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Recent Developments in Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW

CHRISTINE SHANG*

ABSTRACT

This Article addresses recent developments in aviation law and the aviation field generally over the past year, from early 2021 through early 2022. It does not attempt to address every reported aviation case. Instead, this Article focuses on the areas of aviation law that will have significant ramifications for the future. This Article summarizes legal developments, including those related to COVID-19, the 737 MAX, 5G technology, space exploration, and more.

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I. INTRODUCTION

THIS ARTICLE ADDRESSES recent developments in aviation law and the aviation field generally over the past year, from early 2021 through early 2022. It does not attempt to address every reported aviation case. Instead, this Article focuses on the areas of aviation law that will have significant ramifications for the future.

II. COVID-19 RELATED ISSUES ON THE AVIATION INDUSTRY

Ongoing lawmaking and often changing rules and regulations continued in 2021 as one of the many consequences of the COVID-19 pandemic, including large-scale restrictions on travel in an effort to slow the spread of the virus. Among these consequences were prohibitions and restrictions on domestic and international travel, mask mandates, and employee vaccination requirements. A consequence of these responses was the filing of numerous lawsuits in United States courts raising various legal issues, including federal preemption.

A. TRAVEL RESTRICTIONS

In March 2020, countries across the world began implementing travel restrictions and mandatory quarantines, closing borders, and prohibiting non-citizens from entry with little advance notice.¹ Many countries began loosening restrictions on international travel during 2021.² However, the United States did not reopen to nonessential international travel until November 8, 2021, when the Biden Administration implemented new policies that allowed foreign national travelers into the United States with proof of COVID-19 vaccination status with only limited exceptions.³ Domestically, few restrictions have been imposed other than ongoing mask mandates, as discussed below.⁴

B. REFUNDS

A significant topic of oversight and litigation in 2021 was claims against air carriers for canceled or changed flight schedules resulting from the reduced demand. On September 9, 2021, the United States Department of Transportation (DOT) published a report on its investigation and enforcement of issues related to air carrier ticket refunds associated with the pandemic.⁵ In the report, the DOT stated that from January 1, 2020, to June 30, 2021, the Department received 124,918 consumer complaints related to air travel, of which 84.3% concerned refunds.⁶

On November 23, 2021, the DOT approved a settlement agreement between its Office of Aviation Consumer Protection

¹ *Coronavirus: Travel Restrictions, Border Shutdowns by Country*, AL JAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country> [https://perma.cc/26ZT-637K].

² See Alex Ledson, *These Countries Are Now Opening After Months of Travel Bans*, FORBES (Oct. 10, 2021, 8:01 AM), <https://www.forbes.com/sites/alexledson/2021/10/10/these-countries-are-now-opening-after-months-of-travel-bans/?sh=4e27ace62e15> [https://perma.cc/6W3C-MTWQ].

³ Proclamation No. 10294, 86 Fed. Reg. 59,603, 59,603–04 (Oct. 25, 2021); *Fact Sheet: Biden Administration Releases Additional Detail for Implementing a Safer, More Stringent International Air Travel System*, WHITE HOUSE (Oct. 25, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/25/fact-sheet-biden-administration-releases-additional-detail-for-implementing-a-safer-more-stringent-international-air-travel-system/> [https://perma.cc/546Q-6NWQ].

⁴ See discussion *infra* Section II.D.

⁵ See U.S. DEP'T OF TRANSP., REPORT TO THE WHITE HOUSE COMPETITION COUNCIL: U.S. DEPARTMENT OF TRANSPORTATION'S INVESTIGATORY, ENFORCEMENT AND OTHER ACTIVITIES ADDRESSING LACK OF TIMELY AIRLINE TICKET REFUNDS ASSOCIATED WITH THE COVID-19 PANDEMIC (2021).

⁶ *Id.* at 5.

(OACP) and Air Canada, which resolved claims against the air carrier for its long delays in providing refunds to thousands of consumers for canceled and significantly changed flights to or from the United States.⁷ As part of that agreement, Air Canada agreed to the payment or credit of \$4.5 million in civil penalties.⁸

1. Federal Preemption

A significant issue in aviation-related COVID-19 litigation has concerned federal preemption of breach of contract claims based on an air carrier's failure to issue timely refunds for canceled flights. In 1978, Congress enacted the Airline Deregulation Act (ADA), which largely deregulates domestic air transport.⁹ The ADA includes a preemption clause to prevent states from enacting laws or regulations related to an air carrier's price, route, or service.¹⁰ However, the Supreme Court has held that the preemption clause has a narrow exception that "allows room for court enforcement of contract terms set by the parties themselves."¹¹ Thus, while claims based on the express terms of contracts between air carriers and passengers are not preempted by the ADA, any attempt to enlarge or enhance the parties' obligations under a contract "based on state laws or policies external to the agreement" is preempted.¹²

Consistent with the principles above, the Supreme Court has held that the ADA does not preempt breach of contract claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings."¹³ In such suits, courts are "confine[d] . . . to the parties' bargain, with no enlargement or

⁷ *In re Air Canada*, No. OST-2021-0073 (U.S. Dep't of Transp. Nov. 23, 2021), <https://www.transportation.gov/individuals/aviation-consumer-protection/air-canada-settlement-agreement> [<https://perma.cc/8JPS-RA38>]. This investigation followed a similar previous investigation into United Airlines, whereby an Order of Dismissal was issued on January 19, 2021, after United's corrective actions. U.S. DEP'T OF TRANSP., *supra* note 5, at 9–10.

⁸ *In re Air Canada*, No. OST-2021-0073 (U.S. Dep't of Transp. Nov. 23, 2021), <https://www.transportation.gov/individuals/aviation-consumer-protection/air-canada-settlement-agreement> [<https://perma.cc/8JPS-RA38>].

⁹ See Airline Deregulation Act of 1978, Pub. L. No. 95–504, 92 Stat. 1705, § 1 (codified as amended at 49 U.S.C. § 40101).

¹⁰ *Id.* § 105(a)(1)–(2).

¹¹ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995).

¹² *Id.* at 233.

¹³ *Id.* at 228.

enhancement based on state laws or policies external to the agreement.”¹⁴

The preemption issue has arisen in lawsuits, including class actions, against several major air carriers related to denials or delays of refunds for tickets purchased for canceled flights due to the COVID-19 pandemic.¹⁵ In *Herrera v. Cathay Pacific Airways Ltd.*, for example, the plaintiffs alleged in a class action brought in the United States District Court for the Northern District of California that Cathay Pacific made it “functionally impossible to specifically request refunds over vouchers/coupons by inaccessibility of customer service, with wait times of more than two hours frequently reported” and that the carrier “obscure[ed] passengers’ right to a monetary refund.”¹⁶ The plaintiffs “assert[ed] a single claim, for breach of contract, on behalf of themselves and a putative nationwide class.”¹⁷ Cathay Pacific moved to dismiss the plaintiffs’ complaint on several grounds, including that the ADA preempted plaintiffs’ claims and that the breach of contract claim would have expanded Cathay Pacific’s obligations beyond the duties identified in its General Conditions of Carriage (GCC).¹⁸ The district court noted that other courts have found that similar breach of contract claims are preempted to the extent the claims rely on the argument that a refund must be provided “immediately upon request” under section 1657 of the California Civil Code when the DOT regulations were not incorporated into the conditions of carriage (COC).¹⁹ However, the district court also observed that courts “have found that breach of contract claims based on alleged untimely refunds are *not* preempted by the ADA to the extent they rely on general principles of contract law to supply a term requiring performance within a reasonable time when no time is specified under the contract.”²⁰ Because the plaintiffs in

¹⁴ *Id.* at 233.

¹⁵ See, e.g., *Maree v. Deutsche Lufthansa AG*, No. SACV 20-885-MWF (MRWx), 2021 U.S. Dist. LEXIS 16452, at *2–4 (C.D. Cal. Jan. 26, 2021), *appeal filed*, No. 21-55154 (9th Cir. Feb. 23, 2021).

¹⁶ *Herrera v. Cathay Pac. Airways Ltd.*, No. 20-cv-03019-JCS, 2021 U.S. Dist. LEXIS 35061, at *3 (N.D. Cal. Feb. 21, 2021) (internal citation omitted).

¹⁷ *Id.* at *6–7.

¹⁸ *Id.* at *8. Cathay Pacific brought “a Motion to Dismiss or in the Alternative, for Judgment on the Pleadings . . . in which it contend[ed] the entire action should be dismissed under Rules 12(b)(1), 12(b)(2), 12(c), and 23(d)(1)(D) of the Federal Rules of Civil Procedure.” *Id.* at *2.

¹⁹ *Id.* at *27–30.

²⁰ *Id.* at *28.

Herrera stipulated that their claims were not based on section 1657 or DOT regulations, which were not incorporated into Cathay Pacific's GCC, but were instead based on common law rules of contract interpretation, the district court concluded that "the common law rule invoked here, reading a reasonable time for performance into contracts that are silent about the time for performance, is nothing more than a rule to effectuate the intent of the parties."²¹ Therefore, the court found that the ADA did not preempt the claim.²²

In *Ide v. British Airways PLC*, the United States District Court for the Southern District of New York followed the district court's decision in *Herrera* when it found that breach of contract claims against British Airways due to an alleged failure to provide refunds for canceled flights were not preempted by the ADA.²³ The plaintiffs alleged that their efforts to receive refunds in accordance with British Airways' COC were frustrated due to a modification on the carrier's website.²⁴ Finding that the claims were based in part on an "implied contractual obligation" under New York law, "namely, the obligation of a party not to frustrate its counterparty's ability to perform a condition precedent," the court found that the plaintiffs sought enforcement of a "'self-imposed undertaking' to which ADA preemption does not apply."²⁵

C. VACCINATION REQUIREMENT

On August 6, 2021, United Airlines and Frontier Airlines were among the first United States air carriers to announce COVID-19 employee vaccine policies, with exceptions for health or re-

²¹ *Id.* at *31, *35.

²² *See id.* at *35. The district court went on to analyze whether the plaintiffs stated a claim for breach of contract, eventually dismissing their complaint with leave to amend. *Id.* at *47–48.

²³ *Ide v. British Airways PLC*, 529 F. Supp. 3d 73, 86 (S.D.N.Y. 2021). The court cited *Herrera* for guidance, indicating that the *Herrera* court suggested that more particularized allegations would be enough to state a breach of contract claim. *Id.* at 85 (citing *Herrera*, 2021 U.S. Dist. LEXIS 35061, at *46–48).

²⁴ *Id.* at 78; *see also In re Frontier Airlines Litig.*, No. 20-cv-01153-PAB-KLM, 2021 U.S. Dist. LEXIS 172895, at *22 (D. Colo. Sept. 13, 2021) ("[P]laintiffs' allegations do not seek to enlarge the [airline's] contractual obligations or the breach of Contract claim and are therefore not preempted by the ADA.").

²⁵ *Ide*, 529 F. Supp. 3d at 86–87 (quoting *Int'l Techs. Mktg., Inc. v. Verint Sys., Ltd.*, 157 F. Supp. 3d 352, 367 (S.D.N.Y. 2016); then quoting *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995)).

ligious reasons.²⁶ Other major carriers began to implement vaccine policies following the implementation of the Biden Administration's policies that require federal employees and contractors to be fully vaccinated and mandate that employers with 100 or more employees ensure each employee is either vaccinated or tests regularly for COVID-19.²⁷ Air carriers have faced employee and labor union opposition to these mandates.²⁸

The vaccine mandates have also led litigants to seek injunctive relief. On October 26, 2021, the United States District Court for the Northern District of Texas concluded that Southwest Airlines' vaccine policy was "arguably justified" to ensure the safety of air transportation and was "mandated by law."²⁹ In another case, also in the Northern District of Texas, the plaintiffs—employees who sought exemptions from the vaccine mandate—alleged that "United [Airlines] violated Title VII of the Civil Rights Act of 1964 by . . . failing to provide reasonable religious accommodations and by retaliating against Plaintiffs for engaging in a protected activity."³⁰ Following an evaluation of each plaintiff's theories of alleged irreparable harm, the district court denied the plaintiffs' request for a preliminary injunction.³¹

D. MASK MANDATE

On January 31, 2021, the Transportation Security Administration (TSA) issued a press release notifying travelers that it was implementing provisions of President Biden's Executive Order

²⁶ Leslie Josephs, *United Will Require Its U.S. Employees to Be Vaccinated, a First for Country's Major Airlines*, CNBC, <https://www.cnbc.com/2021/08/06/united-airlines-vaccine-mandate-employees.html> [<https://perma.cc/3Q3V-NWZ7>] (Aug. 6, 2021, 6:00 PM); *Frontier Airlines Announces Employee Vaccine Policy Effective Oct. 1*, FRONTIER (Aug. 6, 2021), <https://news.flyfrontier.com/frontier-airlines-announces-employee-vaccine-policy-effective-oct-1/> [<https://perma.cc/9TQX-4N9K>].

