELLESILES, *supra* note 19, at 187–88.

<sup>37</sup> *Id.* at 175.

<sup>38</sup> Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 386 (1983).

<sup>39</sup> *Id.* at 380–81.

<sup>40</sup> *Id.* at 382.

<sup>41</sup> *Id.*; Arbitration Act of 1888, Pub. L. No. 64-252, 39 Stat. 721 (1888) (repealed 1898).

not used once.<sup>42</sup> The Arbitration Act's requirement of impartial and disinterested mediators, slow-moving bureaucracy, and inability to bring both sides to the table resulted in a wholly ineffective piece of legislation, which was quickly replaced.<sup>43</sup>

The Arbitration Act's follow-up, the Erdman Act of 1898 (Erdman Act),<sup>44</sup> sought to correct the deficiencies of the Arbitration Act.<sup>45</sup> The Erdman Act removed the requirement of having impartial mediators and established a permanent commission with the power to prevent strikes and firings during an investigation.<sup>46</sup> With the exception of a single failed attempt to invoke an arbitration proceeding, the Erdman Act was not used at all during the first eight years of its existence.<sup>47</sup> But this changed beginning in 1906, and it was invoked in sixty cases from 1906 to 1913.<sup>48</sup> The most important change was perhaps the ability to appeal arbitration awards to federal courts.<sup>49</sup> Unfortunately, the increased use resulted in increased disapproval of the Erdman Act, as decisions affecting millions of dollars and thousands of workers were often made by an outside mediator with little to no knowledge of the industry.<sup>50</sup> Eventually, dissatisfaction with the mediators' decisions led to both unions and railway leaders refusing to use the Act, and threats of an incoming strike galvanized Congress to pass yet another version of the bill.<sup>51</sup>

The 1913 edition of the legislation, the Newlands Labor Act (Newlands Act),<sup>52</sup> again sought to correct perceived deficiencies in the previous versions, this time establishing a permanent three-member board of remediation and conciliation utilizing mediators from within the industry.<sup>53</sup> This version received more use than previous iterations, handling seventy-one disputes between 1913 and 1917, though it ran into an impasse in 1916 after unions asserted that their demand for an eight-hour

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<sup>42</sup> Nolan & Abrams, *supra* note 38, at 382.

<sup>43</sup> *Id.* at 383.

<sup>44</sup> Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898) (repealed 1913).

<sup>45</sup> Nolan & Abrams, *supra* note 38, at 383.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 383–84.

<sup>49</sup> *Id.* at 385.

<sup>50</sup> *Id.* at 384.

<sup>51</sup> *Id.*

<sup>52</sup> Mediation, Conciliation, and Arbitration Between Carriers and Employees, ch. 6, 38 Stat. 103 (1913) (repealed 1926).

<sup>53</sup> Nolan & Abrams, *supra* note 38, at 384–85.

workday was not a question suitable for the three-member board to resolve.<sup>54</sup>

With the threat of yet another strike mounting, Congress passed the Adamson Eight-Hour Act of 1916 (Adamson Act),<sup>55</sup> which established an eight-hour workday and overtime pay for railway workers.<sup>56</sup> Fervently contested by railway owners, the Adamson Act was litigated all the way up to the Supreme Court, and, in 1917, the Supreme Court upheld the ability of Congress to regulate the workday and overtime compensation for interstate railway workers,<sup>57</sup> a surprising change of pace for a Court that had struck down New York's attempt to limit the amount of hours worked in a bakery to ten hours a day as unconstitutional just twelve years prior.<sup>58</sup>

While the goings-on of the railway industry had largely been an insular affair, in 1918, the mounting need for a nationally unified railway entity due to the demands of World War I resulted in the nationalization of the railway industry under the Railway Administration Act.<sup>59</sup> The nationalization of the country's railway system would last a few years, until 1920, when the railways returned to private ownership.<sup>60</sup> However, the relative harmony in which railways operated for the years of nationalization signaled that improvements still could be made to the Newlands Act, and as a result, Congress passed yet another version, the Transportation Act of 1920 (Transportation Act).<sup>61</sup>

The Transportation Act, however, largely regressed from the improvements made in previous iterations, with both labor unions and railway executives seeking to replace the legislation.<sup>62</sup> The Transportation Act mandated use of arbitration proceedings, but the decisions were ultimately toothless because they were not legally enforceable.<sup>63</sup> However, contrary to prior laws, the Transportation Act was widely used, and the newly established board was inundated with nearly 14,000 cases over its five-

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<sup>54</sup> *Id.* at 385.

<sup>55</sup> Adamson Eight-Hour Act, Pub. L. No. 64-252, 39 Stat. 721 (1916) (current version at 49 U.S.C. §§ 28301-02).

<sup>56</sup> Nolan & Abrams, *supra* note 38, at 385.

<sup>57</sup> *Wilson v. New*, 243 U.S. 332, 359 (1917).

<sup>58</sup> *Lochner v. New York*, 198 U.S. 45, 63-64 (1905).

<sup>59</sup> Railway Administration Act, Pub. L. No. 65-107, 40 Stat. 451 (1918) (repealed 1920); Nolan & Abrams, *supra* note 38, at 385.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; Transportation Act, Pub. L. No. 66-152, 41 Stat. 456 (1920).

<sup>62</sup> Nolan & Abrams, *supra* note 38, at 386.

<sup>63</sup> *Id.* at 385.

year lifespan.<sup>64</sup> The dissatisfaction from both railway owners and union officials led the parties to begin drafting their own version of the law, which was then proposed to Congress.<sup>65</sup> That version was ultimately passed in 1926 as the RLA.<sup>66</sup>

The RLA, further amended in 1934 to fix some deficiencies and again in 1936 to include the airline industry within the Act's purview, remains the governing law over labor relations in both the railway and airline industries to this day.<sup>67</sup> The RLA governs the handling of disputes within the industries, utilizing a single organization, the National Railroad Adjustment Board (Board).<sup>68</sup> As a result of comprehensive negotiations, the RLA contains significant concessions for both sides: labor unions largely gave up their ability to strike without first going through the Board, but gained the ability to sue employers in federal court for violations of the RLA.<sup>69</sup> The ability to bring suits for violation of the RLA on their own volition distinguishes railway and airline workers from most other employees in the country, who are subject to the NLRA of 1935, which gives the National Labor Relations Board exclusive standing to sue.<sup>70</sup> This right is a direct result of the long-fought history of railway workers in the early stages of an industrializing United States.

While the 1934 amendments sought to correct several deficiencies of the original Act, the 1936 amendments were added to extend the Act to the fledgling airline industry.<sup>71</sup> The RLA was extended to the airline industry for a myriad of reasons: similar to the railway industry, the airline industry dealt with inter-

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 386.

<sup>66</sup> *Id.*; Railway Administration Act, Pub. L. No. 69-257, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151-88).

<sup>67</sup> Nolan & Abrams, *supra* note 38, at 386.

<sup>68</sup> *Id.* at 387.

<sup>69</sup> *Id.* at 387-88.

<sup>70</sup> See National Labor Relations Act, 29 U.S.C. § 152(2).

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

*Id.* (emphasis added).

