

2023

Deregulating Consumers from the Airline Industry—DOT's Proposed Rule in Response to U.S. Airlines' Refusal to Refund Unused Tickets During COVID-19

Alicia L. Hinton
San Joaquin College of Law

Author(s) ORCID Identifier:

Alicia L. Hinton:  <https://orcid.org/0009-0001-2449-1073>

Diana HyunJin Malcolm
San Joaquin College of Law

Author(s) ORCID Identifier:

Alicia L. Hinton:  <https://orcid.org/0009-0001-2449-1073>

Recommended Citation

Alicia L. Hinton et al., *Deregulating Consumers from the Airline Industry—DOT's Proposed Rule in Response to U.S. Airlines' Refusal to Refund Unused Tickets During COVID-19*, 88 J. AIR L. & COM. 433 (2023)

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**DEREGULATING CONSUMERS FROM THE AIRLINE
INDUSTRY—DOT’S PROPOSED RULE IN RESPONSE
TO U.S. AIRLINES’ REFUSAL TO REFUND UNUSED
TICKETS DURING COVID-19**

ALICIA L. HINTON, ESQ.* AND DIANA HYUNJIN MALCOLM**

ABSTRACT

The COVID-19 pandemic has resulted in significant delays and cancellation of airline tickets without proper refunds to consumers by U.S. airlines. In response to an unprecedented number of consumer complaints, in August 2022, the Department of Transportation (Department or DOT) proposed new rules regarding airline ticket refunds and consumer protections.¹ Does this rule go far enough?

This article provides a summary of the events and policy changes leading up to the Airline Deregulation Act (ADA) of 1978 and challenges the scope of federal preemption over the field of airline regulation that has created a boon to air carriers while essentially eliminating consumers as a market influencer. A review of court opinions since the enactment of the ADA shows an ongoing struggle with the scope of preemption and

DOI: <https://doi.org/10.25172/jalc.88.2.3>

* Adjunct Professor, San Joaquin College of Law; J.D., San Joaquin College of Law, May 2009; M.A. in Conflict Resolution and Peacemaking, Fresno Pacific University, December 2008; and California consumer law attorney.

** B.A., Ewha Women’s University, 2014 (Seoul, South Korea); J.D. May 2023, San Joaquin College of Law.

¹ Airline Ticket Refunds and Consumer Protections, 87 Fed. Reg. 51,550, 51550 (proposed Aug. 22, 2022) (to be codified at _____.) (“The U.S. Department of Transportation (Department or DOT) is proposing to codify its long-standing interpretation that it is an unfair business practice for a U.S. air carrier, a foreign air carrier, or a ticket agent to refuse to provide requested refunds to consumers when a carrier has cancelled or made a significant change to a scheduled flight to, from, or within the United States, and consumers found the alternative transportation offered by the carrier or the ticket agent to be unacceptable.”)

tenuous carve-outs for private rights of action. The role and effectiveness of DOT is evaluated in light of airlines refusal to comply with DOT requirements to provide ticket refunds for cancelled flights during COVID. This article also suggests ways to increase airline accountability for compliance with airline refund policies and increase protection of consumer rights by empowering consumers to bring private actions against airlines.

TABLE OF CONTENTS

| | | |
|------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| I. | INTRODUCTION..... | 435 |
| II. | REGULATION AND DEREGULATION OF THE AIRLINE INDUSTRY | 437 |
| | A. THE AIR COMMERCE ACT OF 1926 AND CIVIL AERONAUTICS ACT OF 1938 | 437 |
| | B. THE FEDERAL AVIATION ACT OF 1958 | 437 |
| | C. THE DEPARTMENT OF TRANSPORTATION WAS CREATED IN 1966 | 438 |
| | D. THE AIRLINE DEREGULATION ACT OF 1978 AND ITS SAVINGS CLAUSE | 438 |
| | E. EXPANDING FEDERAL PREEMPTION OVER REGULATIONS “RELATING TO” AIRLINE RATES, ROUTES, OR SERVICES LEAVES ENFORCEMENT TO THE DEPARTMENT OF TRANSPORTATION | 439 |
| III. | THE DEPARTMENT OF TRANSPORTATION’S NEW AIRLINE REFUND REGULATION | 443 |
| | A. DOT’S AIRLINE TICKET REFUND POLICY..... | 443 |
| | B. AIRLINE REFUND REFUSALS BECAME THE NO. 1 COMPLAINT TO DOT DURING COVID-19 | 444 |
| | C. AIRLINES SOUGHT TO MITIGATE LOST PROFITS FROM FLIGHT CANCELLATION FEES DURING COVID-19 BY VIOLATING DOT’S TICKET REFUND POLICIES..... | 446 |
| | D. DOT’S ENFORCEMENT NOTICES TO AIR CARRIERS CARRY NO ENFORCEMENT POWER..... | 447 |
| | E. DOT’S PROPOSED NEW AIRLINE REFUND REGULATION | 449 |
| IV. | EXPANDING CONSUMERS’ RIGHTS TO BRING PRIVATE ACTIONS AGAINST AIRLINES SERVES THE ADA’S GOAL OF ALLOWING FREE MARKET MECHANISMS TO INFLUENCE THE AIRLINE INDUSTRY MARKETPLACE..... | 451 |

| | | |
|----|---------------------------------------------------------------------------------------------------------------------------|-----|
| A. | REQUIRE DOT’S TICKET REFUND REQUIREMENTS BE STATED EXPLICITLY ON AIRLINE’S WEBSITES AND CONTRACTS OF CARRIAGE | 453 |
| B. | BROADLY IMPOSE DOT’S REGULATIONS INTO AIRLINES’ CONTRACTS OF CARRIAGE | 454 |
| C. | RECOGNIZE THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AS A SELF-IMPOSED CONTRACTUAL OBLIGATION | 456 |
| D. | GRANT CONSUMERS A FEDERAL PRIVATE RIGHT OF ACTION TO HOLD AIRLINES ACCOUNTABLE UNDER DOT’S REGULATIONS | 459 |
| V. | SUMMARY | 463 |

I. INTRODUCTION

TICKET REFUNDS HAVE BECOME a high-priced and disruptive problem for airline consumers during the COVID-19 pandemic. Many flights were delayed or even cancelled due to overbooking, shortage of staff, and unpredictable COVID outbreaks worldwide. Although the problems were not caused by consumers, the burden became their liability—a liability with very little recourse.

Both the airline industry and consumers are victims of COVID. However, the airline industry was unable or unwilling to respond to the air travel crisis created by this pandemic despite its greater control, resources, and capabilities. Although ticket refund regulations and policies were already in place, unprecedented flight delays, cancellations, lack of airline staff, and inadequate systems created a financial crisis of its own and placed a heavy burden on consumers. Consumers were stranded in airports with little to no information about flight delays or cancellations and were left to fend for themselves and their families while waiting for an available flight, burdened with finding alternate transportation, or cancelling their plans altogether. Many consumers were left with no choice but to pay extra upgrade fees, to book the next flight, or pay for hotels and rental cars without the assistance of the airlines.

“[D]ifficulty obtaining a refund has been far and away the top consumer complaint to DOT since the beginning of the pandemic, though flight problems (collectively, flight cancellations, delays and misconnections) passed it in June.”² With unprece-

² Adam Minter, *Airlines Keep Gouging Passengers. Regulate Them.*, (referring to a 2022 Office of Aviation Consumer Protection Report), WASH. POST (Sept. 1,

dened problems like flight cancellations and refund issues due to COVID, DOT recently proposed revisions to the airline refund regulations to relieve consumers from the burden of obtaining a refund to which they are entitled.³ This newly proposed regulation seeks “to codify its longstanding interpretation that it is an unfair business practice for a U.S. air carrier, a foreign air carrier, or a ticket agent to refuse to provide requested refunds to consumers when a carrier has cancelled or made a significant change to a scheduled flight” if requested by a consumer.⁴

PART II of this article provides a summary of the events and policy changes leading up to the Airline Deregulation Act, federal preemption, and resulting boon to the airline industry at the expense of consumers (even during the pandemic). PART III reviews the role of DOT, provides an overview of current airline ticket refund policies, the impact of COVID on consumer complaints and the response of airlines in violation of DOT’s ticket refund rules, DOT’s response, and an analysis of the benefits and limitations of DOT’s newly proposed airline refund regulation. PART IV offers ways to expand the role of consumers as market influencers by (1) requiring airlines to incorporate DOT’s new refund policy into their contract of carriage or website; (2) imposing DOT’s regulations into air carrier’s contracts of carriage; (3) recognizing the implied covenant of good faith and fair dealing as a self-imposed contractual obligation; and (4) granting consumers a federal private right of action to hold airlines accountable to DOT’s regulations.