²⁷ *Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies*, WHITE HOUSE (Nov. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/> [<https://perma.cc/B827-RJ3J>].

²⁸ See Suzanne R. Keller, *All but 2 Major U.S. Airlines Have Announced Vaccine Mandates*, FORBES (Oct. 3, 2021, 9:12 AM), <https://www.forbes.com/sites/suzanne-rowan-kelleher/2021/10/03/major-us-airlines-vaccine-mandates/?sh=1f7d0b5d73d9> [<https://perma.cc/T495-RXM4>].

²⁹ *Sw. Airlines Pilots Ass'n v. Sw. Airlines Co.*, No. 21-cv-02065-M, 2021 U.S. Dist. LEXIS 205947, at *33 (N.D. Tex. Oct. 26, 2021) .

³⁰ *Sambrano v. United Airlines, Inc.*, No. 21-cv-1074-P, 2021 U.S. Dist. LEXIS 215285, at *3-4 (N.D. Tex. Nov. 8, 2021) .

³¹ *Id.* at *25.

on Promoting COVID-19 Safety in Domestic and International Travel by requiring travelers to wear face masks in airports and on passenger aircraft, among other areas.³²

In February 2021, a *pro se* petitioner, Jonathan Corbett, filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 49 U.S.C. § 46110(a) to challenge the January 2021 mask mandate.³³ In the petition Mr. Corbett argued that the TSA lacked authority to issue the mandate because it regulated general health and safety, not transportation security.³⁴ The court found no merit in Mr. Corbett's claim and denied the petition.³⁵ The court found that because the COVID-19 pandemic "pose[d] one of the greatest threats to the operational viability of the transportation system . . . TSA, which is tasked with maintaining transportation safety and security, plainly has the authority to address such threats under both sections 114(f) and (g) of the Aviation and Transportation Security Act."³⁶

On July 29, 2021, the Association of Flight Attendants (AFA) published its national survey of nearly 5,000 flight attendants, which found that "over 85 percent of all respondents had dealt with unruly passengers as air travel picked up in the first half of 2021," and "[m]ore than half . . . experienced at least five incidents this year."³⁷ Among other factors, mask compliance or lack thereof was listed as a common factor for the unruly behavior.³⁸

³² See *TSA to Implement Executive Order Regarding Face Masks at Airport Security Checkpoints and Throughout the Transportation Network*, TRANSP. SEC. ADMIN. (Jan. 31, 2021), <https://www.tsa.gov/news/press/releases/2021/01/31/tsa-implement-executive-order-regarding-face-masks-airport-security> [<https://perma.cc/32FB-RZL5>]; *Penalty for Refusal to Wear a Face Mask*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/coronavirus/penalty-mask> [<https://perma.cc/7SHA-JABK>] ("Effective Friday September 10, 2021, TSA will be increasing the range of civil penalties that may be charged against individuals who violate the federal mask mandate in U.S. transportation systems covered by the January 31, 2021 Security Directive, and subsequent amendments, implementing the mask mandate.").

³³ *Corbett v. Transp. Sec. Admin.*, 19 F.4th 478, 480 (D.C. Cir. 2021) .

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (citing 49 U.S.C. § 114(f)–(g)).

³⁷ *85 Percent of Flight Attendants Dealt With Unruly Passengers*, ASS'N FLIGHT ATTENDANTS–CWA (July 29, 2021), https://www.afacwa.org/unruly_passengers_survey [<https://perma.cc/V3P5-3XAP>].

³⁸ *Id.*

In 2021 alone, airline crews reported 4,290 mask-related incidents to the Federal Aviation Administration (FAA).³⁹ In response to the surge in unruly behavior aboard passenger flights, on November 24, 2021, Attorney General Merrick Garland directed federal prosecutors to “prioritize prosecution of federal crimes occurring on commercial aircraft that endanger the safety of passengers, flight crews, and flight attendants.”⁴⁰ In December 2021, an altercation began on a Delta Air Lines flight involving, among other issues, a mask dispute.⁴¹ The woman involved now faces a federal assault charge after allegedly punching and spitting on a man during the exchange.⁴²

III. 737 MAX LEGAL DEVELOPMENTS

Following the crashes of Lion Air flight 610 in October 2018 and Ethiopian Airlines flight 302 in March 2019, killing all 346 persons onboard the two flights, Boeing 737 MAX aircraft were grounded worldwide.⁴³ The 737 MAX’s Maneuvering Characteristics Augmentation System (MCAS), which was intended to help its pitch stability, became the center of scrutiny in both accidents.⁴⁴ During the accident flights, the angle-of-attack (AOA) sensor provided inaccurate information to the flight control computer, which triggered MCAS to move the horizontal stabilizer and pushed the airplane’s nose down, such that the

³⁹ FAA, 2021 UNRULY PASSENGER DATA (2022), https://www.faa.gov/data_research/passengers_cargo/unruly_passengers/2021_archive/ [<https://perma.cc/GXN7-VLLP>]. There were 139 incidents related to face masks as of January 25, 2022, and the number continues to rise. See FAA, UNRULY PASSENGERS (2022), https://www.faa.gov/data_research/passengers_cargo/unruly_passengers/ [<https://perma.cc/X2YY-3FTM>].

⁴⁰ OFF. OF THE ATT’Y GEN., U.S. DEP’T OF JUST., MEMORANDUM ON COORDINATING WITH FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL PROSECUTORS AND LAW ENFORCEMENT TO ADDRESS CRIMINAL CONDUCT ON COMMERCIAL AIRCRAFT I (2021), <https://www.justice.gov/ag/page/file/1451491/download> [<https://perma.cc/6WVJ-MQRK>].

⁴¹ Paul P. Murphy & Steve Almasy, *Los Angeles Woman Faces Federal Charge After Allegedly Punching Another Passenger on Delta Flight*, CNN, <https://www.cnn.com/2021/12/27/us/delta-passenger-allegedly-punches-fellow-passenger/index.html> [<https://perma.cc/JRG3-9K5A>] (Dec. 28, 2021, 12:43 PM).

⁴² *Id.*

⁴³ Kent German, *2 Years After Being Grounded, the Boeing 737 Max Is Flying Again*, CNET (June 19, 2021, 11:00 AM), <https://www.cnet.com/tech/tech-industry/boeing-737-max-8-all-about-the-aircraft-flight-ban-and-investigations/> [<https://perma.cc/3JDU-GYSD>].

⁴⁴ MAJORITY STAFF OF H. COMM. ON TRANSP. & INFRASTRUCTURE, 116TH CONG., FINAL COMMITTEE REP.: THE DESIGN, DEVELOPMENT & CERTIFICATION OF THE BOEING 737 MAX (2020).

pilots were unable to recover.⁴⁵ Numerous related investigations and litigations—many of which focused on limited FAA scrutiny of the MCAS system during the development of the 737 MAX—continued in 2021.

A. CIVIL LITIGATION

Many lawsuits brought by the passengers' families are still ongoing. However, during November 2021, in a stipulation filed in the United States District Court for the Northern District of Illinois, Boeing accepted responsibility for the Ethiopian Airlines crash, and the representatives of the victims' families agreed not to seek punitive damages against the company.⁴⁶ The litigation is continuing as to the amount of compensatory damages.⁴⁷

A shareholder derivative action brought by Boeing's stockholders, in which Boeing's directors and officers allegedly failed "in overseeing mission-critical airplane safety to protect enterprise and stockholder value," also continued into 2021.⁴⁸ On November 5, 2021, according to documents filed in the Delaware Court of Chancery, Boeing's board of directors reached a \$237.5 million deal to end the lawsuit.⁴⁹ As part of the settlement, Boeing also agreed to undertake certain corporate governance measures, such as the election of an additional board director with expertise in aviation/aerospace, engineering, or product-safety oversight, and the establishment of an ombudsperson program to provide employees in the FAA's Organization Designation Authorization (ODA) program with a channel for raising work-related concerns, including any concerns relating to independence and transparency.⁵⁰

⁴⁵ *Id.* at 8, 13.

⁴⁶ Alison Sider, *Boeing and 737 MAX Crash Victims' Families Move Closer to Resolution*, WALL ST. J., <https://www.wsj.com/articles/boeing-and-737-max-crash-victims-families-move-closer-to-resolution-11636576845> [https://perma.cc/UXV2-YQLL] (Nov. 10, 2021, 5:35 PM).

⁴⁷ Theo Leggett, *Boeing Agrees Deal with Families of Ethiopia Crash Victims*, BBC (Nov. 11, 2021), <https://www.bbc.com/news/business-59236437> [https://perma.cc/S8U4-9H6N].

⁴⁸ *In re The Boeing Co. Derivative Litig.*, No. 2019-0907-MTZ, 2021 Del. Ch. LEXIS 197, at *2 (Del. Ch. Sept. 7, 2021).

⁴⁹ Stipulation & Agreement of Compromise, Settlement, & Release, at 27, Exhibit A.I, A.VIII, *In re The Boeing Company Derivative Litig.*, No. 2019-0907-MTZ, 2021 Del. Ch. LEXIS 197.

⁵⁰ See *id.* at Exhibit A.I–VIII; Joe Walsh, *Boeing Directors Settle Shareholder Lawsuit Over 737 MAX Crashes for \$237.5 Million*, FORBES, <https://www.forbes.com/sites/joewalsh/2021/11/05/boeing-directors-settle-shareholder-lawsuit-over-737-max->

B. CRIMINAL INVESTIGATION AND INDICTMENTS

In January 2021, Boeing reached a settlement to pay a total of \$2.5 billion to resolve a U.S. Department of Justice (DOJ) criminal investigation, which included a nearly \$244 million fine and almost \$2.3 billion in compensation to airline customers and families of those killed.⁵¹ As part of the Deferred Prosecution Agreement (DPA) filed in the United States District Court for the Northern District of Texas, Boeing would be charged with one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 related to the FAA's evaluation of the 737 MAX.⁵² Boeing agreed, among other things, to continue to cooperate with the DOJ's Fraud Section in any ongoing or future investigations and prosecutions.⁵³ In exchange, the Fraud Section agreed to defer prosecution of the company, and if Boeing fully complies with its obligations under the DPA, the Fraud Section would not continue its criminal prosecution on the fraud charge.⁵⁴ On December 16, 2021, some of the victims' families filed motions in the district court case arguing that the DPA was "secretly" negotiated in violation of their rights under the federal Crime Victims' Rights Act.⁵⁵ Specifically, the families requested a chance to confer and be heard about Boeing's conditions of release.⁵⁶

In a relatively rare development in the United States following an aviation accident, federal prosecutors brought criminal charges against a former Boeing employee, Mark A. Forkner, as a result of the accident.⁵⁷ On October 14, 2021, a grand jury in

crashes-for-2375-million/?sh=7c534250344b [https://perma.cc/W377-634K] (Apr. 21, 2022, 8:17 AM).

⁵¹ Dave Michaels, Andrew Tangel & Andy Pasztor, *Boeing Reaches \$2.5 Billion Settlement of U.S. Probe Into 737 MAX Crashes*, WALL ST. J., https://www.wsj.com/articles/boeing-reaches-2-5-billion-settlement-of-u-s-probe-into-737-max-crashes-11610054729?mod=Article_inline [https://perma.cc/2M66-TP7P] (Jan. 7, 2021, 9:16 PM).