<sup>71</sup> A. J. Harper II, *Major Disputes Under the Railway Labor Act*, 35 J. AIR L. & COM. 3, 3 (1969).

state commerce, making it ripe for federal legislation, and the airline industry had an immediate need for thorough and effective regulations, which the RLA could provide.<sup>72</sup> By doing so, it established uniformity between the industries.<sup>73</sup> Additionally, by 1936, nearly every other facet of the airline industry was subject to close regulation, and there was no compelling reason to exclude labor from the norm.<sup>74</sup> However, while the RLA undoubtedly provided a much-needed framework at the industry's emergence, the airline industry has continued to be burdened by a system that was not designed with its needs in mind.<sup>75</sup> As will be discussed in Part IV.A, the modern needs of the airline industry have only exacerbated its growing pains within the framework of the RLA, and either an amendment to existing federal frameworks or a new statute is required to adequately respond to the current landscape.

### C. NON-UNION LABOR LAW DEVELOPMENTS: THE RISE AND FALL OF THE *LOCHNER* ERA

While the development of the RLA was largely a fifty-year process of iterative legislation insulated from other labor developments in the United States, the modern rights of both railway and airline workers are further enmeshed in a broader net of protections, combining the RLA, Supreme Court precedent, and other federal legislation such as the FLSA of 1938.

Around the same time that the Supreme Court upheld the Adamson Act in 1917, limiting the working day of railway employees to eight hours, the Court had been consistently striking down other extensions of protections to workers.<sup>76</sup> Dubbed the “*Lochner* era” after the Court’s ruling in *Lochner v. New York* (striking down a state law limiting the working day to ten hours), the Court’s decisions in this era were characterized by a laissez-faire approach to the labor market.<sup>77</sup> Strictly protecting the principle that individuals were free to enter into contracts of

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> James B. Frankel, *Judicial and Regulatory Decisions*, 18 J. AIR L. & COM. 461, 461–62 (1951).

<sup>75</sup> *Id.* at 477–79.

<sup>76</sup> *See supra* Part II.

<sup>77</sup> Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 15–17 (1991).

their choice, the *Lochner* Court rejected the idea of a “paternal government” interfering with the liberty of contract.<sup>78</sup>

However, the *Lochner* era began on shaky ground, as it was not fully supported by precedent, and it would be a mere three decades before the *Lochner* jurisprudence fully collapsed in 1937.<sup>79</sup> The laissez-faire principles undergirding the *Lochner* era stood at odds with an earlier ruling in *Holden v. Hardy*, which upheld regulations preventing individuals from contracting in ways that harmed themselves.<sup>80</sup> In fact, it would only be twelve years before *Lochner*’s specific holding regarding the validity of maximum hours legislation would be overruled, though the pernicious logic behind its reasoning would persist.<sup>81</sup> In *Bunting v. Oregon*, the Court upheld a state law limiting the working day to ten hours and providing time-and-a-half overtime for hours worked past the limit, overruling the particular holding in *Lochner*.<sup>82</sup>

Despite *Bunting* overturning *Lochner*, the era would continue with some of its most notorious decisions in the years to come. Just a year after *Bunting*, the Court struck down a federal law prohibiting the sale of products made by child labor in interstate commerce in *Hammer v. Dagenhart*.<sup>83</sup> The decision in *Adkins v. Children’s Hospital* soon followed, where the Court struck down another federal law providing protections for workers, this time mandating a minimum wage for female employees in the District of Columbia.<sup>84</sup> Grasping at straws to distinguish the decision from that of *Bunting*, the Court focused on the difference between laws regulating wages and those regulating hours as sufficient grounds to differentiate it from *Bunting*.<sup>85</sup> The *Lochner* era’s tenuous grasp of logic would soon lead to its downfall, and the overruling of *Adkins* sounded the death knell of the era. In 1937, the Court heard yet another case regarding the minimum wage, and in *West Coast Hotel Co. v. Parrish*, the Court struck the killing blow to the *Lochner* jurisprudence and upheld a minimum wage.<sup>86</sup>

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<sup>78</sup> *Id.* at 9.

<sup>79</sup> *Id.* at 52.

<sup>80</sup> *Id.* at 19.

<sup>81</sup> *Id.* at 19–20.

<sup>82</sup> *Id.* at 19–20, 19 n.78; *Bunting v. Oregon*, 243 U.S. 426, 439 (1917).

<sup>83</sup> 247 U.S. 251, 276 (1918).

<sup>84</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525, 560–61 (1923).

<sup>85</sup> *Id.* at 550–51.

<sup>86</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

With the looming threat of the Court striking down labor regulations finally over, hardly a year elapsed between the fall of the *Lochner* era and the passage of a comprehensive set of federal labor regulations. The FLSA established a national base level minimum wage, prohibited the employment of children, capped the work week at forty-four hours, and provided time-and-a-half overtime pay on work past the cap—a monumental expansion of worker protections, and one that President Franklin D. Roosevelt characterized as the most important piece of New Deal legislation next to the Social Security Act.<sup>87</sup> The FLSA would be challenged shortly after on the grounds that it could not proscribe child labor given the precedent of *Hammer v. Dagenhart*, and the Supreme Court was given a chance to strike down the FLSA. However, in *United States v. Darby Lumber Co.*, the Court unanimously upheld the FLSA, abolishing the last vestiges of the *Lochner* era and overturning *Hammer*.<sup>88</sup> While the FLSA has been amended many times since its passage, the core of the legislation nonetheless persists as the national bare minimum of worker rights and protections for employees engaged in interstate commerce.

### III. CURRENT STATE OF THE LAW

Bolstered by both the RLA and the FLSA, in addition to applicable state and local laws, it would seem at first glance that airline workers must be some of the most protected workers in the country. While airline workers benefit in some areas from the years of collective labor bargaining that led to the passing of the RLA, the RLA was written with railway workers in mind, and it continues to be a poor fit for the airline industry. For employees in the airline industry, the multi-jurisdictional nature of their work, combined with conflicting state and local laws and the lack of a uniform federal standard to preempt such laws, subjects airline workers to a confusing thicket of inconsistent laws that can obfuscate their rights.

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<sup>87</sup> Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV. Dec. 2000, at 32, 32, 36; see also Jared Bernstein & Ross Eisenbrey, *Eliminating the Right to Overtime Pay*, ECON. POL'Y INST. (June 25, 2003), [https://www.epi.org/publication/briefingpapers\\_flsa\\_jun03/](https://www.epi.org/publication/briefingpapers_flsa_jun03/) [https://perma.cc/V49R-7LTK].

<sup>88</sup> *United States v. Darby Lumber Co.*, 312 U.S. 100, 116–17 (1941).

At odds with the age-old legal maxim of *ubi jus ubi remedium* (where there is a right, there is a remedy),<sup>89</sup> there can be no remedy if a worker does not know that she has that right to begin with. Especially given the fact that federal legislation like the RLA or FLSA merely sets out the bare minimum protections that are often exceeded by state and local laws like California's wage and hour law<sup>90</sup> or Washington's Paid Sick Leave Act (PSLA),<sup>91</sup> an airline worker uncertain of her rights may in fact end up with fewer protections than a worker who never leaves the city or state and is certain of her rights.