This article does not focus on safety or a private right of action for personal injury in the airline industry. Instead, the focus of this article is on consumer rights. A “consumer” is generally defined under state and federal law as an individual who purchases or leases goods or services for family, household, or personal use from a retail seller in the business.⁵

2022, 2:59 PM), https://www.washingtonpost.com/business/airlines-keep-gouging-passengers-regulate-them/2022/09/01/0af090ca-29e6-11ed-a90a-fce4015dfc8f_story.html [<https://perma.cc/E64F-K3QD>]; see U.S. DEP’T OF TRANSP., THE OFFICE OF AVIATION CONSUMER PROTECTION, Air Travel Consumer Report (August 2022) (Consumer Complaints, Table 2 at p. 56, <https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports>).

³ See Airline Ticket Refunds and Consumer Protection, 87 Fed. Reg. at 51,550.

⁴ *Id.*

⁵ See 12 C.F.R. § 1016.3(1) (2012); 15 U.S.C. § 2301(3); 15 U.S.C. § 1602(h).

II. REGULATION AND DEREGULATION OF THE AIRLINE INDUSTRY

This section reviews the development of federal government regulation and subsequent deregulation of the airline transportation industry from the 1920s to the present. This section also reflects upon the expansion of federal preemption over the field and the creation of DOT as the sole arbiter of air carrier compliance with its regulation of rates, routes, and services to the near-complete exclusion of consumers' rights to individually challenge air carriers unfair and deceptive practices.

A. THE AIR COMMERCE ACT OF 1926 AND CIVIL AERONAUTICS ACT OF 1938

The Air Commerce Act was enacted in 1926 as the first federal regulation of civil aviation.⁶ This was followed by the passage of the Civil Aeronautics Act of 1938 to meet the then-existing need for coordinated government regulation of a greatly expanding airline transportation industry.⁷ The Act created the Civil Aeronautics Authority⁸ to regulate aviation services and “supervise the business practices of airlines and to prevent use of unfair business practices and unfair methods of competition.”⁹

B. THE FEDERAL AVIATION ACT OF 1958

Multiple midair collisions between military and commercial airplanes revealed an urgent need for unified control of airspace for civil and military flights in the 1950s.¹⁰ At the same time, there were increasingly heavy airline traffic jams at commercial airports and other growing pains in the airline industry.¹¹ In response, the Federal Aviation Act was signed into law in 1958 and the Federal Aviation Agency was created to oversee and regulate safety in the airline industry.¹² Importantly, the Federal Aviation Act contained a savings provision which pre-

⁶ See Clinton M. Hester, *The Civil Aeronautics Act of 1938*, 9 J. AIR L. & COM. 451, 451 (1938).

⁷ See *id.* at 452.

⁸ See *id.* at 453 (showing it was renamed to the Civil Aeronautics Board in 1940).

⁹ *Id.* at 454.

¹⁰ *A Brief History of the FAA*, FED. AVIATION ADMIN., https://www.faa.gov/about/history/brief_history [<https://perma.cc/2X3F-N8Z8>].

¹¹ See *id.*

¹² Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 731; *Air Line Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960).

served preexisting state statutory and common law remedies.¹³ “Thus states could continue to regulate *intrastate* airfares and enforce their own laws against deceptive trade practices.”¹⁴

C. THE DEPARTMENT OF TRANSPORTATION WAS CREATED IN 1966

In response to concerns about the lack of a coordinated transportation system across all transportation modes, in 1966, Congress created a new Department of Transportation under which the Federal Aviation Agency (FAA)¹⁵ became one of several transportation model organizations.¹⁶ The primary objectives of DOT were to develop efficient, convenient, safe, and low-cost transportation to meet public need.¹⁷ Throughout the late 1950s and 1960s, the FAA was tasked with handling the scheduling delays created by a 112% increase in the number of aircraft operations monitored by FAA air traffic control towers that had cost air carriers millions of dollars and caused extensive passenger inconvenience and expense.¹⁸

D. THE AIRLINE DEREGULATION ACT OF 1978 AND ITS SAVINGS CLAUSE

Until 1978, the federal government determined airline rates, routes, and terms of service similar to how it determined public utilities, resulting in high airline travel costs. “The Airline Deregulation Act of 1978 phased out the government’s control over fares and service and allowed market forces to determine the price and level of domestic airline service in the United

¹³ See *Martin v. DHL Express (USA), Inc.*, 580 F. Supp. 3d 66, 70–71 (D.N.J. 2022) (citing *Northwest, Inc. v. Ginsburg*, 572 U.S. 273, 279–80 (2014)).

¹⁴ *Trinidad v. Am. Airlines, Inc.*, 932 F. Supp. 521, 524 (S.D.N.Y. 1996) (emphasis added).

¹⁵ See *A Brief History of FAA*, *supra* note 10 (explaining that it was subsequently named Federal Aviation Administration).

¹⁶ Robert D. Schuler, *The Effects of The Transportation Act of 1966*, 19 ADMIN. L. REV. 384, 384 (1967); see also Alan S. Boyd, *The United States Department of Transportation*, 33 J. AIR L. & COM. 225, 229 (1967) (explaining that Congress merged multiple diverse programs, 92,000 employees, and an annual budget of close to six billion dollars under DOT).

¹⁷ John A. Volpe, *Department of Transportation and the Consumer*, 8 SAN DIEGO L. REV. 4, 5 (1971) (citing Department of Transportation Act 49 U.S.C. § 1651(2) (1966)) (“The development of efficient, convenient, safe and low cost transportation to fulfill the needs of the user public is a basic objective of the Department and was a declared purpose of the Congress in establishing the Department.”).

¹⁸ *A Brief History of the FAA*, *supra* note 10.

States.”¹⁹ “Airline deregulation was premised on an expectation that an unregulated industry would attract entry [by new air carriers] and increase competition among airlines” resulting in lower fares and better services.²⁰ The result was that airlines could fly where they wanted, increase efficiency, modify services, and charge what the market would bear.

Despite this deregulation, the ADA preserved federal preemption over any law “related to a price, route, or service of an air carrier” with regard to *interstate* air transportation—maintaining regulatory control in a newly deregulated industry.²¹ Notably, the ADA did not eliminate the preexisting savings clause of the 1958 Federal Aviation Act preserving state statutory and common law remedies.²² As late as 1996, a New York district court recognized that “[t]he ADA did not alter or repeal the FAA’s [*intrastate*] saving clause.”²³

E. EXPANDING FEDERAL PREEMPTION OVER REGULATIONS
“RELATING TO” AIRLINE RATES, ROUTES, OR SERVICES
LEAVES ENFORCEMENT TO THE DEPARTMENT
OF TRANSPORTATION

Near extinction of consumer rights in the airline industry began with the ADA insertion of § 105 to the Federal Aviation Act of 1958, 49 U.S.C. § 1305, subsequently codified at 49 U.S.C. § 41713(b)(1) as follows:

[A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law **related to a price, route, or service of an air carrier** that may provide air transportation under this subpart.²⁴

In other words, only the federal government and air carriers could make determinations affecting market prices.

¹⁹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-630, AIRLINE DEREGULATION: REREGULATING THE AIRLINE INDUSTRY WOULD LIKELY REVERSE CONSUMER BENEFITS AND NOT SAVE AIRLINE PENSIONS, 1 (2006); *see also* Airline Deregulation Act of 1978, Pub. L. No. 95-504; 92 STAT. 1705.

²⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-630, *supra* note 19, at 8.

²¹ 49 U.S.C. § 41713(b)(1); *see also* U.S. CONST. art. VI, cl. 2; *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 366 (3d Cir. 1999).

²² Airline Deregulation Act of 1978, Pub. L. No. 95-504, §105(a)(1), 92 Stat. 1705, 1708 (later codified at 49 U.S.C. § 1305).

²³ *Trinidad v. Am. Airlines, Inc.*, 932 F. Supp. 521, 524 (S.D.N.Y. 1996) (emphasis added).

²⁴ § 41713(b)(1) (emphasis added).

In 1992, the U.S. Supreme Court in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), broadened the definition of the “relate[d] to” language to include “[s]tate enforcement actions having a connection with or reference to airline ‘rates, routes, or services.’”²⁵ The Court opined that a broad degree of preemption was necessary “to ensure that the States would not undo the anticipated benefits of federal deregulation of the airline industry.”²⁶ However, three of the nine Justices dissented, including Chief Justice Rehnquist,²⁷ based on a detailed review of the legislative history of the ADA, concluding, “[i]n short, there is no indication that Congress intended to exempt airlines from state prohibitions of deceptive advertising.”²⁸ The dissent determined that:

Because Congress did not eliminate federal regulation of unfair or deceptive practices, and because state and federal prohibitions of unfair or deceptive practices had coexisted during the period of federal regulation, there is no reason to believe that Congress intended § 105(a) to immunize the airlines from state liability for engaging in deceptive or misleading advertising.²⁹

Subsequent courts have struggled with application of the breadth of the ADAs federal preemption by carving out narrow piecemeal exceptions.³⁰

²⁵ 504 U.S. at 384 (emphasis added) (referring to 49 U.S.C. § 1305(a)(1)).