⁵² Deferred Prosecution Agreement at 1, *United States v. Boeing Co.*, No. 21-CR-005-O (N.D. Tex. Jan 7, 2021), ECF No. 4.

⁵³ *Id.* at 7–8; *Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over \$2.5 Billion*, DEP'T OF JUST. (Jan. 7, 2021), <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion> [https://perma.cc/LK8D-59R5].

⁵⁴ Deferred Prosecution Agreement, *supra* note 52, at 16.

⁵⁵ Motion of Naoise Connolly Ryan et al., as Representatives Under The Crime Victims' Rights Act, at 18, *Boeing Co.*

⁵⁶ *Id.* at 28.

⁵⁷ See Indictment at 1, 11–13, *United States v. Forkner*, No. 21-CR-00268-O (N.D. Tex. Oct. 14, 2021).

the United States District Court for the Northern District of Texas indicted Mr. Forkner—the former chief technical pilot for Boeing—on fraud charges, alleging he misled a FAA Aircraft Evaluation Group (AEG) evaluation of the 737 MAX and withheld crucial information related to the MCAS.⁵⁸ On December 23, 2021, Mr. Forkner moved to dismiss all counts of the indictment, arguing that “[b]ecause the government cannot prove that Forkner withheld anything from the AEG that the AEG did not know, it cannot sustain any of the charges it has brought.”⁵⁹ On February 8, 2022, the district court granted in part and denied in part Mr. Forkner’s Motion to Dismiss, holding that “the Government has failed to state an offense that Defendant violated 18 U.S.C. § 38(a)(1)(C),” removing counts one and two, but leaving open counts three through six because “the indictment sufficiently alleges causation and materiality.”⁶⁰

C. REGULATORY AND CONGRESSIONAL INVESTIGATIONS

Amidst the lawsuits, regulators across the world have been working with Boeing to re-certify the 737 MAX for passenger flight. Following software and other safety changes to the 737 MAX, the FAA lifted its twenty-month grounding of the planes in November 2020.⁶¹ Transport Canada and the European Union Aviation Safety Agency (EASA) both cleared the 737 MAX to return to service in January 2021, subject to additional requirements.⁶² Regulatory agencies in other countries took longer to test and eventually recertify the aircraft, and the aircraft still remains grounded in some countries.⁶³

⁵⁸ *Id.* at 1, 5, 8–13.

⁵⁹ Defendant Mark Forkner’s Motion to Dismiss at 3, *Forkner*.

⁶⁰ Memorandum Opinion & Order at 15–17, *Forkner*.

⁶¹ *FAA Updates on Boeing 737 Max: FAA Statement on Boeing 737 Return to Service*, FAA (Nov. 18, 2020), <https://www.faa.gov/newsroom/faa-updates-boeing-737-max-0> [<https://perma.cc/FC78-XK7E>].

⁶² *Transport Canada Introduces Additional Requirements to Allow for the Return to Service of the Boeing 737 MAX*, TRANSP. CAN., <https://www.canada.ca/en/transport-canada/news/2021/01/transport-canada-introduces-additional-requirements-to-allow-for-the-return-to-service-of-the-boeing-737-max1.html> [<https://perma.cc/TWY4-58T4>] (Jan. 18, 2021); Eur. Union Aviation Safety Agency, *Boeing 737 MAX Return to Service Report*, at 4, 10–11 (Jan. 27, 2021), https://www.easa.europa.eu/sites/default/files/dfu/B737_Max_Return_to_Service_Report.pdf [<https://perma.cc/R6ZE-SRF6>].

⁶³ See Aditi Shah & Rama Venkat, *India Allows Boeing 737 MAX Planes to Fly Ending an over 2-Year Ban*, REUTERS (Aug. 26, 2021, 11:19AM), <https://www.reuters.com/world/india/india-allows-boeing-737-max-planes-fly-ending-an-over-2-year-ban-2021-08-26/> [<https://perma.cc/NX89-CH4N>]; *Boeing 737 Max*

On February 23, 2021, a report was released on an investigation conducted by the DOT Office of Inspector General at the request of Secretary of Transportation Elaine L. Chao and several members of Congress, numbered Report No. AV2021020 titled, *Weaknesses in FAA's Certification and Delegation Processes Hindered Its Oversight of the 737 MAX 8*.⁶⁴ The report found that “[w]hile the FAA and Boeing followed the established certification process for the 737 MAX 8,” there were “limitations in [the] FAA’s guidance and processes that impacted certification and led to a significant misunderstanding of the Maneuvering Characteristics Augmentation System (MCAS), the flight control software identified as contributing to the two accidents.”⁶⁵ The Office of Inspector General made fourteen recommendations, all of which the FAA concurred with and provided planned dates of completion.⁶⁶

D. FOIA

Flyers Rights Education Fund, Inc. (FlyersRights), a non-profit airline passengers’ rights advocate, submitted a Freedom of Information Act (FOIA) request on October 31, 2019, “seeking records concerning the FAA’s review of Boeing’s design changes to the 737 MAX following the Lion Air and Ethiopian Air crashes.”⁶⁷ On December 16, 2019, FlyersRights initiated an action in the United States District Court for the District of Columbia “to compel the FAA to produce the requested records on an expedited basis.”⁶⁸ The district court required the FAA to provide Boeing with the documents it had identified as responsive and ordered Boeing to “indicate to [the FAA] over which documents it has objections and over which documents it has no

Test Plane Takes Flight in China After 2 Years of Grounding, CNBC (Aug. 10, 2021, 11:22 PM), <https://www.cnbc.com/2021/08/11/boeing-737-max-test-plane-takes-flight-in-china-after-grounding.html> [<https://perma.cc/2N5P-6SGE>].

⁶⁴ OFF. OF INSPECTOR GEN., U.S. DEP’T OF TRANSP., REP. NO. AV2021020, *WEAKNESSES IN FAA’S CERTIFICATION AND DELEGATION PROCESSES HINDERED ITS OVERSIGHT OF THE 737 MAX 8*, at Highlights (2021).

⁶⁵ *Id.*

⁶⁶ *Id.* Some recommendations include “[e]stablish[ing] and implement[ing] processes for manufacturers to officially notify FAA certification engineers of any changes made to System Safety Assessments, including after FAA flight testing has begun,” and “[i]ncorporat[ing] lessons learned from the Boeing 737 MAX accidents.” *Id.* at 41–42.

⁶⁷ See *Flyers Rts. Educ. Fund, Inc. v. FAA*, No. 19-3749 (CKK), 2021 U.S. Dist. LEXIS 175977, at *3 (D.D.C. Sept. 16, 2021) .

⁶⁸ *Id.* at *5.

objections.”⁶⁹ Following the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media*, which clarified when information provided to a federal agency is confidential for purposes of FOIA Exemption 4,⁷⁰ Boeing took the position that the majority of the documents requested by FlyersRights contained confidential commercial information based on the argument that they contained “trade secrets and other proprietary commercial information that Boeing customarily and actually treats as private and that Boeing provided to the FAA under an assurance of privacy.”⁷¹ The district court agreed and found that “a commitment to ‘transparency’ does not equate to a commitment to public release of proprietary or confidential information,” and ultimately held that “the FAA properly withheld the records at issue pursuant to FOIA Exemption 4.”⁷²

IV. FEDERAL PREEMPTION

Authorities are still split on the question of whether the Federal Aviation Regulations (FARs) preempt the entire field of aviation safety and aviation product defect claims.⁷³ On September 1, 2020, a notice of appeal to the United States Court of Appeals for the Second Circuit was filed following the United States District Court for the District of Connecticut’s decision in *Jones v. Goodrich* that the FARs preempted the plaintiffs’ strict liability, negligence, breach of warranty, breach of contract, and fraud claims.⁷⁴ The case arose out of a fatal U.S. Army helicopter crash allegedly “caused by a failure of the helicopter’s Full Authority Digital Electronic Control (FADEC) computer.”⁷⁵ Activity is ongoing in the appellate court.⁷⁶

⁶⁹ *Id.* at *6.

⁷⁰ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

⁷¹ *Flyers Rts. Educ. Fund, Inc.*, 2021 U.S. Dist. LEXIS 175977, at *8.

⁷² *Id.* at *29–31.

⁷³ *See, e.g., Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 704 (3d Cir. 2018).

⁷⁴ Plaintiffs’ Joint Notice of Appeal at 1, *Jones v. Goodrich Corp.*, No. 12-CV-01297-WWE (D. Conn. Sept. 1, 2020); *Jones v. Goodrich Corp.*, 422 F. Supp. 3d 518, 525–26 (D. Conn. 2019), *motion to alter judgment denied*, No. 12-cv1297 (JBA), 2020 U.S. Dist. LEXIS 141493, at *1 (D. Conn. Sept. 1, 2020), *appeal docketed*, No. 20-2591 (2d Cir. Sept. 2, 2020).

⁷⁵ *Jones*, 2020 U.S. Dist. LEXIS 141493, at *3. Full background and analysis of the district court’s decision is contained in the *Recent Developments in Aviation Law – 2019* article. *See* Arthur I. Willner, Raymond L. Mariani & Emily K. Doty, *Recent Developments in Aviation Law – 2019*, 85 J. AIR L. & COM. 221, 240–41 (2020).

⁷⁶ *See* Plaintiffs’ Joint Notice of Appeal, *supra* note 74.

A. MEAL AND REST BREAKS

In *Bernstein v. Virgin America, Inc.*, the United States Court of Appeals for the Ninth Circuit held that meal and rest break requirements under California law were not preempted by the FAA or the ADA.⁷⁷ The court disagreed with Virgin's argument that federal law preempted the California law "in the aviation context" because of the FAA's regulation of flight attendance duty-period limitations and rest requirements.⁷⁸ While the court acknowledged its decision in *Montalvo v. Spirit Airlines* and stated that "field preemption generally applies to state regulations specifically in the field of *aviation safety*," the court found the connection between California's law and the Federal Aviation Act "too tenuous to support field preemption" because "[u]nlike the state laws at issue in *Montalvo* . . . California's meal and rest break requirements have no *direct* bearing on the field of aviation safety."⁷⁹ Moreover, "[t]he regulation d[id] not compel [the court] to conclude that Congress left no room for states to prescribe meal periods and ten-minute rest breaks within the maximum total duty period allowed under federal law."⁸⁰ The court also found that conflict preemption does not bar application of California law because "it is physically possible to comply with federal regulations prohibiting a duty period of longer than fourteen hours and California's statutes requiring ten-minute rest breaks and thirty-minute meal periods at specific intervals."⁸¹ The Ninth Circuit held that airlines could comply with both the Federal Aviation Act and California's requirement by staffing longer flights with more flight attendants to allow for duty-free breaks.⁸² The Ninth Circuit further found that "an increase in cost associated with compliance was not sufficient to show a relation to prices, routes, or services" so as to be preempted under the ADA.⁸³

⁷⁷ *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1140–41 (9th Cir. 2021).

⁷⁸ *Id.* at 1138–41.

⁷⁹ *Id.* at 1138–39 (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007)).

⁸⁰ *Id.* at 1139.

⁸¹ *Id.* at 1139–40.

⁸² *Id.* at 1140.

⁸³ *Id.* at 1141 (citing *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)).