#### A. THE BARREN FIELD: A LACK OF CLEAR FEDERAL PREEMPTION

A critical issue for a worker in determining her rights is the lack of clarity on what laws apply when and the overall absence of unambiguous federal protections. On the whole for workers outside of the airline industry, the lack of federal preemptive standards tends to benefit workers given the bare minimum standards presented in the federal statutes and the additional protections workers receive through more comprehensive state and local laws. Many states have passed higher wage and hour rates than the FLSA base level, with twenty-nine states (plus Washington, D.C., Guam, and the Virgin Islands) exceeding the federal minimum wage.<sup>92</sup> The ability of states to pass higher standards was clearly an intentional feature of the FLSA and is laid out in § 218(a) of the Act. Colloquially referred to as the "savings clause," the FLSA states that "[n]o provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance" establishing a higher minimum wage or shorter maximum work week.<sup>93</sup> As has been held by the Third Circuit, "the statute's plain language evinces a clear intent to *preserve rather than supplant* state law."<sup>94</sup> The savings clause allows states and local municipalities to ex-

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<sup>89</sup> Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71, 78 n.47 (2001).

<sup>90</sup> CAL. CODE REGS. tit. 8, § 11090 (2020).

<sup>91</sup> WASH. REV. CODE § 49.46.210 (West 2020).

<sup>92</sup> See *Consolidated Minimum Wage Table*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (Jan. 1, 2020), <https://www.dol.gov/agencies/whd/mw-consolidated> [<https://perma.cc/5YX7-RP4X>].

<sup>93</sup> 29 U.S.C. § 218(a).

<sup>94</sup> *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262 (3d Cir. 2012) (emphasis added); see also *Spoerle v. Kraft Foods Glob., Inc.*, 614 F.3d 427, 430 (7th Cir. 2010) ("According to § 218(a), . . . state law supersedes the collective bargaining agreement.").

tend greater protections to workers in their jurisdiction than would otherwise be available through the FLSA.

Though the RLA does not have a corollary to the savings clause, the Supreme Court has repeatedly instructed that RLA preemption “extends only as far as necessary to protect the role of labor arbitration in resolving [collective bargaining agreement] disputes.”<sup>95</sup> In line with this precedent, the RLA only preempts state law when a state law claim arises entirely from or requires construction of a collective bargaining agreement.<sup>96</sup> As such, the RLA does not preempt state law claims to enforce rights independent of a collective bargaining agreement, such as minimum labor standards.<sup>97</sup>

Since neither the FLSA nor the RLA preempt state law in the vast majority of circumstances, this would ordinarily simplify the analysis—a worker is subject to the standards in the RLA or FLSA, then any standards in the state or municipality of her job that exceed the federal baseline. However, this analysis is confounded when an employee does work in multiple jurisdictions, such as an employee who spends most of her time working in Dallas, Texas, but who attends a trade conference in Los Angeles, California. In that scenario, the labor laws of both Dallas and Texas would apply to the worker as she does her work in Dallas, but when she arrives in Los Angeles, she becomes subject to the laws and protections of California and local laws of Los Angeles. As the Supreme Court has held, “[a] basic principle of federalism is that each state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.”<sup>98</sup> This principle was upheld in *Sullivan v. Oracle*, where the California Supreme Court held that the California Labor Code’s overtime protections applied to work performed in California by out-of-state plaintiffs on short-term trips.<sup>99</sup>

However, dealing with airline employees who can potentially cross hundreds of state borders in each pay period pushes this scenario to its logical extreme, with potentially multiple different and conflicting labor standards applying to employees

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<sup>95</sup> *Alaska Airlines, Inc. v. Schurke*, 898 F.3d 904, 913–14 (9th Cir. 2018) (en banc), cert. denied, 139 S. Ct. 1445 (2019); see also *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 262–64 (1994); *Lingle v. Norge Div. Magic Chef, Inc.*, 486 U.S. 399, 413 (1988).

<sup>96</sup> *Matson v. United Parcel Serv., Inc.*, 840 F.3d 1126, 1132–33 (9th Cir. 2016).

<sup>97</sup> *Norris*, 512 U.S. at 256.

<sup>98</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

<sup>99</sup> *Sullivan v. Oracle Corp.*, 254 P.3d 237, 241 (Cal. 2011).

within a span of minutes. This issue is only confounded further by states that then assert extraterritorial jurisdiction to apply their wage and hours laws to workers who are neither residents of the state nor employees of a resident employer. The RLA's inability to deal with this problem through federal preemption only furthers the need to divorce the airline industry from this outdated and ill-fitting piece of legislation.

#### B. THE STICKY HAND: EXTRATERRITORIAL ASSERTION OF STATE WAGE AND HOURS LAWS

Some states have begun to apply their wage and hour statutes to employees who live or work outside of the state's jurisdiction. Unlike the FLSA, which expressly limits its application to work performed within the United States and its territories,<sup>100</sup> many state wage and hour statutes hold no such geographic limitations. There have been four categories of these laws being applied extraterritorially to: (1) "out-of-state employees working in-state for resident employers"; (2) "out-of-state employees working out-of-state for resident employers"; (3) "resident employees working in-state for out-of-state employers"; and (4) "resident employees working out-of-state for resident employers."<sup>101</sup>

First, in terms of laws being applied extraterritorially to out-of-state employees working in-state for resident employers, California,<sup>102</sup> Illinois,<sup>103</sup> and Massachusetts<sup>104</sup> have extended their protections to all instances of work performed in the state,

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<sup>100</sup> 29 U.S.C. § 213(f).

Employment in foreign countries and certain United States territories: The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act . . . ; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

*Id.*

<sup>101</sup> Deborah F. Buckman, Annotation, *Extraterritorial Application of State Wage and Hours Laws*, 29 A.L.R. 7th, art. 7 (2017).

<sup>102</sup> *Maez v. Chevron Texaco Corp.*, No. C 04-00790 JSW, 2005 WL 1656908, at \*2, \*8-9 (N.D. Cal. July 13, 2005) (rejecting Defendant's argument that California law was inapplicable); *Sullivan v. Oracle Corp.*, 254 P.3d 237, 243 (Cal. 2011).

<sup>103</sup> *Adams v. Catrambone*, 359 F.3d 858, 863 (7th Cir. 2004) (applying Illinois law).

<sup>104</sup> *Dow v. Casale*, 989 N.E.2d 909, 913 (Mass. App. Ct. 2013).

regardless of the resident status of the employee. Second, for out-of-state employees working out-of-state for resident employers, Kansas,<sup>105</sup> Kentucky,<sup>106</sup> and Washington<sup>107</sup> have held that their state wage and hour statutes may apply to protect employees who may never have even set foot in the state as long as their employer was based in that state. Third, instances of resident employees working in-state for out-of-state employers and having access to the wage and labor laws of the state have been found in some capacity in Connecticut,<sup>108</sup> Delaware,<sup>109</sup> and Massachusetts.<sup>110</sup>

The fourth category, and perhaps the most relevant category for workers within the airline industry, deals with the extraterritorial assertion of wage and labor laws for resident employees working out-of-state for a resident employer. So far, California,<sup>111</sup> New York,<sup>112</sup> Pennsylvania,<sup>113</sup> and Washington<sup>114</sup> have extended such rights in some capacity. *Bernstein*, out of the Northern District of California, dealt precisely with the issue of whether flight attendants, who are based in California but spend only about a quarter of their time in the state, have access to the broad protections provided by California's wage and labor laws.<sup>115</sup> The court held that the workers fell under the protec-

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<sup>105</sup> *Harlow v. Sprint Nextel Corp.*, 574 F. Supp. 2d 1224, 1226–27 (D. Kan. 2008) (applying Kansas law).