²⁶ *Id.* at 374.

²⁷ *See id.* at 419 (Stevens, J., Dissenting).

²⁸ *Id.* at 423.

²⁹ *Id.* at 424 (explaining that section 105(a) of the ADA is the federal preemption provision over any state law “relating to rates, routes, or services of any air carrier”).

³⁰ *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995) (allowing breach of contract claims for an airline’s “self-imposed undertakings”); *Cont’l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 274 (Tex. 1996) (holding (1) Airline Deregulation Act does not preempt common-law personal-injury negligence claims against air carriers, and (2) the Act did not, as a matter of law, preempt all negligence claims arising out of performance meet-and-assist services); *Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 727–28 (Tex. 2019) (allowing tortious interference claims based on business dealings between two non-carriers); *Herrera v. Cathay Pacific Airways, Ltd.*, No. 20-CV-03019-JCS, 2021 WL 673448, at *11–12 (N.D. Cal. Feb. 21, 2021) (holding that a consumer’s claim for breach of contract against an airline for failure to provide a cash refund for tickets purchased for a flight cancelled due to COVID-19 was not preempted); *Id. v. British Airways PLC*, 529 F. Supp. 3d 73, 73 (S.D.N.Y., 2021) (allowing a consumer breach of contract claim for an airline’s failure to provide ticket refunds for flights cancelled due to COVID-19); *Flaster/Greenberg P.C. v. Brendan Airways, LLC*, No. 08-4333, 2009 WL 1652156, at *1 (D.N.J. June 10, 2009) (dismissing state consumer law claim and allowing breach of contract claim).

Conforming to *Morales*, in 1995, the U.S. Supreme Court in *Wolens*, also held that the ADA expressed a broad preemptive purpose over any state regulation relating to rates, routes, and services.³¹ *Wolens* then further expanded ADA preemption over the application of state consumer protection rules to private air carrier contracts, such as loyalty programs.³² Despite expanding the preemptive effect of the ADA, the Court then reconciled the savings clause and federal preemption by carving out an exception allowing for routine breach of contract claims “solely for the airline’s breach of its own, self-imposed undertakings.”³³ Justice Stevens again dissented, arguing that there is no difference between state tort law requiring an airline to honor its contractual commitments (not preempted under *Wolens*) and a state consumer law imposing a “duty not to make false statements of material fact or to conceal such facts” regarding that same contract (deemed preempted under *Wolens*).³⁴ However, Justice O’Connor also dissented, arguing that even a breach of contract claim, self-imposed or not, should be preempted because it is a contractual obligation that is necessarily governed by state law and related to rates, routes, and services.³⁵ Interestingly, Justice O’Connor would not preempt personal injury claims because, even though they are governed by state law, they are related to airline safety not airline services.³⁶

In 2020, Federal Rule 85 Fed. Reg. 78,707 was enacted “to provide regulated entities and other stakeholders clarity and certainty about what constitutes unfair and deceptive practice and DOT’s process for making such determinations in the context of aviation consumer protection rulemaking and enforcement actions.”³⁷ This rule left unchanged DOT’s sole responsibility for enforcement of air carrier violations of unfair and deceptive practices.

Between 1995 and 2020, the courts have generally held to the precedent that individuals can sue for personal injury and common law breach of contract claims for an air carrier’s self-im-

³¹ *Wolens*, 513 U.S. at 219–20.

³² *See id.* at 220.

³³ *Id.* at 220; *see also* *Northwest, Inc v. Ginsberg*, 572 U.S. 273, 284 (2014).

³⁴ *Wolens*, 513 U.S. at 236.

³⁵ *See id.* at 238–39.

³⁶ *See id.* at 242.

³⁷ *Defining Unfair or Deceptive Practices*, 85 Fed. Reg. 78,707, (Dec. 7, 2020) (to be codified at 14 C.F.R. pt. 399).

posed undertakings. However, consumer protection claims have been left almost exclusively to enforcement by DOT.

What is clear from this history is that during the infancy of the air carrier industry, as in any new industry, no one could predict the substantial growth of air traffic and the potential for conflicting and competing airspace and market forces. To resolve these issues, the federal government applied a model similar to a public utility which reduced market competition and restricted air carriers' ability to expand as they wished. However, even with deregulation, the federal government continues to play a significant role in air commerce, including DOT's "mandate to protect consumers from unfair and deceptive practices in air transportation and its sale."³⁸

DOT has authority to conduct investigations, prescribe regulations, standards, procedures, and issue orders.³⁹ The methods by which it accomplishes compliance and enforcement include warning letters, voluntary consent orders, and formal punitive enforcement actions, albeit rarely.⁴⁰ Since 2012, if determined to be in the public interest, DOT has authority to "investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."⁴¹ DOT also has authority to impose civil penalties for violation of its regulatory unfair and deceptive acts provisions,⁴² but it believes an informal enforcement policy benefits consumers more than a strictly punitive approach.⁴³ However, DOT does not have the authority to require individualized compensation for aggrieved consumers other than encouragement of compensation by an airline that voluntarily enters into a consent order.⁴⁴

Importantly for consumers, under the lax DOT enforcement standards, air carriers are free to set rates, routes, and services even if using deceptive and unfair methods, but airline passengers are preempted from suing under state or local consumer

³⁸ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 19, at 3.

³⁹ 49 U.S.C. § 40113(a).

⁴⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-109, AVIATION CONSUMER PROTECTION: INCREASED TRANSPARENCY COULD HELP BUILD CONFIDENCE IN DOT'S ENFORCEMENT APPROACH (2020).

⁴¹ 49 U.S.C. § 41712(a); 14 C.F.R. § 399.79(e)(2) (2023).

⁴² 49 U.S.C. § 46301(a); 14 C.F.R. § 383.

⁴³ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 40, at 5.

⁴⁴ *See id.* at 6.

protection laws.⁴⁵ This informal approach is seen in DOT's response to both unprecedented flight cancellations and mounting complaints about air carriers' refusal to provide ticket refunds during the COVID pandemic, by publishing reminders to air carriers that refusal to provide a refund is an unfair business practice rather than pursuing enforcement.⁴⁶ It is under this framework that we look at U.S. airlines' response to substantial reduction of profits during COVID-19 by refusing to refund tickets and DOT's response.

III. THE DEPARTMENT OF TRANSPORTATION'S NEW AIRLINE REFUND REGULATION

PART III provides an overview of DOT's current airline ticket refund policy, the impact of COVID-19 on flight cancellations, and an analysis of the benefits and limitations of DOT's newly proposed airline refund regulation.

A. DOT'S AIRLINE TICKET REFUND POLICY

"Carriers have a longstanding obligation to provide a prompt refund to a ticketed passenger when the carrier cancels the passenger's flight or makes a significant change in the flight schedule and the passenger chooses not to accept the alternative offered by the carrier."⁴⁷ This obligation does not cease if the change is outside of the carrier's control, but "rather on the fact that the cancellation is through no fault of the passenger."⁴⁸ Therefore, a consumer is entitled to a refund if the flight is cancelled or if the airline makes a "significant change" to the flight schedule.⁴⁹

Although DOT provides regulations regarding an "unfair refund practice," it left to the airlines their own interpretation of

⁴⁵ See *id.* at 5–6.

⁴⁶ U.S. DEP'T OF TRANSP., ENFORCEMENT NOTICE REGARDING REFUNDS BY CARRIERS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL I (2020), <https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%202020.pdf> [https://perma.cc/2LQL-B8YL]; U.S. DEP'T OF TRANSP., FREQUENTLY ASKED QUESTIONS REGARDING AIRLINE TICKET REFUNDS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL (2020), <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds-%20Second%20Enforcement%20Notice%20FINAL%20%28May%2012%202020%29.pdf> [https://perma.cc/9EVF-4S64].

⁴⁷ ENFORCEMENT NOTICE, *supra* note 46, at 1.

⁴⁸ *Id.* at 2.

⁴⁹ FAQ, *supra* note 46, at 1.