B. AIR AMBULANCE

The United States Court of Appeals for the Fifth Circuit recently addressed conflicting regulatory rules regarding air ambulance rates in *Air Evac EMS, Inc. v. Sullivan*.⁸⁴ The Texas Workers' Compensation Act (TWCA) "regulates the prices that insurers must pay to providers for various medical services [including air transport services] utilized by their beneficiaries."⁸⁵ However, under the ADA, states "may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of an air carrier that may provide air transportation under this subpart."⁸⁶ The plaintiff, "Air Evac EMS, Inc., is an air ambulance provider that offers medical transport services to a wide variety of patients," including "patients who are injured at their workplace."⁸⁷ The Fifth Circuit agreed with the Fourth and Tenth Circuits, which had previously "held that the ADA preempts price controls on air ambulance services set by state workers' compensation regulations,"⁸⁸ and the Fifth Circuit held that "the ADA expressly preempts TWCA reimbursement regulations as applied to air ambulance services."⁸⁹

In *Guardian Flight LLC v. Godfread*, the United States Court of Appeals for the Eighth Circuit analyzed two provisions of a North Dakota Senate Bill that would have prohibited "air ambulance providers from directly billing out-of-network insured patients for any amount not paid for by their insurers" and would have prohibited "air ambulance providers or their agents from selling subscription agreements."⁹⁰ In this appeal, brought by air ambulance provider Guardian Flight, the Eighth Circuit found that both provisions are preempted by the ADA because they

⁸⁴ *Air Evac EMS, Inc. v. Sullivan*, 8 F.4th 346, 349–50 (5th Cir. 2021) .

⁸⁵ *Id.* at 349 (citing TEX. LAB. CODE ANN. §§ 401.007–419.007 (West 2005)).

⁸⁶ *Id.* (quoting 49 U.S.C. § 41713(b)(1)).

⁸⁷ *See id.*

⁸⁸ *Id.* at 350.

⁸⁹ *Id.* at 353. The term "related to" in this context is broadly construed. *Id.* at 351 (first citing *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 283 (2014); then citing *Morales v. TWA*, 504 U.S. 374, 383–85 (1992)). Nor are the TWCA reimbursement regulations saved by the McCarran–Ferguson Act because the TWCA relates to the relationship between insurers and providers, not insurers and their beneficiaries. *See id.* at 355.

⁹⁰ *Guardian Flight LLC v. Godfread*, 991 F.3d 916, 919 (8th Cir. 2021) (first citing N.D. CENT. CODE ANN. § 26.1-47-09(3) (West 2017) ; then citing N.D. CENT. CODE ANN. § 26.1-47-08 (West 2017)); *see also* S.B. 2231, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

were “‘related to’ . . . the price that air ambulance providers charge for their services.”⁹¹

C. PAID SICK LEAVE

The Air Transport Association (d/b/a Airlines for America) brought an action in the United States Court of Appeals for the Ninth Circuit “against Washington’s Department of Labor and Industries [], seeking to enjoin enforcement of Washington’s law governing paid sick leave.”⁹² One aspect of the law instituted a prohibition on employers “penalizing employees for using sick leave . . . or requiring medical verification for sick leave absences of fewer than three days.”⁹³ Airlines for America argued that the ADA preempted the Washington law because it would deprive airlines of disciplinary point systems and medical verification requirements that help prevent flight delays and cancellations.⁹⁴ The Ninth Circuit held that the paid sick leave law “may ultimately affect airlines’ competitive decisions,” but because the law “does not regulate the airline-customer relationship or otherwise bind the airlines to a particular price, route, or service, it is not preempted by the ADA.”⁹⁵

V. ANTITRUST

Scrutiny of anticompetitive coordination in the airline industry continued in 2021.⁹⁶ On September 21, 2021, the “Depart-

⁹¹ *Guardian Flight LLC*, 991 F.3d at 921. The McCarran–Ferguson Act did not apply because neither the subscription nor payment provisions were enacted “for the purpose of regulating the business of insurance.” *Id.* at 919.

⁹² *Air Transp. Ass’n of Am. v. Wash. Dep’t of Lab. & Indus.*, 859 F. App’x 181, 183 (9th Cir. 2021) (citing WASH. REV. CODE § 49.46.210 (2021)).

⁹³ *Id.* (first citing WASH. REV. CODE § 49.46.210(3) (2019); then citing WASH. ADMIN. CODE § 296-128-660 (1)).

⁹⁴ *Id.* at 183 –84.

⁹⁵ *Id.* at 184. This case also addressed the Dormant Commerce Clause with the court declining to find that the paid sick leave law would “severely disrupt operation of interstate transportation.” *Id.* at 185 (quoting *Ward v. United Airlines, Inc.* 986 F.3d 1234, 1242 (9th Cir. 2021)).

⁹⁶ Korean Air and its plans to acquire its domestic rival Asiana are also currently under investigation. See Competition & Mkts. Auth., *Korean Air/Asiana Airlines Merger Inquiry*, GOV.UK (Nov. 19, 2021), <https://www.gov.uk/cma-cases/korean-air-slash-asiana-airlines-merger-inquiry> [https://perma.cc/R9D4-ZAA7]. Additionally, “[t]he acquisition proposal is subject to approval from countries or regions whose industries will be affected by the merger,” including the United States. Kim Jae-heun, *FTC Asked to Speed Up Process of Korean Air-Asiana Airlines Acquisition*, KOREA TIMES, https://www.koreatimes.co.kr/www/tech/2021/10/774_317030.html [https://perma.cc/3PDV-88AF] (Oct. 14, 2021, 4:55 PM).

ment of Justice, together with Attorneys General of six states and the District of Columbia, sued . . . in the District of Massachusetts to block an unprecedented series of agreements between American Airlines and JetBlue” that would consolidate the two airlines’ operations in Boston and New York City.⁹⁷ According to the civil antitrust complaint, this combination, dubbed the “Northeast Alliance,” will eliminate key competition and “harm air travelers across the country.”⁹⁸ The DOJ’s complaint states:

Knowing full well that an outright merger would invite a challenge under Section 7 of the Clayton Act, American instead seeks to align JetBlue’s economic incentives with its own through a far-reaching partnership based on the same kinds of alliances that American has used to consolidate international air travel. In so doing, American and JetBlue have violated Section 1 of the Sherman Act by effectively merging their operations in Boston and New York City and eliminating competition that has resulted in substantial benefits for consumers.⁹⁹

On November 22, 2021, American Airlines Group, Inc. and Jetblue Airways Corporation moved to dismiss the complaint, arguing, among other things, that “[w]ithout proof of *substantial, marketwide anticompetitive effects*, a challenge to an efficiency-enhancing joint venture fails as a matter of law.”¹⁰⁰ A trial date has been jointly requested for September 26, 2022.¹⁰¹

VI. NTSB ACCIDENT INVESTIGATIONS & FOIA

In *Jobe v. NTSB*, the United States Court of Appeals for the Fifth Circuit evaluated whether communications between the National Transportation Safety Board (NTSB)—the federal agency charged with investigating transportation-related accidents—and outside consultants, such as “representatives from the aircraft’s manufacturer or operator, who are uniquely positioned to shed light on what went wrong,” must be disclosed

⁹⁷ *Justice Department Sues to Block Unprecedented Domestic Alliance Between American Airlines and JetBlue*, U.S. DEP’T OF JUST. (Sept. 21, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-unprecedented-domestic-alliance-between-american-airlines-and> [<https://perma.cc/4C82-PN3B>].

⁹⁸ *Id.*

⁹⁹ Complaint at 6, *United States v. Am. Airlines Grp., Inc.*, No. 21-cv-11558 (Sept. 21, 2021), ECF No. 1.

¹⁰⁰ Memorandum in Support of Am. Airlines Grp., Inc. & JetBlue Airways Corp.’s Motion to Dismiss at 3, *Am. Airlines Grp., Inc.*, ECF No. 68 (citing *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021)).

¹⁰¹ Scheduling & Case Management Order at 4, *Am. Airlines Grp., Inc.*, ECF No. 76.

under FOIA.¹⁰² The answer to that question “turns on the scope of FOIA’s ‘Exemption 5,’ which shields privileged ‘intra-agency’ documents.”¹⁰³ The court first explained that “[s]everal circuits, including ours, read Exemption 5 to protect communications not only among an agency’s employees, but also with some non-agency experts whose input the agency has solicited. This is known as the ‘consultant corollary.’”¹⁰⁴ In a 2–1 decision, the court went on to find that the United States District Court for the Eastern District of Louisiana erred in finding that, under the Supreme Court case *Department of the Interior v. Klamath Water Users Protective Association*,¹⁰⁵ such outside parties’ alleged “‘self-interest’ disqualifies them as consultants” whose communications with the NTSB are protected under Exemption 5.¹⁰⁶ Citing 49 C.F.R. § 831.4, the panel reiterated that NTSB investigations are fact-finding proceedings with no adverse parties.¹⁰⁷ The majority found that “[s]ubjecting the NTSB’s communications with consultants to broad public disclosure would inhibit the agency’s ability to receive candid technical input from those best positioned to give it.”¹⁰⁸ The panel noted that its decision did not end the Exemption 5 inquiry though, since “deeming documents as ‘intra-agency’ is only the first step in a two-part” process.¹⁰⁹ On remand, the district court will need to evaluate the second step: “[D]etermining whether the documents at issue are subject to a litigation privilege ordinarily available to a government agency.”¹¹⁰

VII. PILOT RECORDS DATABASE

Effective August 9, 2021, the FAA issued its final rule for the establishment of a Pilot Records Database (PRD), which seeks to modernize pilot record-sharing.¹¹¹ The electronic database is intended to enhance sharing of a wide variety of pilot-related

¹⁰² *Jobe v. NTSB*, 1 F.4th 396, 399 (5th Cir. 2021).

¹⁰³ *Id.* (citing 5 U.S.C. § 552(b)(5)).

¹⁰⁴ *Id.* (first citing *Hoover v. U.S. Dep’t of the Interior*, 611 F.2d 1132, 1137–38 (5th Cir. 1980); then citing *Wu v. Nat’l Endowment for Humans.*, 460 F.2d 1030, 1032 (5th Cir. 1972)).

¹⁰⁵ 532 U.S. 1, 4 (2001).

¹⁰⁶ *Jobe*, 1 F.4th at 407.

¹⁰⁷ *Id.* at 405 (citing 49 C.F.R. § 831.4).

¹⁰⁸ *Id.* at 400.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Pilot Records Database, 86 Fed. Reg. 31006 (June 10, 2021) (to be codified as amended at 14 C.F.R. §§ 11, 91, 111), <https://www.federalregister.gov/docu->

records such as airman certificate information, medical certificate class, enforcement history, and incident and accident records with air carriers and operators.¹¹² The PRD “will contain the required operator and FAA records for the life of the pilot and will function as a hiring tool that an operator will use in making decisions regarding pilot employment.”¹¹³ As a means to protect a pilot’s privacy, any “operator that wishes to view records can see a pilot’s record only if that pilot has granted consent to that hiring employer,” and that consent is time-limited.¹¹⁴

As of “December 7, 2021, the Aviation Data Systems Branch [is] no longer accept[ing] FAA Form 8060-10 to request FAA records” under the Pilot Records Improvement Act of 1996 (PRIA).¹¹⁵ Air carriers and operators reviewing FAA records under PRIA, 14 C.F.R. § 111.105, or both must use the PRD.¹¹⁶

VIII. ECONOMIC LOSS RULE

The economic loss rule is a judicially created doctrine that generally bars tort claims if the only damages sought are economic and there has been no injury to persons or other property.¹¹⁷ The rule itself is uncontroversial, but its nuances are often litigated. In *Lima Charlie Sierra, LLC v. Textron Aviation Inc.*, the United States District Court for the District of Kansas addressed whether the economic loss doctrine as it exists under Kansas law applied “to negligence or bailment claims when two parties have contracted for aircraft repair services.”¹¹⁸ The plaintiff, Lima Charlie Sierra (LCS), asserted tort claims against the defendant, Textron Aviation, Inc. (Textron), after Textron allegedly “damaged LCS’s aircraft while the aircraft was at Textron’s service center for routine inspection and repair.”¹¹⁹

ments/2021/06/10/2021-11424/pilot-records-database [https://perma.cc/H8FF-AKHH].

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Pilot Records Improvement Act of 1996 (PRIA)*, FAA, https://www.faa.gov/pilots/lic_cert/pria/ [https://perma.cc/39MD-RQSR] (Dec. 6, 2021).

¹¹⁶ *Id.*

¹¹⁷ *See, e.g., Turbomeca, S.A. v. Era Helicopters LLC*, 536 F.3d 351, 354 (5th Cir. 2008) (quoting *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 859, 876 (1986)).