<sup>106</sup> *Himmelheber v. ev3, Inc.*, No. 3:07-CV-593-H, 2008 WL 360694, at \*11 (W.D. Ky. Feb. 8, 2008) (applying Kentucky law).

<sup>107</sup> *Woods v. Mitchell Bros. Truck Line, Inc.*, No. 3304-6-II, 2008 WL 496803, at \*2 (Wash. Ct. App. Feb. 26, 2008).

<sup>108</sup> *Goldberg v. Goodwill Indus.*, No. CV054009642, 2006 WL 224124, at \*14–15 (Conn. Super. Ct. Jan. 3, 2006).

<sup>109</sup> *Redick v. E Mortg. Mgmt., LLC*, No. 11-1260-GMS-CJB, 2013 WL 1089710, at \*1–2, \*41–42 (D. Del. Mar. 15, 2013).

<sup>110</sup> *Taylor v. E. Connection Operating, Inc.*, 988 N.E.2d 408, 409 (Mass. 2013).

<sup>111</sup> *Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, at 1055–56, 1063–64 (N.D. Cal. 2017) (applying California law); *Tidewater Marine W., Inc. v. Bradshaw*, 927 P.2d 296, 309 (Cal. 1996).

<sup>112</sup> *Heng Guo Jin v. Han Sung Sikpoom Trading Corp.*, No. 13-CV-6789 CBA LB, 2015 WL 5567073, at \*25–26 (E.D.N.Y. Sept. 21, 2015) (denying summary judgment on Defendant's extraterritoriality argument because "[n]either party has briefed the choice of law analysis").

<sup>113</sup> *Truman v. DeWolff, Boberg & Assocs., Inc.*, No. 07-01702, 2009 WL 2015126, at \*10–11 (W.D. Pa. July 7, 2009) (noting that "[n]othing within the language of the statute implies that work performed in a foreign country by a Pennsylvania resident does not deserve the same protections as work performed within Pennsylvania by the same resident and for the same company").

<sup>114</sup> *Bostain v. Food Exp., Inc.*, 153 P.3d 846, 858 (Wash. 2007); *Miller v. Farmer Bros. Co.*, 150 P.3d 598, 606 (Wash. Ct. App. 2007).

<sup>115</sup> *Bernstein*, 227 F. Supp. 3d at 1060.

tion of California's laws and rejected the idea that "job situs [is] the dispositive factor to determine whether California's wage and hour laws apply."<sup>116</sup> This view, read in conjunction with the California Supreme Court precedent coming out of *Sullivan v. Oracle*, covers both those who are based in the state but perform the majority of their work outside the state, and those based outside the state who perform some work within the state.<sup>117</sup>

The holdings in *Bernstein* and *Sullivan* were reinforced in *Goldthorpe v. Cathay*, which dealt with pilots who were based in California but spent the majority of their time either in federal airspace or outside the country.<sup>118</sup> The court held that the pilots were still under the protection of California's wage and hours laws, reasoning that there was:

no categorical rule that California's wage and hour protections can only apply if most of an employee's work is performed within the state, and the presumption against extraterritorial application does not prevent the application of California wage and hour law to transportation workers based in California who travel interstate. Absent such a categorical rule, and absent the presumption against extraterritorial application, it is difficult to think of a reason why California law should not apply in this situation. After all, California's wage and hour laws . . . were designed to protect workers, and to prevent employers from exploiting their bargaining advantage by denying workers fair wages and tolerable working conditions. Courts must construe these laws "with an eye towards the purposes [they] were meant to serve, and the type of person they were meant to protect."<sup>119</sup>

While this bodes well for airline workers who live or frequently work in California, what of airline workers across the country?

For airline workers in Washington, the question is much more complicated, and they only receive the benefits of Washington's PSLA if they are a "Washington-based" employee.<sup>120</sup> This is an ad hoc determination and considers a multitude of factors such as: (1) where the employment agreement was made; (2) the employee's domicile; (3) the location of the employer's base of operations; (4) the location of the employee's base of operations;

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<sup>116</sup> *Id.* at 1059–60.

<sup>117</sup> *Sullivan v. Oracle Corp.*, 254 P.3d 237, 243 (Cal. 2011).

<sup>118</sup> *Goldthorpe v. Cathay Pac. Airways*, 279 F. Supp. 3d 1001, 1005 (S.D. Cal. 2018).

<sup>119</sup> *Id.* at 1004–05 (internal citations omitted).

<sup>120</sup> *Air Transp. Ass'n Am. v. Wash. Dep't Lab. & Indus.*, 410 F. Supp. 3d 1162, 1168 (W.D. Wash. 2019).

(5) whether the employer maintains a work site in Washington; (6) whether the employee leaves Washington as part of the job; (7) where work assignments come from; (8) where supervisors are located; (9) the amount of work done in Washington; and (10) the length of the contract to work in Washington.<sup>121</sup> Though Washington is willing to give less weight to certain factors depending on the circumstances, e.g., “[f]or flight crew, who do not spend very much time working in any one place, [Washington Department of Labor & Industries] has indicated that location of work is given less weight,” even a seemingly dispositive factor like being domiciled at a Washington airport would not be enough to grant flight crew protections under the law without satisfying other factors.<sup>122</sup> Given the relative stringency of Washington’s determination for granting protections compared to the leniency of California’s, it does not take much to imagine a scenario in which an airline worker whose base of operations is out of a Washington airport and who is a resident of Washington, but whose employer is based out of California and who frequently travels to California as a result, receives much greater protections under California labor laws than those of her own home state of Washington.

Thus arises the problem of extraterritorial jurisdiction—though California is seeking to increase the rights and protections of workers, the thought that an out-of-state domiciled and working employee would have greater protections in California than in her home state runs contrary to common sense. And a right without the knowledge that one has it is hardly a right at all.

Additionally, this confusion harms employers as well as employees. While employees may not know their rights, the only thing they lose for that ignorance is their ability to exercise the right. However, the stakes are much higher for airline corporations, who can rack up massive civil liability to their employees if found to have violated provisions of either the FLSA or state law.<sup>123</sup> In the case of *Bernstein*, Virgin Airlines racked up over \$85 million in backpay and civil and statutory liabilities.<sup>124</sup> Employers are stuck wading through the murk to try to figure out

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> E.g., John Petrick, *Virgin America Calls Bid for \$85M in Wage Case ‘Excessive’*, LAW360 (Nov. 15, 2018), <https://www.law360.com/articles/1102248> [<https://perma.cc/7SZM-6PN7>].

<sup>124</sup> *Id.*

which laws are applicable to their employees, which quickly becomes a Sisyphean task as their workers may work in any number of states in a single pay cycle. The only recourse airlines have against potential wage and hour violations would be to adopt the highest standard of all the jurisdictions where they do business, which could become a financially ruinous undertaking.