“a significant change in the flight” in deciding under what circumstances it would provide ticket refunds. DOT’s existing rule has not defined the terms “significant change” and “cancellation” in either a regulation or statute. Instead, it elected “not to adopt a strict standard of what constitutes a significant delay as such a delay is difficult to define”⁵⁰ and “depends on a wide variety of factors such as the length of the delay, length of the flight and the passenger’s circumstances.”⁵¹ DOT left discretion to airlines to interpret these terms resulting in inconsistencies and bias in the airlines favor.⁵² During the COVID-19 pandemic, “many carriers concluded that cancellations due to massive worldwide travel restriction were not their fault, and thus assumed flexibility in the issuance of refunds and travel credits.”⁵³

B. AIRLINE REFUND REFUSALS BECAME THE NO. 1 COMPLAINT TO DOT DURING COVID-19

During the COVID-19 pandemic, actual refunds to consumers plummeted. Understandably, “[t]he COVID-19 pandemic has resulted in significant changes to airline schedules and operations.”⁵⁴ DOT reported that during COVID “many airlines cancelled flights or significantly changed their flight schedules without providing refunds to passengers.”⁵⁵

According to an Office of Aviation Consumer Protection (OACP)⁵⁶ Report, “consumer complaints against airlines rose more than 300% above pre-pandemic levels”⁵⁷ and “obtaining a

⁵⁰ Amna Arshad, Charlie Beller & Meredith Mommers, *Balancing Travelers’ Right to Refunds and Airlines’ Right to Survival in The Age of COVID-19*, FRESHFIELDS (May 11, 2020), <http://blog.freshfields.us/post/102g71o/balancing-travelers-right-to-refunds-and-airlines-right-to-survival-in-the-age> [<https://perma.cc/L94S-4LBS>].

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.*

⁵⁴ 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 4* (2021), <https://www.transportation.gov/sites/dot.gov/files/2021-09/DOT%20Report%20on%20Airline%20Ticket%20Refunds.pdf> [<https://perma.cc/VM2B-8U9H>].

⁵⁵ *Id.*

⁵⁶ *See Aviation Consumer Protection*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/airconsumer> [<https://perma.cc/TF4X-GJR3>] (“The Office of Aviation Consumer Protection reviews and responds to consumer complaints and promotes awareness and understanding of consumer rights through online consumer information and education.”).

⁵⁷ *Air Travel Consumer Report: Consumer Complaints Against Rise More Than 300 Percent Above Pre-Pandemic Levels*, U.S. DEP’T OF TRANSP. (June 23, 2023), <https://www.transportation.gov/airconsumer>.

refund has been a far and away the top consumer complaint to the Department of Transportation since the beginning of the pandemic.”⁵⁸ “From March through May 2020, consumers filed vastly more complaints with DOT than usual in those months, many of which alleged, among other things, that airlines did not provide adequate refunds for flights cancelled as the result of the COVID-19 pandemic.”⁵⁹ In the first five months of 2020, there were 41,043 refund complaints—“a huge increase over the 3,634 total complaints and 433 refund complaints made during the same period a year before.”⁶⁰

In 2020 overall, DOT received “an unprecedented number of complaints and inquiries from ticketed passengers . . . who describe having been denied refunds for flights that were cancelled or significantly delayed.”⁶¹ DOT reported that they received:

[A] total of 102,561 consumer complaints—the highest number on record an increase of 568.4% from the prior year—and⁶²in the first half of 2021, the Department received a total of 124,918 consumer complaints . . . related to the air travel . . . [with] 84.3% [of these] complaints concern[ing] refunds.⁶³

Of the approximately 83,900 consumer refund complaints for cancelled or significant changes to flights that were received by DOT between January 1, 2020, and June 30, 2021, including passengers electing not to fly due to COVID-19 concerns, “approximately 53.2% (about 44,600 complaints) have been referred to OACP attorneys for further action.”⁶⁴ About 4.6% were closed without action.⁶⁵ Of the 46.8% complaints not referred to OACP, the report implies that the airlines voluntarily provided a remedy to consumers, but this is not clear. It is likely that some of these consumers decided not to pursue their complaints, received no resolution, or could not file an individual action due to the ADAs preemption. In effect, DOTs leniency appears to protect airlines over consumers.

www.transportation.gov/briefing-room/air-travel-consumer-report-consumer-complaints-against-airlines-rise-more-300-percent [https://perma.cc/9K8A-R59N].

⁵⁸ Minter, *supra* note 2.

⁵⁹ INCREASED TRANSPARENCY, *supra* note 40, at 11.

⁶⁰ *Id.*

⁶¹ U.S. DEP’T OF TRANSP., *supra* note 54, at 4.

⁶² *Id.* at 5.

⁶³ *Id.*

⁶⁴ U.S. DEP’T OF TRANSP., *supra* note 54, at 9.

⁶⁵ *Id.*

The 2022 data shows that consumer complaints related to ticket refunds remain the number one complaint category. In April 2022, DOT received 5,079 complaints from airline consumers, with the highest complaint category related to airline refunds at 32.3%.⁶⁶ The second highest complaint category (30.5%) was regarding “cancellations, delays, or other deviations from airlines’ schedules.”⁶⁷ In November 2022, DOT received 6,616 complaints from airline consumers with refund complaints still the highest category at 30.5%, an overall increase of 603.1% from pre-pandemic November 2019 complaints.⁶⁸ This extreme number of flight cancellations substantially reduced a secondary profit pool for air carriers, that of cancellation and ancillary fees, motivating them to avoid ticket refunds by instead offering vouchers or refusing refunds altogether.

C. AIRLINES SOUGHT TO MITIGATE LOST PROFITS FROM FLIGHT CANCELLATION FEES DURING COVID-19 BY VIOLATING DOT’S TICKET REFUND POLICIES

Since deregulation, U.S. airlines developed refund policies designed to generate substantial profit from individual consumers. To get the lowest price, consumers purchase tickets months in advance, during which time airlines have the benefit of this advance loan from consumers and “almost never had to repay the loans in cash if the itinerary was canceled.”⁶⁹ The cancellation and change fees became another major source for the airlines to generate profits from consumers. “In 2015, the U.S. passenger airline industry collected more than \$3.8 billion in baggage fees and nearly \$3 billion in reservation cancellation/change fees.”⁷⁰ According to the Bureau of Transportation Statis-

⁶⁶ *Air Travel Consumer Report: Consumer Complaints Down from April, Still More Than 200 Percent Above Pre-Pandemic Levels*, U.S. DEP’T OF TRANSP., (July 21, 2022), <https://www.bts.gov/newsroom/air-travel-consumer-report-consumer-complaints-down-april-still-more-200-percent-above-pre#:~:text=there%20was%20a%2015%25%20decline,of%20services%20provided%20by%20airlines> [https://perma.cc/96T9-SQFW].

⁶⁷ *Id.*

⁶⁸ *Air Travel Consumer Report*, U.S. DEP’T OF TRANSP., (Jan. 2023), <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.transportation.gov/sites/dot.gov/files/2023-02/January%202023%20ATCR.pdf> [https://perma.cc/MVE6-EP2R].

⁶⁹ Minter, *supra* note 2.

⁷⁰ Rachel Y. Tang, *Airline Passenger Rights: The Federal Role in Aviation Consumer Protection*, CRS REPORT, 12 (Aug. 17, 2016).

tics, U.S. airlines earned about \$2.8 billion from reservation cancellation or change fees in 2019.⁷¹ This profit source for major US air carriers dropped to \$898 million in reservation cancellation and change fees during COVID in 2020.⁷²

While airlines historically profit from flight cancellation and reservation fees, during COVID they transferred their lost profits onto consumers by refusing to issue ticket refunds. While consumers were faced with last minute changes in flight schedules and needed ticket refunds to pay for alternate transportation, they were unable to get them. Although DOT provides air carriers with mandatory refund requirements, “airlines were also initially reluctant to provide the required refunds”⁷³ and instead offered vouchers or denied refunds outright.

According to DOT, “[a]n airline’s practice is ‘deceptive’ to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances with respect to a material matter.”⁷⁴ The Department considers a carrier’s or ticket agent’s refusal to offer a passenger the option of a refund in circumstances where “the carrier has cancelled or makes a significant change in the flight,” and the passenger does not want to accept the alternative offered by the airline, to be “an unfair business practice in violation of section 41712.”⁷⁵

Perhaps in light of DOT’s soft enforcement policy, airlines that engage in unfair and deceptive practices feel secure knowing that consumers were preempted from bringing action and DOT would first engage in an informal reminder allowing them time to self-correct without any requirement to correct past wrongs.

D. DOT’S ENFORCEMENT NOTICES TO AIR CARRIERS CARRY NO ENFORCEMENT POWER

Responding to the significant rise in consumer complaints, DOT issued two enforcement notices reminding airlines of their obligation to provide prompt ticket refunds for flight cancella-

⁷¹ Minter, *supra* note 2; *Reservation Cancellation/Change Fees by Airline 2019*, U.S. DEP’T OF TRANSP., <https://www.bts.gov/content/reservation-cancellationchange-fees-airline-2020> [<https://perma.cc/35G3-AH3Y>].