¹¹⁸ *Lima Charlie Sierra, LLC v. Textron Aviation Inc.*, No. 20-CV-1089-EFM, 2021 WL 2477014, at *5 (D. Kan. June 17, 2021) .

¹¹⁹ *Id.* at *1.

Textron argued, among other things, that “LCS’s tort claims [were] barred by the economic loss doctrine.”¹²⁰ The district court disagreed.¹²¹

Applying Kansas precedent, the district court found that the fact that the parties had a contract would not preclude a tort claim if the conduct at issue was a violation of a duty imposed by law that was independent of the contract.¹²² The court quoted a 2010 case from the United States District Court for the District of Kansas, *Presbyterian Manors, Inc. v. SimplexGrinnell, L.P.*, which found that:

Under Kansas law, not all tort claims are barred by the existence of a valid contract. When conduct could satisfy the elements of both a breach of contract and an independent tort, [the] plaintiff may pursue both remedies unless the conduct is permitted by the express provisions of the contract.¹²³

Because LCS alleged that Textron had a duty to use ordinary and reasonable care in servicing the aircraft, which Textron allegedly breached by allowing the aircraft to be damaged, the Kansas District Court found that the duty LCS asserted in its complaint arose from “Textron’s alleged negligent workmanship and not the Terms and Conditions” of the contract, which did not “expressly address or allow incidents of damage to the aircraft while at Textron’s facility for inspection and repairs.”¹²⁴ Therefore, Textron’s duty arose in tort, and the economic loss doctrine did not bar LCS’s negligence claim.¹²⁵ The district court also found that the economic loss doctrine did not bar LCS’s bailment claim since Kansas law imposes a duty on a bailee to use “ordinary care and diligence in the safeguarding of the bailor’s property, and [the bailee] is answerable for loss or injury resulting from failure to exercise such care.”¹²⁶ “Because Kansas law gives a plaintiff the option of bringing suit in contract or tort,” therefore “Kansas courts would hold that the underlying duty for a bailment claim arises by operation of law.”¹²⁷

¹²⁰ *Id.* at *2.

¹²¹ *Id.* at *6–7.

¹²² *Id.* at *6.

¹²³ *Id.* (quoting *Presbyterian Manors, Inc. v. SimplexGrinnell, L.P.*, No. 09-2656-KHV, 2010 WL 11628522, at *6 (D. Kan. May 11, 2010)).

¹²⁴ *Id.* at *17–18.

¹²⁵ *Id.* at *18.

¹²⁶ *Id.* at *18–20.

¹²⁷ *Id.* at *19.

Alternatively, in *Christensen v. Boeing Co.*, the United States District Court for the Northern District of Illinois held that negligence and negligent misrepresentation claims were barred by the economic loss rule under Illinois law when flight attendants filed a claim seeking lost wages and other damages in connection with the grounding of Boeing's 737 MAX aircraft.¹²⁸ The district court explained that under Illinois law, there are three exceptions that allow a plaintiff to recover for solely economic loss:

1) where the plaintiff sustains personal injury or property damage resulting from a sudden or dangerous occurrence; 2) where the plaintiff's damages are proximately caused by a defendant's intentional false representation; and 3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions.¹²⁹

However, the court found that none of these exceptions applied where the plaintiffs did not allege any direct connection to the two air crashes, and "their claims [were] of the nature of a third party 'who suffer[ed] no physical damage to person or property, but who claim[ed] harm as a result of injury to the person or property of another.'"¹³⁰ Nor did their negligence claims allege intentional misrepresentations or that Boeing was in the business of supplying information for the guidance of others in their business dealings.¹³¹ Therefore, the court found that the plaintiffs failed to state plausible claims.¹³²

IX. PERSONAL JURISDICTION

The Supreme Court issued another specific personal jurisdiction decision in 2021. In *Ford Motor Co.*, the Court attempted to clarify the arises out of or relates to requirement for specific jurisdiction, as Ford had conceded purposeful availment in the two forums where the lawsuits arose.¹³³ Ford appealed decisions from the Montana and Minnesota Supreme Courts that found

¹²⁸ *Christensen v. Boeing Co.*, No. 20 C 1813, 2021 U.S. Dist. LEXIS 4745, at *2, *8 (N.D. Ill. Jan. 11, 2021) .

¹²⁹ *Id.* at *9 (citing *Trans States Airlines v. Pratt & Whitney Can., Inc.*, 682 N.E.2d 45, 48 (Ill. 1997)).

¹³⁰ *Id.* at *6, *9 (quoting *Dundee Cement Co v. Chem. Lab'ys, Inc.*, 712 F.2d 1166, 1168 (7th Cir. 1983)).

¹³¹ *Id.* at *9.

¹³² *Id.* at *10.

¹³³ *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021).

Ford subject to specific jurisdiction for claims by state residents following accidents in their states.¹³⁴ Ford contended that the claims were not causally related to its substantial business in the states because the vehicles were designed, manufactured, and first sold outside of the forum states: “Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota.”¹³⁵ Each state’s high court found that the exercise of jurisdiction over Ford would not offend due process after finding that the company’s substantial in-state activities provided the necessary connection to the plaintiff’s allegations that a defective Ford caused in-state injury.¹³⁶

The Supreme Court affirmed.¹³⁷ In the majority opinion written by Justice Elena Kagan,¹³⁸ the Court found that the connection between the plaintiffs’ claims and Ford’s extensive activities in those states “is close enough to support specific jurisdiction” where the “resident-plaintiffs alleg[ed] that they suffered in-state injury because of defective products that Ford extensively promoted, sold, and serviced in Montana and Minnesota,” and where Ford did not contest that it conducted substantial business in the forum states.¹³⁹ However, the Court noted that “[n]one of this is to say that any person using any means to sell any good in a State is subject to jurisdiction there if the product malfunctions after arrival. [The Court] ha[s] long treated isolated or sporadic transactions differently from continuous ones.”¹⁴⁰

In a concurring opinion, Justice Neil Gorsuch noted that the Court still had not provided a clear test for when forum contacts are sufficiently related to a claim to support specific jurisdiction, stating that “between the poles of ‘continuous’ and ‘isolated’ contacts lie a virtually infinite number of ‘affiliations’ waiting to be explored. And when it comes to that vast terrain, the majority

¹³⁴ *Id.* at 1023–24.

¹³⁵ *Id.* at 1022–23.

¹³⁶ *Id.* at 1023–24.

¹³⁷ *Id.* at 1032.

¹³⁸ Justice Kagan delivered the opinion of the Court, in which Justices Roberts, Breyer, Sotomayor, and Kavanaugh joined. *Id.* at 1022. Justice Alito filed a concurring opinion, and Justice Gorsuch filed another concurring opinion, in which Justice Thomas joined. *Id.* Justice Barrett took no part in the consideration or decision of the cases. *Id.*

¹³⁹ *See id.* at 1026, 1032.

¹⁴⁰ *Id.* at 1028 n.4 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) .

supplies no meaningful guidance about what kind or how much of an ‘affiliation’ will suffice.”¹⁴¹

In other personal jurisdiction cases, the United States Court of Appeals for the Ninth Circuit in *LNS Enterprises LLC v. Continental Motors, Inc.* held that no personal jurisdiction existed over Continental Motors, Inc. or Textron Aviation, Inc. in Arizona for claims brought after a nonfatal airplane crash.¹⁴² The Ninth Circuit compared Supreme Court precedent in *World-Wide Volkswagen Corp. v. Woodson*, where personal jurisdiction was not found when the plaintiffs sought to “base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom,”¹⁴³ to *Ford Motor Co.* on the “opposite end of the range.”¹⁴⁴ Although Textron did “maintain[] a single service center in Arizona,” and Continental had a third-party relationship with four service centers in Arizona, these contacts were insufficient to render the companies subject to specific jurisdiction in Arizona where none of the service centers were alleged to have worked on the subject aircraft.¹⁴⁵ Furthermore, the plaintiffs’ request for jurisdictional discovery was denied because it amounted to a “mere hunch” that discovery could lead to jurisdictionally relevant facts.¹⁴⁶

In *Elliott v. Cessna Aircraft Co.*, the United States District Court for the Central District of California found that California lacked specific jurisdiction over claims against an engine manufacturer, Continental Aerospace Technologies, Inc. (Continental), stemming from an accident in California.¹⁴⁷ Continental designed and manufactured the original engines in Alabama, and sold them decades before to parties located outside of California.¹⁴⁸ The court found that the plaintiffs had not established purposeful availment where there was no indication that Continental engaged in any sort of advertising or marketing in California to accomplish its sales in the state, despite the company

¹⁴¹ *Id.* at 1035 (Gorsuch, J., dissenting).

¹⁴² See *LNS Enters. LLC v. Cont’l Motors, Inc.*, 22 F.4th 852, 856–57, 862 (9th Cir. 2022) .

¹⁴³ *World-Wide Volkswagen*, 444 U.S. at 295.

¹⁴⁴ *LNS Enters. LLC*, 22 F.4th at 860.

¹⁴⁵ *Id.* at 863–64.

¹⁴⁶ *Id.* at 865 (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008)).

¹⁴⁷ *Elliott v. Cessna Aircraft Co.*, No. 20-cv-00378-SB (ADSx), 2021 U.S. Dist. LEXIS 102012, at *3–4, *10 (C.D. Cal. May 25, 2021).

¹⁴⁸ *Id.* at *5–6.

having more than \$8 million in sales in California.¹⁴⁹ According to the court, “The question is not whether California consumers have purchased engines from Defendant generating significant revenue; rather, the question is whether Defendant specifically targeted California consumers.”¹⁵⁰ The court also found that the Continental’s “universally accessible” interactive website was insufficient to establish specific targeting of California consumers.¹⁵¹

In an employment discrimination case, *Sambrano v. United Airlines, Inc.*, brought in the United States District Court for the Northern District of Texas, the plaintiffs alleged that United Airlines failed to provide reasonable religious accommodations, retaliated against the plaintiffs for requesting exemptions from United’s COVID-19 vaccine mandate, and failed to provide reasonable accommodations to employees seeking medical exemptions.¹⁵² The district court found that it lacked general jurisdiction despite United’s “constant and significant presence” in Texas since United could not be deemed to be “essentially at home” in Texas: “If [the court found it did have general jurisdiction], then large corporations would be ‘essentially at home’ in many states. And a ‘corporation that operates in many places can scarcely be deemed at home in all of them.’”¹⁵³ However, the district court found that specific jurisdiction existed over the claims of two of the plaintiffs because they lived in Texas, were “accommodated” there, and without injunctive relief, will suffer injury there because of United’s policy that was directed at Texas.¹⁵⁴ After finding that United purposefully availed itself of the privilege of conducting business in Texas, the court found that under *Ford Motor Co.*, two of the plaintiffs had established the necessary “jurisdictional hooks” since their claims related to United’s Texas contacts—the policy “targets, and necessarily affects, an employee at their workplace *and* their home.”¹⁵⁵

In *Robinson Helicopter Co. v. Gangapersaud*, the helicopter manufacturer, a California entity, sold a helicopter to an out-of-state

¹⁴⁹ *Id.* at *8–9.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at *9.

¹⁵² *Sambrano v. United Airlines, Inc.*, No. 21-cv-1074-P, 2021 U.S. Dist. LEXIS 215289, at *2–3 (N.D. Tex. Nov. 8, 2021) .

¹⁵³ *Id.* at *11 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 138–39, 139 n.20 (2014)).

¹⁵⁴ *Id.* at *11–12.