### C. THE COVERAGE GAP: INADEQUACIES IN THE FEDERAL AVIATION ADMINISTRATION ACT

At approximately 9:00 a.m. on June 30, 1956, United Airlines Flight 718 and Trans World Airlines Flight 2, both regularly scheduled passenger flights to the Midwest, took off from Los Angeles International Airport.<sup>125</sup> A mere hour and a half later, the two planes collided over the Grand Canyon, destroying both aircraft and resulting in the deaths of all passengers and crew, with 128 lives lost.<sup>126</sup> Both pilots followed the existing protocol and reported to communication stations that they would be flying over the Grand Canyon at the same altitude at the same time, but the flight controller with that information was under no obligation to inform the pilots of their impending crash course.<sup>127</sup> In the pre-FAA world, it was the responsibility of the pilots alone to keep clear of other aircraft.<sup>128</sup> This crash went down in history as the deadliest commercial aviation collision at the time and marked the first instance of a commercial airline collision resulting in more than 100 deaths.<sup>129</sup> However, the deaths were not completely in vain, as public outrage over the outdated and ineffective air traffic control system that resulted in the crash would galvanize the creation of the Federal Aviation Agency (later known as the FAA).<sup>130</sup>

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<sup>125</sup> NAT'L TRANSP. SAFETY BD., REP. NO. SA-320/1-0090 MIDAIR COLLISION, ACCIDENT INVESTIGATION REPORT, TRANS WORLD AIRLINES LOCKHEED 1049A N6902C AND UNITED AIR LINES DOUGLAS DC-7 N6324C, OVER THE GRAND CANYON, ARIZONA, JUNE 30, 1956, ¶¶ 2, 7 (1957), [https://www.fss.aero/accident-reports/look.php?report\\_key=1251](https://www.fss.aero/accident-reports/look.php?report_key=1251) [<https://perma.cc/L3DP-QTAL>].

<sup>126</sup> *Id.* ¶ 1.

<sup>127</sup> *1956 Grand Canyon Airplane Crash a Game-Changer*, CBS NEWS (July 8, 2014), <https://www.cbsnews.com/news/1956-grand-canyon-airplane-crash-a-game-changer/> [<https://perma.cc/N4XY-RF8P>].

<sup>128</sup> *Id.*

<sup>129</sup> *Grand Canyon Collision Declared a National Historic Landmark*, GRAND CANYON VISITOR CTR. (May 1, 2014), <https://explorethecanyon.com/grand-canyon-collision-declared-a-national-historic-landmark/> [<https://perma.cc/ZMV3-59HN>].

<sup>130</sup> *Id.*

Just two years after the 1956 Grand Canyon collision, President Dwight D. Eisenhower signed the Federal Aviation Act of 1958 (FAAct) into law.<sup>131</sup> The FAAct's purpose was to regulate the safety and efficiency of the airways, providing a comprehensive series of regulations that covered most aspects of the airline industry.<sup>132</sup> The agency would later become known as the FAA when it was consolidated into the Department of Transportation (DoT) in 1967, and the FAA continues to be the governing body for commercial airline regulation and standards.<sup>133</sup>

The field of airline safety was uniquely ripe for federal regulation because air travel takes place almost entirely within federal jurisdiction, requires more coordination than any other form of public transportation, and poses the largest risk to safety when done carelessly.<sup>134</sup> “Regulation on a national basis is required because air transportation [itself] is a national operation.”<sup>135</sup> As the court in *Montalvo* held, “[t]he FAA, together with federal air safety regulations, establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, states.”<sup>136</sup> In other words, the FAA is used to preempt the entire field of aviation safety—“[f]ield preemption occurs if federal law ‘thoroughly occupies’ the ‘legislative field’ in question, i.e., the field of aviation safety. . . . Such a purpose properly may be inferred . . . where the federal interest in the field is sufficiently dominant.”<sup>137</sup> The Third Circuit succinctly summarized it as follows: “[F]ederal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation.”<sup>138</sup> Despite the FAA's broad authority in the field of air safety, the administration is entirely silent on the issue of wage and labor laws for employees within its industry.

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<sup>131</sup> *A Brief History of the FAA*, FED. AVIATION ADMIN. (Jan. 4, 2017), [https://www.faa.gov/about/history/brief\\_history/#birth](https://www.faa.gov/about/history/brief_history/#birth) [<https://perma.cc/9QAN-7B9V>].

<sup>132</sup> Federal Aviation Act, Pub. L. No. 85-726, pmbll., 72 Stat. 731, 731 (1958).

<sup>133</sup> *A Brief History of the FAA*, *supra* note 131.

<sup>134</sup> *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 474.

<sup>137</sup> *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999).

<sup>138</sup> *Id.*

#### IV. THE NEED FOR REFORM IN AIRLINE LABOR LEGISLATION

In an industry where nearly every facet is now closely regulated on a federal level, the thicket of conflicting and confusing law surrounding airline labor rights is truly an anomaly. This Comment proposes adding federal legislation that would expressly preempt state wage and hour laws. The current system fits poorly within the RLA, causes needless litigation, and obfuscates the rights of workers. A uniform legislative framework will better provide for the needs of workers, increase the overall safety of the industry, and minimize litigation between workers and airlines over disagreements about pay and rights.

##### A. TAKING THE TRAINING WHEELS OFF: THE AIRLINE INDUSTRY HAS OUTGROWN THE RLA

Though the RLA may have provided a useful legal framework for the airline industry in the 1930s, changes in society, new technological advancements, and the growth of the industry as a whole have evinced a need for an updated legal framework tailored to the needs of the airline industry. Two critical factors interfere with the RLA's ability to serve the needs of the airline industry: its bespoke past and its age.

Not only have there been massive changes to the industry in the interim, but the 1936 amendment to the RLA bundled the rights of airline workers into an act "designed by and for the railroad industry."<sup>139</sup> As discussed in Part II, the RLA was the particular product of half a century of railway strikes, negotiations between railway unions and owners, and legislative attempts to balance the interests of the parties, and the final draft of the RLA itself was written *by* the railway unions and owners together.<sup>140</sup> The unique past of the RLA makes it especially unsuitable for application to a new industry, and whether it actually provided a benefit to the nascent aviation field is subject to some controversy, as other transportation industries developed labor protections without the need of specialized treatment like the railroad industry.<sup>141</sup> Because the RLA was drafted to deal with the specific intricacies of railway labor relations, it contains several oddities that were the result of concessions made in ne-

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<sup>139</sup> James B. Frankel, *Airline Labor Policy: The Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461, 461 (1951).

<sup>140</sup> *Id.* at 466–67.