⁷² Minter, *supra* note 2.

⁷³ U.S. DEP’T OF TRANSP., *supra* note 54, at 1.

⁷⁴ *Id.* at 2.

⁷⁵ *Id.* at 3; *Airline Ticket Refunds and Consumer Protections*, 87 Fed. Reg. 51,550, 51,556 (Aug. 22, 2022) (to be codified at 14 C.F.R. pts. 259, 260, 399).

tions and substantial changes to itineraries even when the tickets are nonrefundable.⁷⁶

In April 2020, DOT issued the “Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel,” as a reminder that “[a]lthough the COVID-19 public health emergency has had an unprecedented impact on air travel, the airlines’ obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.”⁷⁷

On May 12, 2020, the OACP issued a second enforcement notice on refunds, responding to both airlines and consumer requests for clarification and “providing answers to some of the most common questions about refunds to help consumers understand their rights and to ensure airlines and ticket agents are complying with aviation consumer protection requirements.”⁷⁸ This notice reminded airlines of their obligation to make refunds promptly. DOT did not modify this obligation during COVID-19, but informed airlines that DOT would be *more lenient* in its enforcement of the mandate.⁷⁹ DOT’s lenient policy emphasizes the conflict between DOT’s policies to both enhance the airline industry and protect consumers through enforcement.

While recognizing “the COVID-19 public health emergency has had an unprecedented impact on air travel,” DOT mandated airlines to refund passengers in the event flights are cancelled or there were significant schedule changes due to the coronavirus outbreak.⁸⁰ However, despite DOT’s effort, refund issues related to COVID-19 were not resolved because its emergency notices did not have any enforcement power in themselves against the airline industry. According to a DOT 2018 internal memo:⁸¹

[I]f a guidance document purports to ‘recommend specific conduct that stretches beyond what is required by existing law,’ then the DOT must include language that the contents of the gui-

⁷⁶ U.S. DEP’T OF TRANSP., *supra* note 54, at 1.

⁷⁷ ENFORCEMENT NOTICE, *supra* note 46, at 1.

⁷⁸ FAQ, *supra* note 46, at 1.

⁷⁹ *Id.* at 2.

⁸⁰ ENFORCEMENT NOTICE, *supra* note 46, at 1.

⁸¹ Stephen G. Bradbury, *Review and Clearance of Guidance Documents*, U.S. DEP’T OF TRANSP. 3 (Dec. 20, 2018), <https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328566/gen-counsel-mem-guidance-documents-signed-122018.pdf> [<https://perma.cc/NT5G-6CHY>].

dance document do not have the force and effect of law and are not meant to bind the public in any way.⁸²

However, these notices did not include “a threat of enforcement action for noncompliance” nor a basis for an enforcement action.⁸³ Therefore, DOT’s emergency notices in themselves lacked enforcement power to bind airlines to the preexisting refund policies.

E. DOT’S PROPOSED NEW AIRLINE REFUND REGULATION

In response to high demands to address the failure of airlines to provide timely refunds for flights cancelled because of the COVID-19 pandemic, in 2022 the Department professed a renewed commitment to making a difference in protecting travelers from unfair practices.

In August 2022, DOT proposed new rules regarding airline ticket refunds and consumer protections that will “require that retail ticket agents provide prompt refunds of the airfare or the air transportation portion of the cost of tour packages when an airline cancels or significantly changes a schedule flight itinerary sold by a retail ticket agent.”⁸⁴ The main purpose of the proposed regulation is to clearly define “‘significant change of flight itinerary’ . . . to protect consumers and ensure consistency among carriers and ticket agents.”⁸⁵ As part of the new rule, a “significant change” would include a domestic flight that is delayed by three hours or more, an international flight that is delayed by six hours or more, changes to the departure or arrival airport, changes that increase the number of connections, or changes to the type of aircraft if it causes a significant downgrade in a passenger’s air travel experience.⁸⁶

⁸² Amna Arshad, Charlie Beller & Meredith Mommers, *Balancing Travelers’ Right to Refunds and Airlines’ Right to Survival in the Age of COVID-19*, FRESHFIELDS (May 11, 2020), <http://blog.freshfields.us/post/102g71o/balancing-travelers-right-to-refunds-and-airlines-right-to-survival-in-the-age> [<https://perma.cc/TY6S-2JW7>].

⁸³ *Id.*

⁸⁴ Airline Ticket Refunds and Consumer Protections, 87 Fed. Reg. 51,550, 51,562 (Aug. 22, 2022) (to be codified at 14 C.R.F pts. 259, 260, 290) (explaining the comment period for the proposed regulation has closed).

⁸⁵ *Id.* at 51, 550 (discussing DOT holding a second public hearing on the Notice of Proposed Rulemaking (NPRM) on Airline Ticket Refunds and Consumer Protections).

⁸⁶ *As Part of Ongoing Airline Consumer Protections Efforts, USDOT Announces New Rulemaking That Would Strengthen Protections for Consumers Seeking Refunds of Airline Tickets*, U.S. DEP’T OF TRANSP. (Aug. 3, 2022), <https://www.transportation.gov/>

Providing a definition of significant change should create greater consistency and compliance among air carriers, as well as provide consumers with a greater understanding of their rights. However, there remains an inherent limitation to DOT's enforcement powers—the lack of resources and inability to take action on behalf of an individual consumer because, like many government agencies, DOT responds only to the largest category of complaints on behalf of the public at large.

According to a 2021 DOT report, the Department received “a flood of complaints about carriers’ failure to provide refunds, an increase of 4,552% relative to the same period pre-pandemic.”⁸⁷ In response to large scale consumer complaints, the Department also conducted “investigations against 20 airlines for failing to timely provide required refunds.”⁸⁸ In other words, individual consumer rights are neglected until the violations become so abusive by an air carrier that DOT has no other choice but to take affirmative action.

During this lengthy wait period, consumers are prevented from seeking redress through a private right of action against the airlines due to the ADA's express preemption of rates, routes, and services. The Supreme Court held that federal regulations alone cannot create private rights of actions; the source of the right must be a statute.⁸⁹ On this basis, the Supreme Court rejected an entreaty to imply a private cause of action pursuant to other regulations implementing the ADA.⁹⁰ The Court has held that the consumer protection provision of the ADA does not permit the imputation of a private right of action against the airline and therefore, individuals do not have an implied right of action under 14 C.F.R. § 253.4 (incorporation by reference in the contract of carriage) or 14 C.F.R. § 253.7 (prohibition against imposing any terms restricting refunds of the

briefing-room/part-ongoing-airline-consumer-protections-efforts-usdot-announces-new-rulemaking [https://perma.cc/M7SC-ESRK].

⁸⁷ U.S. DEP'T OF TRANSP., *supra* note 54, at 1 (explaining that the Department conducted an investigation of Air Canada resulting in a formal complaint seeking substantial penalties for extreme delays in providing required refunds to passengers based on 5,110 violations for passenger wait times from 5 months to 13 months).

⁸⁸ *Id.*

⁸⁹ *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001); *see also Iverson v. City of Boston*, 452 F.3d 94, 100 (1st Cir. 2006).

⁹⁰ *Alexander*, 532 U.S. at 291.

ticket price).⁹¹ Additionally, the Fifth Circuit rejected an argument that consumers could have a right of action for violations of the regulations prescribed by DOT.⁹² Therefore, even if DOT regulates the airline refund policy and defines the meaning of significant delay, consumers are still excluded from filing enforcement actions against air carriers and must rely on DOT to utilize its enforcement power. Certainly, consumers can exercise their right to use a different carrier or take an alternate mode of transportation, but this is often not practical and does not correct past wrongs.

Understandably, it would be a hardship for air carriers to be subject to differing state consumer protection statutes. But, enabling a consumer to bring an action under federal law would not trigger this result and would be in line with other federal consumer statutes providing for a private right of action, such as the Truth in Lending Act, the Magnusson Moss Consumer Warranty Act, the Fair Credit Reporting and Debt Collection Practices Acts, the Equal Credit Opportunity Act, the Telephone Consumer Protection Act, and others.

IV. EXPANDING CONSUMERS' RIGHTS TO BRING PRIVATE ACTIONS AGAINST AIRLINES SERVES THE ADA'S GOAL OF ALLOWING FREE MARKET MECHANISMS TO INFLUENCE THE AIRLINE INDUSTRY MARKETPLACE

PART IV offers ways to expand the role of consumers as market influencers by narrowing federal preemption and expanding consumers' private right of action to hold air carriers directly accountable for breach of contract claims and unfair and deceptive practices. Four recommendations for accomplishing this goal are (1) requiring DOT's ticket refund requirements be explicitly stated on airlines' websites and contracts of carriage, (2) broadly imposing DOT's regulations into air carrier's contracts of carriage, (3) recognizing the implied covenant of good faith and fair dealing as a self-imposed contractual obligation, and (4) granting consumers a federal private right of action to hold airlines accountable to DOT's regulations.