¹⁵⁵ *Id.* at *13–16, *18–19.

purchaser, but the helicopter later crashed in Florida, killing a passenger in a vehicle on the ground.¹⁵⁶ The passenger's estate sued Robinson—the manufacturer—and a local maintenance entity, arguing that Robinson was subject to personal jurisdiction because “three Robinson-authorized dealers and eleven authorized service centers [existed] in Florida, which allow owners of Robinson helicopters to obtain maintenance all over the state. As the Estate puts it, Robinson ‘sold its products knowing that they would end up in Florida.’”¹⁵⁷ The court disagreed that such facts could support the exercise of specific jurisdiction over the manufacturer and distinguished the case from *Ford Motor Co.*, stating that the “circumstances here are much different than in the *Ford* case.”¹⁵⁸ Particularly, “Ford conceded the issue of purposeful availment,” and “Robinson Helicopter Company is no Ford Motor Company.”¹⁵⁹ There was “no indication that Robinson engage[d] in any targeted advertising in Florida (or any other state), much less the types of ‘wide-ranging promotional activities’ which are commonplace for Ford,” and while Robinson did have several “‘authorized’ dealers and service centers in various states, including Florida, those businesses [were] separate entities.”¹⁶⁰ The court concluded that “Robinson did not direct the subject helicopter into Florida nor has it continuously exploited the state’s market such that it must reasonably anticipate being haled into court here,” and therefore found that personal jurisdiction over Robinson did not exist.¹⁶¹

X. ADMIRALTY JURISDICTION & REMOVAL

In *Curry v. Boeing Co.*, the plaintiff flight attendants brought a lawsuit in the Cook County, Illinois state court alleging personal injury and lost wages and earnings capacity due to an in-flight contaminated air event while working on a Boeing aircraft operated as United Airlines flight 71 from Amsterdam, Netherlands, to Newark, New Jersey.¹⁶² Four months after being served with the complaint, Boeing removed the lawsuit to the United States District Court for the Northern District of Illinois, maintaining

¹⁵⁶ *Robinson Helicopter Co. v. Gangapersaud*, No. 2D20-2470, 2022 Fla. App. LEXIS 19, at *2 (Fla. Dist. Ct. App. Jan. 5, 2022).

¹⁵⁷ *Id.* at *2–3, *13.

¹⁵⁸ *Id.* at *16, *19.

¹⁵⁹ *Id.* at *16–17.

¹⁶⁰ *Id.* at *17.

¹⁶¹ *Id.* at *18–19.

¹⁶² *Curry v. Boeing Co.*, 542 F. Supp. 3d 804, 808–09 (N.D. Ill. 2021) .

that it fell under admiralty jurisdiction.¹⁶³ In denying the plaintiffs' motion to remand, the district court found that it had admiralty jurisdiction and that the removal was timely.¹⁶⁴

Applying the Supreme Court's test for admiralty jurisdiction and relying heavily on Seventh Circuit precedent from *Lu Junhong v. Boeing Co.*, which stemmed from the crash of Asiana Airlines flight 214 in San Francisco,¹⁶⁵ the district court found that Boeing had adduced un rebutted evidence that the "dirty sock" smell that the complaint alleged indicated contaminated air was first detected when the aircraft was flying over navigable waters.¹⁶⁶ While the complaint itself was silent about the plane's location at the time when the injury occurred, Boeing used publicly available data to estimate the aircraft's trajectory over the North Sea and thus satisfy the "location" requirement.¹⁶⁷ Focusing on the fact that in order for a tort to occur there must be an injury, the court rejected the plaintiffs' argument that Boeing's omissions that led to the contaminated air event occurred long before the flight over the North Sea.¹⁶⁸ In finding the "connection to maritime commerce" test also satisfied, the court explained that "[t]oxic air conditions aboard a transoceanic flight, just as those aboard a vessel, have the potential to cause such a disruption [a disruption of maritime commerce]," and that the transatlantic flight had a "substantial relationship to traditional maritime activity."¹⁶⁹ It was immaterial to the court that flight 71 turned back to Amsterdam and never actually made it across the ocean.¹⁷⁰ The court also reiterated from *Lu Junhong* that:

[A] tort occurring in an airplane above navigable waters is *always* sufficiently related to traditional maritime activity. . . . While Plaintiffs may prefer a test that calls for a more careful examination of the facts and legal claims when searching for a connection to maritime commerce, that is not the test the Supreme Court has framed.¹⁷¹

¹⁶³ *Id.* at 809.

¹⁶⁴ *Id.* at 810 .

¹⁶⁵ *See* *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 807 (7th Cir. 2015) .

¹⁶⁶ *Curry*, 542 F. Supp. 3d at 813, 817.

¹⁶⁷ *Id.* at 812–13.

¹⁶⁸ *Id.* at 815.

¹⁶⁹ *Id.* at 814–15.

¹⁷⁰ *Id.* at 815.

¹⁷¹ *Id.* at 816 (first citing *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 815 (7th Cir. 2015); then citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 541–43 (1995)).

In finding that Boeing's removal was timely even though it removed the action more than thirty days after being served, the district court agreed with Boeing that the time to remove "never started because it is not clear from the face of the complaint that this suit is within the admiralty jurisdiction."¹⁷² Following the Seventh Circuit's "bright-line rule" under which the thirty-day clock to remove "does not begin to run until the defendant receives a pleading or other paper that *affirmatively* and *unambiguously* reveals that the predicates for removal are present,"¹⁷³ the district court rejected the plaintiffs' argument that Boeing should have known that admiralty jurisdiction was present from the complaint because flight 71 would have had to travel over water at some point in the flight, "for if the complaint leaves *any* work for the defendant to do in that regard, the removal clock does not start to run."¹⁷⁴

XI. MONTREAL & WARSAW CONVENTIONS

The Montreal Convention is a multilateral treaty that "applies to all international carriage of persons, baggage or cargo performed by aircraft."¹⁷⁵ Courts continue to reiterate that Montreal Convention provisions "may be analyzed in accordance with case law arising from substantively similar provisions of its predecessor, the Warsaw Convention."¹⁷⁶

A. PREEMPTION

Article 29 describes the Montreal Convention's preemptive effect: "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention. . . ."¹⁷⁷ Article 29 attempted to clarify Article 24(1) of the Warsaw Convention, since courts had required that "all state law claims that fall within the scope of

¹⁷² *Curry*, 542 F. Supp. 3d at 818.

¹⁷³ *Id.* (quoting *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013)).

¹⁷⁴ *See id.* at 819.

¹⁷⁵ Int'l Civ. Aviation Org. [ICAO], *Convention for the Unification of Certain Rules for International Carriage by Air*, at art. 1, ICAO Doc. 9740 (May 28, 1999) [hereinafter *Montreal Convention*], <https://www.icao.int/Meetings/AirCargoDevelopmentForum-Togo/Documents/9740.pdf> [<https://perma.cc/VG8R-BJ48>].

¹⁷⁶ *See, e.g.*, *Cohen v. Am. Airlines Grp., Inc.*, 13 F.4th 240, 245 (2d Cir. 2021).

¹⁷⁷ *Montreal Convention*, *supra* note 175, at art. 29.

the Convention are preempted.”¹⁷⁸ However, preemption and related issues, including federal question removal, continue to be regularly litigated in Montreal Convention cases.

In *Sun Coast Merchandise Corp. v. Hecny Transportation, Inc.*, plaintiff Sun Coast brought a California state court action after defendant Hecny admitted losing some KN-95 masks during shipment that Sun Coast had sourced from China for the State of California.¹⁷⁹ Hecny removed the action to the United States District Court for the Central District of California after alleging that the Montreal Convention, as a treaty of the United States, conferred original federal question jurisdiction over the action under 28 U.S.C. § 1331.¹⁸⁰ The district court remanded on the basis that while the Convention preempts certain state law causes of action arising in the international carriage of goods, it does not completely preempt state law claims.¹⁸¹ Noting that the Supreme Court and Ninth Circuit Court of Appeals have not answered this question, the *Sun Coast* court followed the majority of California federal courts, which have “found that the Montreal Convention does not completely preempt state law claims, and thus, that it does not confer federal subject matter jurisdiction over a complaint alleging only state law claims.”¹⁸²

The United States Court of Appeals for the Second Circuit also addressed preemption in *New Fortune Inc. v. Apex Logistics International*.¹⁸³ Because the case was originally brought in federal court, the issue was not whether the Montreal Convention would support federal jurisdiction to allow a complaint to be removed to federal court, but whether the Montreal Convention preempted the claims under an ordinary federal preemption de-

¹⁷⁸ See, e.g., *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141 (2d Cir. 1998).

¹⁷⁹ *Sun Coast Merch. Corp. v. Hecny Transp., Inc.*, No. 20-CV-11007-CAS-JPRx, 2021 U.S. Dist. LEXIS 32544, at *3–4 (C.D. Cal. Feb. 22, 2021).

¹⁸⁰ *Id.* at *6.

¹⁸¹ *Id.* at *12–13.

¹⁸² *Id.* at *10; see also *Parrish v. City of Albuquerque*, No. CIV 20-cv-01055, 2021 U.S. Dist. LEXIS 91982, at *8 (D.N.M. May 13, 2021). The United States District Court for the District of New Mexico remanded an action filed by a passenger who was injured while embarking on an international flight in Albuquerque after finding that the Montreal Convention did not completely preempt the plaintiff’s state law claims. *Id.* at *9–10. Citing Article 29, the district court wrote that “if the Convention was read to require complete preemption, the words ‘or in contract or in tort or otherwise’ would be rendered worthless and no alternative would be available.” *Id.* at *8.

¹⁸³ *New Fortune Inc. v. Apex Logistics Int’l (CN) Ltd.*, No. 21-262-cv, 2021 U.S. App. LEXIS 34924, at *1 (2d Cir. Nov. 24, 2021).

fense asserted by the defendants.¹⁸⁴ Relying on the Supreme Court's decision in *El Al Israel Airlines, Inc. v. Tsui Yuan Tseng*, which interpreted the preemptive scope of the Warsaw Convention,¹⁸⁵ the court held that to the extent the plaintiff's claims fell within the "substantive scope" of the Montreal Convention, the Montreal Convention would preempt its claims.¹⁸⁶ Additionally, "[i]n determining whether a claim is preempted because it falls within . . . the 'substantive scope,'" the court "look[ed] to the Convention's liability provisions,' which 'describe in further detail when an activity is part of the carriage of passengers and baggage' and goods."¹⁸⁷ The court then looked at "Article 19 of the Convention, which states that '[t]he carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo,'"¹⁸⁸ and Article 18, "which provides in relevant part that a carrier is 'liable for damage sustained in the event of . . . damage to . . . cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.'"¹⁸⁹ While the plaintiff argued that its complaint was "best read as asserting claims for nonperformance [of the shipping contract], not claims for delay," the Second Circuit disagreed and found the claims preempted by the Montreal Convention.¹⁹⁰

B. CARRIERS

Litigation also continues over who is entitled to protection under the Montreal Convention. The Convention provides that:

If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.¹⁹¹

In *Meirer v. Scandinavian Airlines System*, the plaintiff brought claims against Scandinavian Airline System (SAS) and MedAire,

¹⁸⁴ *Id.* at *3.

¹⁸⁵ *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 174–75 (1999) .

¹⁸⁶ *New Fortune Inc.*, 2021 U.S. App. LEXIS 34924, at *4–5 (internal citation omitted).

¹⁸⁷ *Id.* (quoting *King v. Am. Airlines, Inc.*, 284 F.3d 352, 358 (2d Cir. 2002)).

¹⁸⁸ *Id.* at *5 (quoting Montreal Convention, *supra* note 175, at art. 19).

¹⁸⁹ *Id.* (quoting Montreal Convention, *supra* note 175, at art. 18).

¹⁹⁰ *Id.* at *5–6.

¹⁹¹ Montreal Convention, *supra* note 175, at art. 30.