<sup>141</sup> *Id.* at 471.

gotiations between unions and owners. For example, as early as 1952, commentators were concerned with the RLA's inapplicability to a fledgling industry:

the lack of a remedial forum for both employees and employers that can expertly administer the relationships intended by the [RLA] and both interpret and enforce its provisions is a basic weakness. . . . Such a framework would not seem to be conducive to the development of the most sensible labor-management relations in a new and growing industry, however satisfactory in the more stabilized railroad industry.<sup>142</sup>

Second, not only was the RLA drafted to deal specifically with the railway industry, but it was drafted close to a century ago with few amendments. The airline industry of the modern-day shares little in common with its predecessor in 1936—it has faced changing levels of regulation and deregulation, has encountered technological developments, and has struggled to deal with bankruptcies and mergers.<sup>143</sup> In addition, the impact of the September 11th terror attacks permanently changed the landscape of the airline industry, with air carriers being forced to shoulder many of the costs of compliance with increased safety regulations.<sup>144</sup> These changes have reached the critical point where “the RLA is no longer adequate to ensure protection for airline employees.”<sup>145</sup>

This is not a problem that is necessarily unique to the RLA—the need to respond to changes in the rapidly evolving aviation field spurred the Montreal Convention of 1999 (Montreal Convention). With striking similarities to the need to replace the outdated RLA and standardize labor rights for workers throughout the country, the Montreal Convention supplanted the outdated Warsaw Convention of 1929 (Warsaw Convention) and standardized the field of airline liability on international flights.<sup>146</sup> The Montreal Convention was an acknowledgement that the concerns that faced the start of the airline industry in the early twentieth century—at the Warsaw Convention, the

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<sup>142</sup> Malcolm A. Macintyre, *The Railway Labor Act—A Misfit for The Airlines*, 19 J. AIR L. & COM. 274, 288 (1952).

<sup>143</sup> Lisa Catherine Tulk, *The 1926 Railway Labor Act and the Modern American Airline Industry: Changes and Chaos Outline the Need for Revised Legislation*, 69 J. AIR L. & COM. 615, 627 (2004).

<sup>144</sup> *Id.* at 628.

<sup>145</sup> *Id.* at 645.

<sup>146</sup> Convention for the Unification of Certain Rules for International Carriage by Air preamble, *opened for signature* May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 309.

concern was limiting liability in order to foster growth of the nascent industry<sup>147</sup>—were not the same concerns that faced the present industry. For many of the same reasons that the RLA needs to be updated or replaced, calls to ratify the Montreal Convention over the Warsaw Convention focused on the present system of fractured and disparate laws depending on the jurisdiction, and the ability of a uniform standard to “simplify, clarify and expedite the fair resolution of [disputes].”<sup>148</sup>

And, much like the Warsaw Convention, the RLA’s inadequacies have led to a fractured field of law because there is no unifying authority. The RLA only preempts state law when a state law claim arises entirely from or requires construction of a collective bargaining agreement.<sup>149</sup> As such, the RLA does not preempt state law claims to enforce rights independent of a collective bargaining agreement, such as minimum wage standards or sick leave.<sup>150</sup>

Nearly a century old, the RLA simply cannot do enough to support the modern-day aviation industry, and ought to be replaced. Part V proposes new legislation that would supplant the RLA and bring the labor rights of workers in the aviation industry into the twenty-first century.

B. THE INTERSECTION OF LABOR LAWS AND PASSENGER SAFETY:  
INCREASED PROTECTIONS FOR AIRLINE WORKERS WILL  
DIRECTLY TRANSLATE INTO INCREASED SAFETY  
FOR PASSENGERS

The airline industry is uniquely situated as one of the most closely regulated industries in the country, and the vast majority of its operations are conducted within federal jurisdiction—the airspace. Airlines are heavily regulated by the FAA, which was formed in order to have a single, uniform system for regulating airline safety after a series of fatal crashes between civilian and military aircraft.<sup>151</sup> The catastrophic impact of mismanaged flights was the key impetus in forming the FAA, and the Supreme Court has characterized FAA regulations as striking “a delicate balance between the safety and efficiency” of planes in

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<sup>147</sup> *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991).

<sup>148</sup> David E. Rapoport & Hans Ephraimson-Abt, *A 73-Year Odyssey: The Time Has Come for a New International Air Liability System*, 2002 *ISSUES AVIATION L. & POL'Y* 22,151, 22,171 (2002).

<sup>149</sup> *Matson v. United Parcel Serv., Inc.*, 840 F.3d 1126, 1132 (9th Cir. 2016).

<sup>150</sup> *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256 (1994).

<sup>151</sup> *Montalvo v. Spirit Airlines*, 508 F. 3d 464, 471 (9th Cir. 2007).

the sky and maintaining protections for persons on the ground.<sup>152</sup> This delicate balance and the interdependence of the safety of persons in the sky and on the ground justified the requirement of a “uniform and exclusive system of federal regulation if the congressional objectives underlying the [FAAct] are to be fulfilled.”<sup>153</sup>

However, one facet of airline safety has slipped through the cracks and has not been regulated by the FAA—sick days and vacation days of airline staff. While perhaps not what immediately comes to mind when one thinks of airplane safety—considering devices such as oxygen masks, parachutes, and chairs that function as floatation devices—pilot fatigue represents “one of the biggest threats to air safety.”<sup>154</sup> Hardly a decade has passed since the tragic crash of Continental Flight 3407 outside of Buffalo, New York in 2009.<sup>155</sup> Fatigue was cited as a cause of the crew’s failure to adequately respond to the rapidly declining plane, which ended up stalling and plunging into a house—killing the pilots, flight attendants, all the passengers, and a man on the ground—resulting in fifty deaths overall.<sup>156</sup> While the odds of a commercial flight crashing are extremely low, “figures show that 80% are a result of human error, with pilot fatigue accounting for 15–20% of human error in fatal accidents.”<sup>157</sup> In the accident report conducted on the crash, the National Transportation Safety Board compared fatigue impaired performance with alcohol impairment:

[S]leep loss is at least as potent as ethanol in its performance-impairing effects and two hours of sleep loss equates to a breath ethanol concentration of approximately .05% . . . correlat[ing] prolonged wakefulness with impairment, such that being awake for 16 hours is equivalent to a .05 [blood alcohol content].<sup>158</sup>

Despite the clear link between crew fatigue and increased risk of harm, the FAA has not stepped in to guarantee sufficient time

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<sup>152</sup> *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638–39 (1973).

<sup>153</sup> *Id.* at 639.

<sup>154</sup> Keith Moore, *Pilot Fatigue ‘One of the Biggest Threats to Air Safety’*, BBC NEWS (Oct. 11, 2012), <https://www.bbc.com/news/health-19837178> [<https://perma.cc/85FJ-4FFE>].

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> NAT’L TRANSP. SAFETY BD., NTSB/AAR-10/01, PB2010-910401, ACCIDENT REPORT, LOSS OF CONTROL ON APPROACH COLGAN AIR, INC. OPERATING AS CONTINENTAL CONNECTION FLIGHT 3407, at 3 (2009).

off for airline crews. This leaves states and municipalities to fight with airline corporations over the amount of leave allowed.