These recommendations are based on the ADA's stated purpose to allow "market forces to determine the price and level of

⁹¹ See *Buck v. American Airlines, Inc.*, 476 F.3d 29, 34 (1st Cir. 2007); see also *Bonano v. E. Carib. Airline Corp.*, 365 F.3d 81, 84–85 (1st Cir. 2004).

⁹² *Bonano*, 365 F.3d at 85.

domestic airline service in the United States”⁹³ and the primary objective of DOT to develop efficient, convenient, safe, and low-cost transportation to meet public need.⁹⁴

Further, the impact of the COVID-19 pandemic is felt on an unprecedented scale for both airlines and consumers. Airline refund violations are out of control and traditional regulation by DOT is not sufficient to address individual consumers’ rights.⁹⁵ As this global crisis affected the airline industry and consumer complaints skyrocketed, the number of potential legal disputes related to the airline ticketing refund practices became overwhelming for DOT and disappointing for consumers learning that their individual rights have been substantially preempted. There currently exists no authority under the ADA to bring a private law suit and courts have only recognized narrowly tailored exceptions to federal preemption for self-imposed undertaking breach of contract claims.⁹⁶ Airlines are given broad discretion to set rates, routes, and services without concern for accountability to individual lawsuits or harsh enforcement policies under DOT’s deferential enforcement practices necessarily focused only on the highest complaint categories.

In light of these inadequacies, this article encourages DOT and courts to recognize the importance of enabling consumers to file individual actions to enforce federal transportation laws and regulations, narrowing the scope of ADA preemption, and incorporating DOT regulations into contracts of carriage. By interpreting air carrier refund policies as part of their contract of carriage subject to individual breach of contract claims, airlines will be subject to the market forces which the deregulation of the aviation industry was meant to do.⁹⁷

⁹³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-630, *supra* note 19, at 1.

⁹⁴ Volpe, *supra* note 17, at 5.

⁹⁵ See COVID-19 Consumer Law Research Group, *Consumer Law and Policy Relating to Change of Circumstances Due to the COVID-19 Pandemic*, 43 J. CONSUMER POL’Y. 437 (2020).

⁹⁶ *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995).

⁹⁷ See *Trans World Airlines, Inc. v. Mattox*, 897 F. 2d 773, 777 (5th Cir. 1990) (“The purpose of the ADA was to encourage and develop an air transportation system that relies on competitive market forces to determine the quality, variety, and price of air services.”).

A. REQUIRE DOT'S TICKET REFUND REQUIREMENTS BE STATED
EXPLICITLY ON AIRLINES' WEBSITES AND CONTRACTS
OF CARRIAGE.

Courts have struggled with the scope and interpretation of “self-imposed” undertakings resulting in inconsistent rulings based on nuances that appear to be immaterial. To avoid the ADA’s federal preemption, passengers must narrowly tailor their claims to the explicit terms of their agreement with an air carrier if the air carrier self-imposed the terms into the contract.⁹⁸ “[A]lthough terms can be incorporated by reference and need not appear on the face of the ticket, ‘salient features’ must be highlighted, and the full terms must be made available on the airline websites.”⁹⁹ For example, the court in *Giannopoulos v. Iberia Lines Aereas de Espana*, No. 11 C 775, 2011 WL 3166159, at *3 (N.D. Ill. July 27, 2011), held that “a carrier could be obligated to pay compensation for a delayed flight pursuant to European regulation that specifically had been incorporated into its passenger contract.”¹⁰⁰ Therefore, if airlines provide an express refund policy on the website or in the contract of carriage, consumers will have a right of action to enforce the provision without preemption.

However, some courts have held that when there is no specific and explicit refund policy in the contract, passengers are barred from bringing an action based on breach of contract. For example, the court in *Schultz v. United Airlines* held that certain claims grounded in contract are preempted by ADA regulation in the absence of “a distinct contract” by the airline.¹⁰¹ In *Schultz*, the airline required payment of a baggage fee but did not timely deliver the baggage and the passenger sued under a breach of implied contract theory based upon language on the airline’s website.¹⁰² The court held that the language on the website was too tenuous to create an implied contract but opined that terms of baggage handling and refunds were explicitly incorporated into the contract of carriage which was not used as the basis for

⁹⁸ 14 C.F.R. §§ 221.107(d), 253.7, 259.6(c) (2023).

⁹⁹ Jol A. Silversmith, *Federal Preemption Over Air Carrier Prices, Routes, and Services: Recent Developments*, 24 AIR AND SPACE LAW. 1, 7 (2012).

¹⁰⁰ See also *Kalick v. Northwest Airlines Corp.*, No. 08-2972, 2009 WL 2448522, at *3 (D.N.J. Aug. 7, 2009).

¹⁰¹ *Schultz v. United Airlines, Inc.*, 797 F. Supp. 2d 1103, 1107 (W.D. Wash. 2011).

¹⁰² See *id.* at 1104.

the breach of contract claim.¹⁰³ The court held that a refund of fees for delayed baggage is preempted by ADA because the claim may not be grounded in documents that are not incorporated into the contract and thus are not a self-imposed undertaking of the airlines.¹⁰⁴ By contrast, in *Hickcox-Huffman*, 788 F. Supp. 2d 1036, 1042 (N.D. Cal. 2011), the court held that the airline passenger, who sought a refund of \$15 checked-baggage fee after the airline failed to deliver her bag upon arrival, could maintain state law breach of contract claim against airline, even though the airline did not expressly promise a refund if the baggage was delayed.¹⁰⁵ This inconsistency among district court interpretation of DOT's federal regulations creates confusion for both airlines and passengers.

It is fundamentally unfair for an airline to avoid liability for its own refund practices by manipulating exactly where its refund policies are posted—in a contract of carriage, on a website, or implied. Refund terms should be easily accessible to consumers in a consistent manner across all airlines. A reasonable resolution would be to require all air carriers to disclose their ticket, baggage, and other refund policies on their websites and contracts of carriage. This is not to suggest that all air carriers should embrace the same refund policies, but only that there should be consistency in where the consumer can find the information to make it easier for them to shop other airlines and compare refund policies to select the airline that best meets their needs. In this way, consumers can become a market influencer.

B. BROADLY IMPOSE DOT'S REGULATIONS INTO AIRLINES' CONTRACTS OF CARRIAGE.

Another method of creating consistent passenger expectations across air carriers is to broadly impose DOT's regulations into contracts of carriage, whether explicitly stated or not currently. Legal claims for refunds of airline tickets only survive preemption if they fall within the narrow contours of the *Wolens* exception—breach of contract claims not based on state law or resulting in an expansion of the contracted terms.¹⁰⁶ Consumers

¹⁰³ *See id.* at 1107.

¹⁰⁴ *See id.* at 1106–1107.

¹⁰⁵ 788 F. Supp. 2d at 1042.

¹⁰⁶ *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33 (1995); *Polinovsky v. British Airways*, No. 11 C 779, 2012 WL 1506052, at *2 (N.D. Ill. Mar. 30, 2012).

can bring an action against airlines to claim refunds only when the contract or website explicitly provides the refund policies. However, the explicit refund policy itself is not sufficient to protect the consumer's regulatory right to receive the refund because airlines could impose discretionary restrictions on the refund policy unsupported by the DOT¹⁰⁷ or refuse to incorporate refund policies altogether. Therefore, stronger measures are necessary to ensure compliance with DOT's regulations and guidelines and avoid unfair and deceptive practices by airlines. One way to ensure that air carriers don't bypass DOT regulations is to incorporate these regulations into airlines' contracts of carriage, impliedly or statutorily.

As mentioned above, DOT's regulation and enforcement notices themselves are not effective because "a mere guidance document that does not create a binding requirement on the airline."¹⁰⁸ However, if the contract explicitly stated compliance with *any* rules issued by [DOT], the airlines would be bound by DOT's regulations including enforcement notices.¹⁰⁹

For example, in *Levey v. Concesionaria Vuela Compania de Aviacion*, 529 F. Supp. 3d 856, 864 (N.D. Ill. 2021), the airline refused to provide a ticket refund despite its own cancellation of the flight, instead offering a "credit toward future travel in the next thirty days, less applicable change fees."¹¹⁰ The relevant contract of carriage terms "provided that, in the event of a flight cancellation, 'alternate transportation or compensation will be provided to Passengers in accordance with rules issued by the U.S. Department of Transportation (DOT).'"¹¹¹ The court interpreted DOT's Enforcement Notice as a rule within the meaning of the contract and held that the airline breached its own self-imposed undertaking, surviving ADA preemption.¹¹²

By contrast, in 2021, *In re Frontier Airlines Litig.*, a passenger brought a breach of contract action against the airline when it cancelled the flight and refused to refund the tickets.¹¹³ The passenger contended that the contract of carriage expressly in-

¹⁰⁷ See *Martin v. United Airlines, Inc.*, 727 F. App'x 459, 463 (10th Cir. 2018).