Inc. after “suffer[ing] a stroke while on-board SAS flight 936 from San Francisco, California to Copenhagen, Denmark.”¹⁹² He alleged “that the SAS flight crew initially assured him” that they would divert to Iceland” but later “rescinded that decision” after receiving remote medical advice from MedAire.¹⁹³ In a motion to dismiss, MedAire argued that “courts have extended [the Convention’s] protection to independent contractors” of carriers.¹⁹⁴ The court granted MedAire’s motion after finding that

[a]lthough Meirer does not allege that MedAire was SAS’s agent, he does allege that “MedAire and SAS acted together and in concert to cause a single result to Mr. Meirer,” the harm he allegedly suffered on the flight. He also alleges that “MedAire had a relationship to provide its purported professional flight operational advice for the benefit of the airline’s passengers, including” Meirer. The facts describing MedAire’s conduct during the flight, as alleged, also support a conclusion that it is entitled to the protections of the Montreal Convention.¹⁹⁵

In contrast, in *Pesa v. Scandinavian Airlines System*, the plaintiff sought to hold SAS and Scandinavian Airlines of North America, Inc. (SANA) strictly liable under the Montreal Convention for alleged injuries that occurred during transit from Stockholm to Croatia.¹⁹⁶ The plaintiff alleged that she tripped, fell, and blacked out during her layover in Stockholm after SAS boarding agents declined her request for wheelchair assistance for her flight to Croatia, during which she claims to have continued to experience pain.¹⁹⁷ The court granted SANA’s motion to dismiss for failure to state a claim on the basis that only an “air carrier” can be strictly liable under Article 17 of the Montreal Convention: the plaintiff’s complaint did not allege that SANA, which is a mere subsidiary of SAS, is an “air carrier;” thus, SANA could not be strictly liable under the Montreal Convention.¹⁹⁸ The district court also found that even if SANA was an air carrier, there was no allegation “that SANA contributed in any way

¹⁹² Meirer v. Scandinavian Airlines Sys., No. 20-cv-05762-JSW, 2021 U.S. Dist. LEXIS 8692, at *2 (N.D. Cal. Jan. 15, 2021).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at *12.

¹⁹⁵ *Id.* at *12–13 (internal citations omitted).

¹⁹⁶ *Pesa v. Scandinavian Airlines Sys.*, No. 19-cv-20415 (BRM) (JSA), 2021 U.S. Dist. LEXIS 80706, at *4–6 (D.N.J. Apr. 27, 2021).

¹⁹⁷ *Id.* at *4–5.

¹⁹⁸ *Id.* at *23–25.

to an injury-causing accident that subjects it to liability under the Montreal Convention.”¹⁹⁹

Pesa is also notable for confirming existing precedent that Article 33 of the Montreal Convention, which lists the State Party territories in which claims may be brought under the Convention, provides for subject matter jurisdiction in a state only; it does not create a basis for personal jurisdiction within a particular state of the United States.²⁰⁰ Thus, the district court granted SAS’s motion to dismiss for lack of personal jurisdiction after finding that it lacked specific jurisdiction over SAS under due process minimum-contacts analysis.²⁰¹

XII. CYBER-ATTACKS

The aviation industry has seen an increasing level of cyber-crime since the COVID-19 pandemic began. The European Organisation for the Safety of Air Navigation, commonly known as Eurocontrol, issued a “Think Paper” report on July 5, 2021, which found that there was a 530% increase in cyber-attacks against the aviation industry that were reported to or identified by the organization in 2020 as compared to 2019.²⁰² Other findings included that airlines, in particular, continue to be a large target for cybercriminals, “with around \$1 billion a year lost from fraudulent websites alone.”²⁰³ Furthermore, according to the report, the aviation industry faces a ransomware attack every week, with a significant impact on productivity and business continuity.²⁰⁴

While Eurocontrol’s “Think Paper” applied to European aviation entities, Airports Council International (ACI), which represents the collective interests of airports around the world, also released an article in July 2021 commenting on cybersecurity.²⁰⁵ In a survey of more than one hundred airports, “84.6% of the

¹⁹⁹ *Id.* at *24 (internal citation omitted).

²⁰⁰ *Id.* at *15–17.

²⁰¹ *Id.* at *22.

²⁰² *Think Paper #12: Aviation Under Attack*, EUROCONTROL (July 5, 2021), <https://www.eurocontrol.int/sites/default/files/2021-07/eurocontrol-think-paper-12-aviation-under-cyber-attack.pdf> [<https://perma.cc/L8GU-LBZ9>].

²⁰³ *Id.* The report stated that “61% of all identified cyberattacks in 2020 targeted airlines”; 16% targeted manufacturers; and 15% targeted airports. *Id.*

²⁰⁴ *Id.*

²⁰⁵ See Kesang Ukyab, *Are Cyber Attacks the Next Big Thing: Improving Cybersecurity at Airports*, ACI INSIGHTS (July 19, 2021), <https://blog.aci.aero/are-cyber-attacks-the-next-big-thing-improving-cybersecurity-at-airports/> [<https://perma.cc/N7FQ-XUHX>].

respondents stated that they had a cybersecurity policy in place at their airport[]s and 61.5% confirmed that they had been targeted by cyberattacks” in 2020.²⁰⁶ ACI outlined various measures that are being taken to combat this risk, including a nonexclusive cooperation agreement between ACI World and Airbus “with an intent to assist airport members to maintain and improve their cybersecurity resilience.”²⁰⁷ However, “ACI recognizes that cybersecurity is a cross industry challenge with multiparty cooperation required to tackle it.”²⁰⁸

One of the largest attacks was announced on March 4, 2021, when SITA, a specialist in air transport communications and information technology, “confirm[ed] that it was the victim of a cyber-attack, leading to a security incident” involving data that was stored on servers which operated passenger processing systems for airlines.²⁰⁹ Star Alliance and Oneworld member airlines were among those affected.²¹⁰

On October 26, 2021, the agenda before the House of Representatives included a session on “Transportation Cybersecurity: Protecting Planes, Trains, and Pipelines From Cyber Threats.”²¹¹ During Chairwoman Watson Coleman’s opening statement, while warning of the severity of the threat of a hacked plane “fall[ing] from the sky,” she indicated that while many operators employ best practices, there is “no substitute for mandatory transportation cybersecurity requirements.”²¹²

XIII. SUSTAINABILITY

On September 9, 2021, President Biden issued a statement endeavoring to “coordinate leadership and innovation . . . to advance the use of cleaner and more sustainable fuels in Ameri-

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *SITA Statement About Security Incident*, SITA (Mar. 4, 2021), <https://www.sita.aero/pressroom/news-releases/sita-statement-about-security-incident/> [<https://perma.cc/9VBA-A4RW>].

²¹⁰ Robert Silk, *Widespread Data Breach Exposes Numerous Airlines*, TRAVEL WKLY. (Mar. 5, 2021), <https://www.travelweekly.com/Travel-News/Airline-News/Widespread-data-breach-exposes-numerous-airlines> [<https://perma.cc/3KH4-38ZX>].

²¹¹ *Transportation Cybersecurity: Protecting Planes, Trains, and Pipelines from Cyber Threats Before the Subcomm. on Cybersecurity, Infrastructure Prot., & Innovation and Subcomm. on Transp. & Mar. Sec.*, 117th Cong. (2021).

²¹² *Id.* (statement of Rep. Bonnie Watson Coleman, Chairwoman, Subcomm. on Transp. & Mar. Sec.).

can aviation.”²¹³ The report indicated that at the time of its release, “aviation (including all non-military flights within and departing from the United States) represents 11% of United States transportation-related emissions.”²¹⁴ Among other actions, the announcement included a “Sustainable Aviation Fuel Grand Challenge to inspire the dramatic increase in the production of sustainable aviation fuels to at least 3 billion gallons per year by 2030” and “[e]fforts to improve air traffic and airport efficiency.” The notice previewed that an aviation climate-action plan would be forthcoming.²¹⁵

The aviation industry is making strides to increase the environmental sustainability of the industry. Boeing released its inaugural Sustainability Report in 2021, whereby Boeing committed to make certain that its “commercial airplanes will be certified to safely fly on 100% sustainable aviation fuels by 2030.”²¹⁶ Airbus has released a similar goal in aiming to “bring zero-emission commercial aircraft to market by 2035.”²¹⁷ In September 2021, United Airlines “committed to investing in and purchasing 1.5 billion gallons of SAF [sustainable aviation fuel] from Alder Fuels,” allegedly the “largest publicly announced SAF agreement in aviation history.”²¹⁸ Other major airlines have also focused on environmental sustainability with long-term goals and initiatives outlined on their websites.²¹⁹ The FAA is

²¹³ *FACT SHEET: Biden Administration Advances the Future of Sustainable Fuels in American Aviation*, WHITE HOUSE: BRIEFING ROOM (Sept. 9, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/09/fact-sheet-biden-administration-advances-the-future-of-sustainable-fuels-in-american-aviation/> [https://perma.cc/H7Y7-Z97S].

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ David L. Calhoun, *2021 Sustainability Report*, BOEING CO. 3 (2021), https://www.boeing.com/resources/boeingdotcom/principles/sustainability/assets/data/2021_Boeing_Sustainability_Report.pdf [https://perma.cc/T3NA-RUR7].

²¹⁷ See *Sustainability Commitments*, AIRBUS (2022), <https://www.airbus.com/en/sustainability/sustainability-commitments> [https://perma.cc/B5T2-U2W7].

²¹⁸ *Our Environmental Commitment*, UNITED (2021), <https://www.united.com/ual/en/us/fly/company/global-citizenship/environment.html> [https://perma.cc/TV74-5A6Q]. This is part of a joint investment with Honeywell. See *Taking Off Soon: A New Kind of Sustainable Aviation Fuel (SAF)*, HONEYWELL (2022), <https://www.honeywell.com/us/en/news/2021/09/taking-off-soon-a-new-kind-of-sustainable-aviation-fuel-saf> [https://perma.cc/M6WH-QKNT].

²¹⁹ See, e.g., *Southwest Airlines Joins Vision 2045 Campaign to Highlight Environmental Sustainability Efforts*, SOUTHWEST AIRLINES, <https://www.swamedia.com/channels/content/channel-82cbf944d0e782c7bbd20a7225fe5efc> [https://perma.cc/67TP-6LUL] (Feb. 16, 2022); *Carbon Neutral from March 2020 Onward*, DELTA, <https://www.delta.com/us/en/about-delta/sustainability> [https://perma.cc/

also providing eligible airports with grants “to develop comprehensive sustainability planning documents.”²²⁰

On November 9, 2021, Airbus performed a “long-haul demonstration of formation flight in general air traffic (GAT) regulated transatlantic airspace with two A350 aircraft flying at three kilometers apart from Toulouse, France to Montreal, Canada.”²²¹ “Over 6 tons of CO₂ emissions were saved on the trip.”²²² On December 1, 2021, in partnership with Boeing, CFM International, Virent, and World Energy, United Airlines flew the first passenger flight using 100% sustainable aviation fuel from Chicago O’Hare International Airport to Ronald Reagan National Airport.²²³

XIV. UNMANNED SYSTEMS

A. OPERATION OF SMALL UNMANNED AIRCRAFT SYSTEMS OVER PEOPLE

The FAA has recently updated its rules governing small unmanned aircraft:

In June 2016, the FAA published remote pilot certification and operating rules for civil small unmanned aircraft weighing less than 55 pounds. Those rules did not permit small unmanned aircraft operations at night or over people without a waiver. On February 13, 2019, the FAA issued a notice of proposed rulemaking (NPRM) titled Operation of Small Unmanned Aircraft Systems over People, which proposed to modify these regulations. . . .²²⁴

4AGB-B5AW]; *Sustainability: A World Worth Traveling Is a World Worth Protecting, Net Zero Carbon Emissions by 2050*, AM. AIRLINES, <https://www.aa.com/i18n/customer-service/about-us/sustainability.jsp> [<https://perma.cc/GN3X-AMFT>].

²²⁰ *Airport Sustainability – Airports*, FAA <https://www.faa.gov/airports/environmental/sustainability/> [<https://perma.cc/L2UN-GRGB>] (Oct. 27, 2021, 6:19 PM).

²²¹ *Airbus and Its Partners Demonstrate How Sharing the Skies Can Save Airlines Fuel and Reduce CO₂ Emissions*, AIRBUS (Nov. 9, 2021), <https://www.airbus.com/en/newsroom/press-releases/2021-11-airbus-and-its-partners-demonstrate-how-sharing-the-skies-can-save> [<https://perma.cc/6LWF-VZVV>].