Dispute over Washington's PSLA centered around this concern.<sup>159</sup> In addition to the risk presented by fatigue, the district court in Washington also considered how the airline's unforgiving time-off policies led to the increased spread of germs, as "flight attendants have attested to working while sick to avoid acquiring [demerits]."<sup>160</sup> This led to "research show[ing] that flight attendants' interactions with passengers make them both the most likely source and recipient of disease on flights."<sup>161</sup> And, in past attempts to alleviate this problem during the 2009 H1N1 "Swine flu" outbreak, the Association of Flight Attendants (AFA) raised concerns with the FAA and the House Subcommittee on Aviation that airline carriers should be required to "allow flight attendants with flu-like symptoms themselves to call in sick without risk of discipline."<sup>162</sup> The AFA turned to seeking federal intervention due to its concern that "airline management [was] more concerned with the appearance of flight attendants than with the health of the public and the flight crew."<sup>163</sup> Without a definite federal standard to guarantee labor protections for workers, history has shown that airline carriers will sacrifice the health of passengers and crew if it benefits their bottom line.

In Washington, though the airlines described being forced to comply with the PSLA as an unreasonable burden, evidence from when airlines were first subjected to New York City's Earned Sick Time Act (ESTA), which has similar provisions to the Washington law, showed that "for the first two years after Virgin began complying with ESTA, cabin crew delays only increased by .16 percentage points, an amount that is almost irrelevant compared to the Airlines' overall delay rates of 15 to 20 percent."<sup>164</sup> With empirics showing that the airlines' argument of the unreasonable burden to comply was without merit, the

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<sup>159</sup> *Air Transp. Ass'n Am. v. Washington Dep't Lab. & Indus.*, 410 F. Supp. 3d 1162, 1166 (W.D. Wash. 2019).

<sup>160</sup> *Id.* at 1177.

<sup>161</sup> *Id.*

<sup>162</sup> Courtney Clegg, *The Aviation Industry and the Transmission of Communicable Disease: The Case of H1N1 Swine Influenza*, 75 J. AIR L. & COM. 437, 460–61 (2010) (citing *Aviation Consumer Issues: Emergency Contingency Planning and Outlook for Summer Travel: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. and Infrastructure*, 111th Cong. 22–24 (2009) (statement of Patricia A. Friend, International President, AFA)).

<sup>163</sup> *Id.* at 461.

<sup>164</sup> *Air Transp. Ass'n Am.*, 410 F. Supp. 3d at 1176.

court in Washington held that airline workers were under the protection of its PSLA.<sup>165</sup> This same debate rages on in New York City over the city's ESTA, as both Delta<sup>166</sup> and American Airlines<sup>167</sup> fight against complying with it.

Without federal intervention through legislation, airline carriers have shown they will continue putting the health and safety of crew, passengers, and people on the ground at risk. Airline carriers will go to any measure to maximize profits at the cost of safety with no hesitation. The FAA is primed to combat this type of profit-over-safety mindset, and a congressional grant of authority to amend Title 49 to include some sort of provision in line with either Washington's PSLA or New York's ESTA would end the debate over the amount of leave given to workers, increase safety, decrease the spread of germs, and combat the issue of pilot fatigue.

### C. NAVIGATING THE MAZE: THE CURRENT THICKET OF CONFUSING AND CONTRADICTING STATE AND LOCAL LAW RESULTS IN NEEDLESS LITIGATION COSTS

The litigation in *Bernstein* is a quintessential example of litigation as deadweight loss—an economic term describing an inefficient allocation of resources that results in a cost to society as a whole.<sup>168</sup> That is to say, it is a needless waste of time, money, and judicial economy. Embroiled in a multi-year class action wage lawsuit with its former flight attendants for failure to pay for all hours worked, overtime or provide accurate wage statements, and waiting time penalties to discharged employees, Virgin Airlines (Virgin) continued to rack up costs as it (1) paid its own legal fees; (2) was sanctioned to pay the legal fees of the class action plaintiffs as a result of its misconduct in discovery;<sup>169</sup> and, ultimately, (3) paid approximately \$77 million to members of the class—nearly double from the starting amount of \$45.4 mil-

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<sup>165</sup> *Id.* at 1177.

<sup>166</sup> Linda Cheim, *NYC Insists Paid Sick Leave Law Doesn't Harm Delta*, LAW360 (May 1, 2020), <https://www.law360.com/articles/1269513> [<https://perma.cc/K9NF-NGKZ>].

<sup>167</sup> Reenat Sinay, *American Airlines Challenges NYC Paid Sick Leave Law*, LAW360 (Aug. 1, 2019), <https://www.law360.com/articles/1184444/american-airlines-challenges-nyc-paid-sick-leave-law> [<https://perma.cc/Z7WH-9KFQ>].

<sup>168</sup> Alicia Tuovila, *Deadweight Loss*, INVESTOPEDIA (Sept. 24, 2019), <https://www.investopedia.com/terms/d/deadweightloss.asp> [<https://perma.cc/4D4V-W9P5>].

<sup>169</sup> *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2018 U.S. Dist. LEXIS 201712, at \*14 (N.D. Cal. Nov. 28, 2018).

lion in damages and restitution for wage and hour violations as a result of civil and statutory penalties.<sup>170</sup> And while these costs were mostly avoidable—namely, if Virgin had paid its employees legally, or at the least complied in the discovery process—Virgin ultimately will not be the party responsible for paying the fees, as that cost gets passed on to society through increased costs to consumers.

While it is certainly plausible that Virgin was genuinely mistaken as to the correct amount to pay its flight attendants who worked in California as a result of the thicket of overlapping and conflicting law discussed in Part III.B, that does not excuse the bad faith dealing the business engaged in over the course of the lawsuit. However, in a world with a clear, uniform, federally preemptive statute instead of the hodgepodge of state regulations, this lawsuit may have not existed at all. Virgin is far from the first corporation embroiled in a suit like this, however—wage and hour class action suits are an increasingly common tool for low wage employees to fight back against predatory employers and are by far the most common type of class action claim filed in federal court.<sup>171</sup> In 2017, employers paid out over \$1.2 billion in wage and hour lawsuits,<sup>172</sup> and while Virgin's \$77 million judgment may seem like a paltry amount in comparison to the total, it represents nearly one-fifteenth of the total amount paid out by all employers across the country that year.

Federally preemptive legislation can be used to stem the increasing tide of wage and hour class action lawsuits. With a clear and national uniform standard, employers are aware of the exact amount that will be owed to each employee without having to figure out the different wage and hour calculations for employees in each state. And, under a clear and uniform standard, employees know exactly how much they should be earning, allowing them to monitor their income for discrepancies and notify their employer as soon as a discrepancy is noticed, thereby alleviating the need for massive class-action lawsuits. Increased information would only serve to benefit both parties, more effi-

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<sup>170</sup> *Bernstein v. Virgin Am., Inc.*, 365 F. Supp. 3d 980, 985, 993 (N.D. Cal. 2019).

<sup>171</sup> Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1251–52 (2009).

<sup>172</sup> *Wage and Hour Claims: 2018's Top Litigation Risk For Employers*, THATCHER L. FIRM BLOG (Feb. 9, 2018), <https://www.thatcherlaw.com/blog/2018/02/wage-and-hour-claims-2018s-top-litigation-risk-for-employers.shtml> [<https://perma.cc/V2MR-X5PY>].

ciently putting wages back in the workers' pockets to begin with, saving employers money that would otherwise go to fighting wage-and-hour class actions, and keeping price lower for consumers as a result.