¹⁰⁸ *Levey v. Concesionaria Vuela Compania de Aviacion*, 529 F. Supp. 3d 856, 864 (N.D. Ill. 2021).

¹⁰⁹ *Id.* at 864–865.

¹¹⁰ *Id.* at 861.

¹¹¹ *Id.*

¹¹² See *id.* at 864.

¹¹³ See *In re Frontier Airlines Litig.*, 559 F. Supp. 3d 1146, 1150 (D. Colo. 2021).

corporates DOT notices and other federal regulations providing that refunds “will be subject to government laws, rules, regulations, or orders of the country in which the ticket was originally purchased and of the country in which the refund is being made.”¹¹⁴ However, the court held that the term “applicable law” was insufficiently specific to incorporate DOT’s regulation.¹¹⁵

In another case, despite DOT’s clear deadlines for providing ticket refunds “prompt[ly]” (7 days if paid by credit card, 20 days if paid by cash or check),¹¹⁶ the court held that because the contract of carriage did not explicitly state a specific period of time for ticket refunds, the airline was not bound by DOT regulation because there is no express terms of how many days are promptly.¹¹⁷

Because only “private obligations explicitly agreed to under general principles of contract law can give rise to valid breach of contract claim related to airline fares,”¹¹⁸ inconsistent contract terms affecting compliance with DOT’s regulations have resulted in conflicting court rulings. Imposition of DOT’s regulations into contracts of carriage, whether explicitly stated or not, would avoid such inconsistencies. It is only fair that airlines are held to the same standards and regulations regardless of any inconsistencies in their separate contracts of carriage, the result of which would be fair competition across air carriers, greater consistency in court rulings, and improved accountability to consumers.

C. RECOGNIZE THE IMPLIED COVENANT OF GOOD FAITH AND
FAIR DEALING AS A SELF-IMPOSED CONTRACTUAL
OBLIGATION.

Courts have also inconsistently ruled whether the implied covenant of good faith and fair dealing is and is not preempted under the ADA. However, this covenant, implied in every contract under the Uniform Commercial Code, should be recognized as inherent in every contract and not preempted under the ADA.

¹¹⁴ *Id.* at 1155.

¹¹⁵ *Id.*

¹¹⁶ 14 C.F.R. § 259.5(b)(5) (2023).

¹¹⁷ *See Daversa-Evdyriadis v. Norwegian Air Shuttle ASA*, No. EDCV 20-767-JGB(SP_x), 2020 WL 5625740, at * 3 (C.D. Cal. Sept. 17, 2020).

¹¹⁸ *Id.* at *5.

The implied covenant of good faith and fair dealing is a general contract principle that “neither party will do anything to injure the right of the other to receive the benefits of the agreement.”¹¹⁹ It gained increased acceptance when it was incorporated into the Uniform Commercial Code and later as part of the *Restatement (Second) of Contracts*.¹²⁰ This covenant is not based in state law. Because it is a generally accepted contract principle it does not expand the scope of the parties’ contractual terms.

In 2010, according to the Ninth Circuit in *Rosenfeld v. JPMorgan Chase Bank, N.A.*, the airline was obligated to compensate consumers under the common law covenant of good faith and fair dealing.¹²¹ Airlines should be liable for a breach of this implied obligation where they act in bad faith by “willfully render[ing] imperfect performance,” or “acts in a commercially unreasonable manner while exercising” some discretionary power under the contract.¹²² In *Rosenfeld*, the airline did not provide an explicit refund provision in its contract of carriage, but the court allowed the action under the doctrine of covenant of good faith and fair dealing for the following reasons: “(1) the airlines and consumers entered into a contract to transport the consumer on a preset date and time to the specific destination; (2) the consumer fulfilled his or her obligation under the contract by paying the full price of the flight tickets; (3) any conditions precedent to the airlines performance occurred; (4) the airline unfairly interfered with the consumer’s right to receive the benefits of the contract; and (5) the consumers were harmed by the airline’s conduct of significantly delaying or canceling the flight.”¹²³

Also in 2010, before reaching the Supreme Court, the Ninth Circuit in *Northwest Inc. v. Ginsberg*, 653 F.3d 1033, 1035 (9th Cir.

¹¹⁹ *Rosenfeld v. JPMorgan Chase Bank*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010) (quoting *Waller v. Truck Ins. Exchange, Inc.*, 900 P.2d 619 (1995)).

¹²⁰ Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviving a Referred Relic*, 80 ST. JOHN’S L. REV. 559, 611–12 (2006); U.C.C. § 1-304 (“Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”).

¹²¹ See *Rosenfeld*, 732 F. Supp. 2d at 968.

¹²² *Barranco v. 3D Systems Corp.*, No. 13-00412 LEK-RLP, 2015 WL 419687, at *11 (D. Haw. Jan. 30, 2015); *Long Rockwood VII, LLC v. Rockwood Lodge, LLC*, No. 2:14-cv-00318-REB, 2015 WL 335853, at *7 (D. Idaho Jan. 26, 2016); In re *Kaplan*, 143 F.3d 807, 818 (3d Cir. 1998); *Implied Covenant or Promise of Good Faith and Fair Dealing*, 23 Williston on Contracts, § 63:22 (4th ed. 2023).

¹²³ *Rosenfeld*, 732 F. Supp. 2d at 968 (citing Judicial Council of California Civil Jury Instruction 325).

2011), held that “the ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing.”¹²⁴ The Ninth circuit based its ruling on three grounds: (1) the ADA does not preempt the common law because “an overly broad definition of what relates to prices” would be far too tenuous and it would effectively subsume all breach of contract claims; (2) “Congress intended the preemption language only to apply to state laws directly regulating “rates, routes, or services”; and (3) the meaning of “service” must be narrowly interpreted because Congress did not intend to broadly preempt state laws directly “regulating rates, routes, or services.”¹²⁵

However, in 2014, the Supreme Court in *Northwest, Inc. v. Ginsberg* determined that claims for violation of the implied covenant of good faith and fair dealing was preempted under the ADA.¹²⁶ The Court reasoned that the implied covenant was not just limited to obligations that the parties voluntarily assumed but also was subject to state-imposed standards, primarily because the implied covenant could not be contracted out of an agreement between the parties.¹²⁷

More recently, in 2021, the Ninth Circuit in *Herrera v. Cathay Pacific Airways Ltd.*, held that a consumer’s claim for breach of contract against an airline for failure to provide a cash refund for tickets purchased for a flight cancelled due to COVID-19 was not preempted.¹²⁸ The airline only offered a voucher with a short expiration date.¹²⁹ The court held that an exception to the ADA preemption exists if the claim is based on general principles of contract law to determine the intent of the contracting parties.¹³⁰ Preemption would apply only if the breach of contract claim was based on state law.¹³¹

Also in 2021, a New York district court held in *Ide v. British Airways PLC* that consumers brought a viable breach of contract claim against an airline for failing to provide their preferred remedy of ticket refund for flights cancelled due to COVID-

¹²⁴ *Ginsburg v. Northwest, Inc.*, 653 F.3d 1033, 1035 (9th Cir. 2011).

¹²⁵ *Id.* at 1041–42.

¹²⁶ 134 U.S. 1422, 1428 (2014).

¹²⁷ *See id.* at 1431–32.

¹²⁸ No. 20-CV-03019-JCS, 2021 WL 673448, at *1 (N.D. Cal. Feb. 21, 2021).

¹²⁹ *See id.*

¹³⁰ *See id.* at *12.

¹³¹ *See id.* at *9.

19.¹³² The court held that an implied contractual obligation of a party not to frustrate the counterparty's ability to perform a condition precedent is not exempted by the ADA because the implied obligation seeks to enforce the party's self-imposed undertakings and does not impose state law or state policy.¹³³

Where a passenger seeks to hold an airline accountable for breach of a self-imposed undertaking, the implied covenant of good faith and fair dealing is an integral part of that undertaking and should not disqualify a breach of contract claim. This covenant holds all parties to a basic standard of good faith and should not be interpreted as an expansion of the undertaking subject to ADA preemption or based in any particular state law. As a generally recognized covenant, its preemption unnecessarily restricts consumers from holding airlines accountable for their own unfair acts in their business dealings with passengers.