²²² *Id.*

²²³ *United to Become First in Aviation History to Fly Aircraft Full of Passengers Using 100% Sustainable Fuel*, UNITED (Dec. 1, 2021), <https://www.united.com/en/us/newsroom/announcements/united-to-become-first-in-aviation-history-to-fly-aircraft-full-of-passengers-using-100-sustainable-fuel> [<https://perma.cc/H3WT-LCQJ>].

²²⁴ *See* Operation of Small Unmanned Aircraft Systems Over People, 84 Fed. Reg. 3856 (proposed Feb. 13, 2019) (to be codified at 14 C.F.R. pt. 107).

According to the FAA, the final rule was an “incremental step towards further integration of unmanned aircraft (UA) in the National Airspace System.”²²⁵

“The rule was published in the Federal Register on January 15, 2021. Corrections to the final rule were published in the Federal Register on March 10, 2021 delaying the effective date from March 16, 2021 to April 21, 2021.”²²⁶ The final rule allows “routine operations of small unmanned aircraft over people, moving vehicles, and at night under certain conditions.”²²⁷ The two conditions for operating at night are: “[First,] [t]he remote pilot in command must complete an updated initial knowledge test or online recurrent training, and [second,] [t]he small unmanned aircraft must have lighted anti-collision lighting visible for at least three [] statute miles that has a flash rate sufficient to avoid a collision.”²²⁸ “The rule will eliminate the need for typical operations to receive individual [14 C.F.R.] part 107 certificate of waivers from the FAA.”²²⁹ “It also changes the recurrent training framework, expands the list of persons who may request the presentation of a remote pilot certificate, and makes other minor changes.”²³⁰

B. REMOTE IDENTIFICATION OF UNMANNED AIRCRAFT SYSTEMS

“The final rule on [the remote identification of unmanned aircraft systems] will require most drones operating in US airspace to have remote ID capability,” which “will provide information about drones in flight, such as the identity, location, and altitude of the drone and its control station or take-off location. Authorized individuals from public safety organizations may request [the] identity of the drone’s owner from the FAA.”²³¹ Drone pilots will be able to meet the identification requirements of the remote ID rule in at least three ways: operate a Standard Remote ID Drone, operate a drone with a remote ID broadcast module, or operate (without remote ID equipment) at FAA-rec-

²²⁵ *Operations Over People General Overview*, FAA, https://www.faa.gov/uas/commercial_operators/operations_over_people/ [https://perma.cc/CL54-267C] (Nov. 17, 2021, 9:02 AM).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *UAS Remote Identification Overview*, FAA, https://www.faa.gov/uas/getting_started/remote_id/ [https://perma.cc/XMW8-YSK2] (Oct. 13, 2021, 12:06 PM).

ognized identification areas (FRIAs).²³² Both a Standard Remote ID Drone and a drone with a remote ID broadcast module must transmit “[a] unique identifier for the drone; . . . [t]he drone’s latitude, longitude, geometric altitude, and velocity; . . . [a]n indication of the latitude, longitude, and geometric altitude of control station (standard) or take-off location (broadcast module); . . . [and] a time mark.”²³³ A Standard Remote ID Drone must also transmit emergency status.²³⁴

While “[a]lmost all of the final rule[s] on remote ID [became] effective April 21, 2021,” the “subpart covering the process for FRIA applications” will become effective September 16, 2022.²³⁵ Drone manufacturers must comply with the final rule’s requirements by September 16, 2022.²³⁶ One year later, on September 16, 2023, “[a]ll drone pilots must meet the operating requirements of [14 C.F.R.] part 89. For most operators this will mean flying a Standard Remote ID Drone, equipping with a broadcast module, or flying at a FRIA.”²³⁷

On August 4, 2021, a drone retailer filed a brief in the United States Court of Appeals for the District of Columbia Circuit arguing that Remote ID infringes upon a reasonable expectation of privacy and requesting that the court overturn the rule.²³⁸ The brief acknowledged that Remote ID can be appropriate when tied to “legitimate safety and security concerns,” but said the final rule goes beyond this and the limits of the law.²³⁹ The summary of the argument was that the “FAA flagrantly disregarded mandates from Congress, ignored material comments, including failure to provide any actual safety justification or authority for the rulemaking, implemented changes not logically flowing from the NPRM [Notice of Proposed Rulemaking] thereby circumventing required notice and comment, and trampled Fourth Amendment rights.”²⁴⁰

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Brief of Petitioners at 20, *Brennan v. Dickson*, No. 21-1087 (D.C. Cir. Aug. 4, 2021); *see also FAA Legal Battle – Challenging Remote ID*, RACE DAY QUADS (2022), <https://www.racedayquads.com/pages/faa-legal-battle-to-save-fpv> [https://perma.cc/3C9W-85BM].

²³⁹ Brief for Petitioners, *supra* note 238, at 20.

²⁴⁰ *Id.* at 14.

On October 4, 2021, the FAA filed its response.²⁴¹ The FAA stated that “Congress required [it] to issue regulations . . . to enable the remote identification of operators and owners of unmanned aircraft systems and associated unmanned aircraft.”²⁴² Among other arguments, the FAA alleged that the final rule does not violate a reasonable expectation of privacy and was a logical outgrowth of the proposed rule.²⁴³ Oral argument was held on December 15, 2021.²⁴⁴

XV. 5G

The FAA has raised concerns about fifth generation technology (5G) standards for cellular networks because 5G services use frequencies in a radio spectrum that “can be close to those used by radio altimeters, an important piece of safety equipment in aircraft.”²⁴⁵ Therefore, the FAA is currently “working to ensure that radio signals from newly activated wireless telecommunications systems can coexist safely with flight operations in the United States, with input from the aviation sector and telecommunications industry.”²⁴⁶ On January 28, 2022, the FAA issued a statement saying that: “Through continued technical collaboration, the FAA, Verizon, and AT&T have agreed on steps that will enable more aircraft to safely use key airports while also enabling more towers to deploy 5G service.”²⁴⁷ In the meantime, the FAA will “continue[] to work with helicopter operators and others in the aviation community” on related safety issues.²⁴⁸

XVI. SPACE EXPLORATION

While human beings have been venturing into space for decades, there have been and continue to be numerous advancements and initiatives for sending humans and robots beyond Low Earth Orbit, and mankind is generally learning more about

²⁴¹ See Brief for Respondents, *Brennan v. Dickson*, No. 21-1087 (D.C. Cir. Oct. 4, 2021).

²⁴² *Id.* at 17.

²⁴³ See *id.* at 23, 50, 55.

²⁴⁴ Courtroom Minutes of Oral Argument, *Brennan v. Dickson*, No. 21-1087 (D.C. Cir. Dec. 15, 2021).

²⁴⁵ *5G and Aviation Safety*, FAA, <https://www.faa.gov/5g> [<https://perma.cc/DG54-7DXC>] (Feb. 23, 2022).

²⁴⁶ *Id.*

²⁴⁷ *FAA Statements on 5G*, FAA (Feb. 23, 2022), <https://www.faa.gov/newsroom/faa-statements-5g> [<https://perma.cc/3F2V-92TX>].

²⁴⁸ *Id.*

the universe and solar system.²⁴⁹ While new advancements, hurdles, and ideas are occurring every day,²⁵⁰ described below are some of the larger ongoing projects involving passenger space travel.

A. PASSENGER SPACE FLIGHTS

SpaceX's Starship spacecraft is meant to be "a fully reusable transportation system designed to carry both crew and cargo to Earth orbit, the Moon, Mars, and beyond."²⁵¹ According to SpaceX, "Starship will be the world's most powerful launch vehicle ever developed, with the ability to carry in excess of 100 metric tonnes to Earth orbit."²⁵²

The first private lunar civilian orbital mission is planned to take place in 2023.²⁵³ "In 2018, Japanese entrepreneur Yusaku Maezawa purchased all the seats aboard this rocket," and created a project called dearMoon where eight individuals could apply for free passage aboard this week-long expedition.²⁵⁴

²⁴⁹ See *The History of Space Exploration*, NAT'L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/history-space-exploration> [<https://perma.cc/G4T2-GNK2>]. Other developments include "NASA's Double Asteroid Redirection Test (DART), the world's first full-scale mission to test technology for defending Earth against potential asteroid or comet hazards," which launched on November 24, 2021, on "a SpaceX Falcon 9 rocket from Space Launch Complex 4 East at Vandenberg Space Force Base in California." See NASA, *SpaceX Launch DART: First Test Mission to Defend Planet Earth*, NASA (Nov. 24, 2021), <https://www.nasa.gov/press-release/nasa-spacex-launch-dart-first-test-mission-to-defend-planet-earth> [<https://perma.cc/FAQ5-PYEZ>]. Also, the James Webb Space Telescope, an international collaboration between NASA, the European Space Agency (ESA), and the Canadian Space Agency (CSA), and NASA's largest and most powerful space science telescope was launched in December 2021 "from Arianespace's ELA-3 launch complex at Europe's Spaceport located near Kourou, French Guiana" on an Ariane 5 rocket. *James Webb Space Telescope*, NASA, <https://jwst.nasa.gov/content/about/launch.html> [<https://perma.cc/QY2S-BY3Y>]; see also James Webb Space Telescope, *Webb Launched Successful! Track: Where Is Webb?*, NASA (Dec. 25, 2021, 7:20 AM), <https://jwst.nasa.gov/content/webbLaunch/countdown.html> [<https://perma.cc/ZLG7-GJ9H>].

²⁵⁰ See, e.g., *Our Solar System*, NASA PLANETARY SCI. DIV., <https://solarsystem.nasa.gov/solar-system/our-solar-system/overview/> [<https://perma.cc/R5D6-YR72>].

²⁵¹ *Flight Test: Starship SN15*, SPACEX, <https://www.spacex.com/vehicles/starship/> [<https://perma.cc/DHZ2-6VLU>].

²⁵² *Id.*

²⁵³ *Schedule (TBC)*, DEARMOON (2021), <https://dearmoon.earth/schedule.html> [<https://perma.cc/HLX9-CVSK>].

²⁵⁴ See *8 Crew Members Wanted! For the Mission to the Moon in 2023*, DEARMOON (2021), <https://dearmoon.earth/> [<https://perma.cc/L2RR-YRLW>]. The crew was selected by the end of June 2021. See DEARMOON, *supra* note 253.

Similarly, other companies, such as Boeing, have been attempting to build spacecraft in collaboration with NASA's Commercial Crew Program. Boeing's Starliner "was designed to accommodate seven passengers, or a mix of crew and cargo, for missions to low-Earth orbit."²⁵⁵ While Boeing was initially set to complete its second Orbital Flight Test (OFT-2) in 2021, due to an investigation of the oxidizer isolation valve issue on the Starliner service module propulsion system, it has been delayed pending completion of the investigation.²⁵⁶

However, as space tourism becomes more of a reality, it may also pose many critical legal issues which have yet to be addressed. The FAA requires that a space vehicle operator must inform any space flight participant of the risks associated with launch and reentry, and must receive the participant's written consent.²⁵⁷ While the Office of Commercial Space Transportation is responsible for enforcing these informed-consent requirements, it is prohibited by the Commercial Space Launch and Amendment Act from imposing any further safety requirements on space tourism.²⁵⁸ This prohibition, which was originally set to expire in 2012, was eventually extended through October 1, 2023, under the Commercial Space Launch Competitiveness Act of 2015.²⁵⁹

²⁵⁵ *CST-100 Starliner: A 21st Century Space Capsule*, BOEING, <https://www.boeing.com/space/starliner/> [https://perma.cc/E48A-XQT9].

²⁵⁶ *NASA, Boeing Prepare to Replace Starliner Service Modules Ahead of Upcoming Orbital Flight Test-2*, BOEING (Jan. 18, 2022), <https://starlinerupdates.com/> [https://perma.cc/F2KE-E2T8].

²⁵⁷ 14 C.F.R. § 460.45 (2015).

²⁵⁸ *See* U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, § 111(4), 129 Stat. 704, 709 (2015).

²⁵⁹ *See id.* § 111(9).