## V. PROPOSED AMENDMENT TO TITLE 49

This Comment proposes an amendment to Title 49, which governs transportation laws, establishes the DoT,<sup>173</sup> and is the current source of the FAA's authority.<sup>174</sup> Given the FAA's wide control of all aspects of aviation safety, and the massive safety implications of labor standards in the industry, as discussed in Part IV.B, an amendment to Title 49 will solve the current gap in the FAA's coverage of safety regulations. Placing labor under the ambit of Title 49 falls squarely within its policy goal of "assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce."<sup>175</sup> This Comment proposes adding a new chapter to Title 49 (Transportation), Subtitle VII (Aviation Programs), Subpart III (Safety). The following proposed amendment is modeled after Washington's PSLA,<sup>176</sup> with modifications made to align it with the language in Title 49.

### Chapter 455—Paid Sick Leave (§§ 45501–45504)

§ 45501. Paid Sick Leave—Every air carrier<sup>177</sup> must provide each of its airmen<sup>178</sup> or flight attendants<sup>179</sup> paid sick leave as follows:

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<sup>173</sup> 49 U.S.C. §§ 101–727. Subtitle I of Title 49 establishes the DoT, its goals, and its duties. *Id.*

<sup>174</sup> 49 U.S.C. §§ 40101–50105. Subtitle VII of Title 49 sets out regulations for the aviation industry. *Id.*

<sup>175</sup> 49 U.S.C. § 40101(d)(1).

<sup>176</sup> WASH. REV. CODE ANN. § 49.46.210 (West 2020).

<sup>177</sup> 49 U.S.C. § 40102(a)(2) (defining "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.").

<sup>178</sup> 49 U.S.C. § 40102(a)(8). Title 49 defines "airman" as an individual—

- (A) in command, or as pilot, mechanic, or member of the crew, who navigates aircraft when under way;
- (B) except to the extent the Administrator of the Federal Aviation Administration may provide otherwise for individuals employed outside the United States, who is directly in charge of inspecting, maintaining, overhauling, or repairing aircraft, aircraft engines, propellers, or appliances; or
- (C) who serves as an aircraft dispatcher or air traffic control-tower operator.

*Id.*

- (a) An airman or flight attendant accrues at least one hour of paid sick leave for every forty hours worked as an airman or flight attendant. An air carrier may provide paid sick leave in advance of accrual provided that such front-loading meets or exceeds the requirements of this section for accrual, use, and carryover of paid sick leave.
- (b) An airman or flight attendant is authorized to use paid sick leave for the following reasons:
  - (1) An absence resulting from an airman's or flight attendant's mental or physical illness, injury, or health condition; to accommodate the airman's or flight attendant's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an airman's or flight attendant's need for preventive medical care;
  - (2) To allow the airman or flight attendant to provide care for a family member with a mental or physical illness, injury, or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care for a family member who needs preventive medical care; and
  - (3) When the airman's or flight attendant's place of business has been closed by order of a public official for any health-related reason, or when an airman's or flight attendant's child's school or place of care has been closed for such a reason.
- (c) An airman or flight attendant is authorized to use paid sick leave for absences as a result of domestic violence as defined in Title 34 of the United States Code.<sup>180</sup>

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<sup>179</sup> 9 U.S.C. § 44728(g) (defining "flight attendant" as "an individual working as a flight attendant in the cabin of an aircraft that has twenty or more seats and is being used by an air carrier to provide air transportation.").

<sup>180</sup> See 34 U.S.C. § 12291(a)(8).

The term "domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

*Id.*

- (d) An airman or flight attendant is entitled to use accrued paid sick leave beginning on the ninetieth calendar day after the commencement of his or her employment.
- (e) Air carriers are not prevented from providing more generous paid sick leave policies or permitting use of paid sick leave for additional purposes.
- (f) An air carrier may require airmen or flight attendants to give reasonable notice of an absence from work, so long as such notice does not interfere with an airman or flight attendant's lawful use of paid sick leave.
- (g) For absences exceeding three days, an air carrier may require verification that an airman or flight attendant's use of paid sick leave is for an authorized purpose. If an air carrier requires verification, verification must be provided to the air carrier within a reasonable time period during or after the leave. An air carrier's requirements for verification may not result in an unreasonable burden or expense on the airman or flight attendant and may not exceed privacy or verification requirements otherwise established by law.
- (h) An air carrier may not require, as a condition of an airman or flight attendant taking paid sick leave, that the airman or flight attendant search for or find a replacement worker to cover the hours during which the airman or flight attendant is on paid sick leave.
- (i) For each hour of paid sick leave used, an airman or flight attendant must be paid the greater of the minimum hourly wage rate established in this chapter or his or her normal hourly compensation. The air carrier is responsible for providing regular notification to airmen or flight attendants about the amount of paid sick leave available to the airman or flight attendant.
- (j) Unused paid sick leave carries over to the following year, except that an air carrier is not required to allow an airman or flight attendant to carry over paid sick leave in excess of forty hours.
- (k) This section does not require an air carrier to provide financial or other reimbursement for accrued and unused paid sick leave to any airman or flight attendant upon the airman or flight attendant's termination, resignation, retirement, or other separation from employment. When there is a separation from employment and the airman or flight attendant is rehired within twelve months of separa-

tion by the same air carrier, whether at the same or a different business location of the air carrier, previously accrued unused paid sick leave must be reinstated and the previous period of employment must be counted for purposes of determining the airman or flight attendant's eligibility to use paid sick leave under subsection 45501(d) of this section.

§ 45502. Family Member Defined—For purposes of this chapter, “family member” means any of the following:

- (a) A child, including a biological, adopted, or foster child, stepchild, or a child to whom the airman or flight attendant stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status;
- (b) A biological, adoptive, de facto, or foster parent, stepparent, or legal guardian of an airman or flight attendant or the airman or flight attendant's spouse or registered domestic partner, or a person who stood in loco parentis when the airman or flight attendant was a minor child;
- (c) A spouse;
- (d) A registered domestic partner;
- (e) A grandparent;
- (f) A grandchild; or
- (g) A sibling.

§ 45503. Limitations on Policies—An air carrier may not adopt or enforce any policy that counts the use of paid sick leave time as an absence that may lead to or result in discipline against the airman or flight attendant.

§ 45504. Air Carrier Retaliation—An air carrier may not discriminate or retaliate against an airman or flight attendant for his or her exercise of any rights under this chapter including the use of paid sick leave.

## VI. CONCLUSION

The lack of a clear and consistent federal standard across the country harms both airline carriers and aviation employees—carriers as they grapple with a myriad of regulations and airline employees who are unsure of their rights and how to exercise them. There is a clear need for an updated federal framework that takes into account the airline industry and the needs of workers in the present day; the RLA served its purpose in stabilizing the nascent airline industry in the 1930s, but the aviation industry has outgrown its usefulness. To replace the RLA and

standardize the labor rights of workers in the aviation industry, this Comment proposes amending Title 49 to include a chapter on labor. Because of the direct impact of the labor rights of airline workers on the safety of the aviation industry, legislation dealing with these rights falls squarely within the purview of the FAA. Through the proposed amendment, the aviation industry will be made safer, workers will receive greater protections, and the squandering of judicial economy through needless litigation over the thicket of conflicting local, state, and federal law will cease.



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Dallas, Texas 75275-0116