D. GRANT CONSUMERS A FEDERAL PRIVATE RIGHT OF ACTION
TO HOLD AIRLINES ACCOUNTABLE UNDER DOT'S
REGULATIONS

The ADA was intended to allow market forces and industry competition to dictate airline expansion and ticket pricing. Consumers are a critical part of those market forces in their ability to affect rates, routes, and services by selecting an air carrier of their choice. For example, "an airline's share of passengers on a route and at the endpoint airports significantly influences its ability to mark up price above cost."¹³⁴ "Market characteristics, such as distance and the demand for convenient service, explain a large share of the variation in fares across markets which are broadly consistent with market efficiency criteria."¹³⁵ Average ticket price "[d]ispersion increases on routes with more competition or lower flight density, consistent with discrimination based on customers' willingness to switch to alternative airlines or flights."¹³⁶

In 1979, John Freeman, then Senior Attorney in the Office of the General Counsel at the CAB, discussed the purpose of the

¹³² 529 F. Supp. 3d 73, 77–78 (S.D.N.Y. 2021).

¹³³ *See id.* at 86.

¹³⁴ Severin Borenstein, *Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry*, 20 RAND J. ECON. 344, 344 (1989).

¹³⁵ David R. Graham, Daniel P. Kaplan & David S. Sibley, *Efficiency and Competition in the Airline Industry*, 14 BELL J. ECON. 118, 137 (1983).

¹³⁶ Severin Borenstein & Nancy L. Rose, *Competition and Price Dispersion in the U.S. Airline Industry*, 102 J. POL. ECON. 653, 653 (1994).

ADA's federal preemption over any law related to a price, route, or service of an air carrier.¹³⁷ The primary thrust of his discussion was the need for "[f]ederal involvement in economic regulation of air transportation" to avoid conflicting state and federal regulation and ticket pricing for interstate air transportation.¹³⁸ "Route" authority was necessary to ensure market expansion and route consistency.¹³⁹ "Rate" regulation was necessary to ensure ticket pricing consistency and fairness to passengers.¹⁴⁰ "Services" regulation was necessary to stabilize the "economic factors that go into the provision of air service and make up the *quid pro quo* for the passenger's fare."¹⁴¹ These factors create stabilization for interstate air carriers, in addition to being a substantial part of the market forces affecting a consumer's choice of air carrier to best meet their travel needs.

But remarkably, consumers have been nearly completely silenced as market influencers under the courts' overbroad interpretation of ADA preemption by precluding them from holding airlines accountable to their own promises and business practices except under the narrowest exemption that courts struggle to interpret even thirty-five years after enactment of the ADA. The result is that airlines have been shielded from direct consumer accountability. Under the protection of the current preemption umbrella, a major policy goal underpinning deregulation—that of market influences—cannot be met. Protecting airlines from direct consumer accountability unreasonably protects the airline industry from market and regulatory accountability.

If the scope of ADA preemption effectively prohibits consumers from enforcing self-imposed contractual obligations "then the competitive market forces sought by Congress cannot operate, because a passenger with any experience or knowledge will know better than to make choices based on the unenforceable competing offers."¹⁴² In other words, if passengers are obligated to their promises but have no mechanism to ensure airlines comply with their own promises, passengers would not engage

¹³⁷ See John W. Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747 (1979).

¹³⁸ *Id.* at 749.

¹³⁹ See *id.* at 751–52.

¹⁴⁰ See *id.* at 752.

¹⁴¹ *Id.* at 767.

¹⁴² *Hickcox-Huffman v. U.S. Airways, Inc.*, 855 F.3d 1057, 1065–66 (9th Cir. 2017).

in competitive shopping for alternate air transportation knowing that all airlines “could break their promises without impunity.”¹⁴³ Only by recognizing its own limits to respond to individual consumer concerns will DOT release its stranglehold on enforcement powers and more closely align with other federal statutes enabling market forces to play a key role.

The ADA was intended to “leave largely to the airlines themselves . . . the selection and design of marketing mechanisms” appropriate to the furnishing of air transportation services.¹⁴⁴ The ADA “replaced the old form of regulation with a new economic regime that relied heavily on free-market mechanisms.”¹⁴⁵ Yet, DOT has been expanding its oversight and regulation of the airline industry in the name of consumer protection and to the exclusion of any private right of action by consumers, requiring a greater number of laws and regulations, not less, and substituting the government’s judgment for that of consumers.¹⁴⁶

Federal government bodies overseeing other industries, such as the Federal Trade Commission and the Consumer Financial Protection Bureau, have succeeded in developing government oversight for the benefit of consumer public interests without broad federal preemption in these fields. However, large government bodies simply cannot represent the individual consumer. They are slow to act and do not have the resources necessary to address every individual concern. DOT is both important and necessary to ensure air carriers comply with its regulations for the benefit of the public but was not structured as an enforcer of consumer rights on an individual scale. DOT’s limited enforcement power and resources are appropriately focused on investigating airline conduct garnering the greatest number of complaints but is unable to address individual complaints.¹⁴⁷

However, DOT’s policy of encouraging airlines to comply with its regulations is a slow-moving process. The most effective way to enforce DOT’s regulations, including its prohibition against unfair and deceptive practices and its newly proposed regula-

¹⁴³ *Id.* at 1066.

¹⁴⁴ *Id.* at 1061.

¹⁴⁵ *Delta Air Lines, Inc. v. Civ. Aeronautics Bd.*, 674 F.2d 1, 3 (D.C. Cir. 1982).

¹⁴⁶ David Heffernan, *Department of Transportation’s Aggressive Approach to Consumer Protection Regulation and Enforcement*, 80 J. AIR L. & COM. 347, 347–48 (2015).

¹⁴⁷ See U.S. DEP’T OF TRANSP., *supra* note 54, at 2.

tions regarding airline refund policies, is to keep DOT focused on protecting the public at large and allow consumers to protect their private interests. This can be done in two ways. First, as discussed above, by incorporating DOT regulations into contracts of carriage passengers can exercise the narrow exception to preemption through breach of contract actions for self-imposed undertakings. This would enable consumers to be a powerful market influencer.

A second corrective measure is to modify DOT regulations to grant individual consumers a federal private right of action against airlines for violation of its regulations, including the ability to seek remedial measures. In fact, the Code of Federal Regulations explicitly requires airlines to include notice of any claim restrictions in contracts of carriage, “including time periods within which passengers must file a claim or *bring an action against the carrier* for its acts or omissions or those of its agents.”¹⁴⁸ However, no cases were found citing to this provision leaving its effect on preemption uncertain.

A private right of action has become a necessity for passengers who have suffered from inconsistent airline refund policies, which DOT has long considered an unfair practice.¹⁴⁹ Without a private right of action passengers, who are harmed by unreasonably delayed and cancelled flights through no fault of their own, are left with no other option to redress their harms than filing a DOT complaint in the hopes of a large-scale enforcement action. “Theoretically, the pressure of thousands of potentials [individual] lawsuits may better encourage airlines to deliver quality” and immediate solutions “to passengers than a single punishment from DOT.”¹⁵⁰

The voice of the consumer need not be interpreted through a large government agency with a conflicting dual purpose of airline expansion and consumer protection. Consumers can speak for themselves more efficiently and effectively than DOT can on their behalf. In this way, consumers will have a direct means of holding airlines accountable to DOT regulations, including refund policies. By granting passengers a private right of action to ensure federal laws are complied with, airlines will remain pro-

¹⁴⁸ 14 C.F.R. § 221.107(b)(2)(ii) (2023) (emphasis added).

¹⁴⁹ Airline Ticket Refunds and Consumer Protections, 87 Fed. Reg. 51,550, 51,561–51,562 (Aug. 22, 2022) (to be codified at 14 C.F.R. pts. 259, 260, 399).

¹⁵⁰ Raina Urton, *Trouble in the Skies: The ACAA’s Failure to Protect Passengers with Disabilities*, 31 L. & INEQ. 437, 465 (2013).

tected from state law imposition, and consumers will have a more direct and immediate remedial option.

V. SUMMARY

Thirty-five years after the Airline Deregulation Act, consumers, government, air carriers, and the courts are still struggling with the implications of deregulation, the scope of federal preemption, holding airlines accountable for unfair and deceptive practices, and the role of the DOT in protecting the public and individual consumers.

DOT's new guidance and regulations are much needed to remind airlines of their responsibilities to consumers, but DOT must recognize that its mandate for both airline safety and expansion may not align with its role to ensure consumer protection in the airline industry. DOT is ill-equipped to protect individual consumer rights and should focus its limited resources on protecting the public at large. DOT should force airlines to meet their consumer obligations and expand consumers' private right of action by incorporating its ticket refund and other regulatory provisions into air carriers' contracts of carriage thereby enabling consumers to hold airlines accountable when they are violated.

The ADA was intended to deregulate the airline industry, but the courts' broad interpretation of the ADA's federal preemption failed to take into account the important influence of consumers to affect the private market. Only a narrow interpretation of federal preemption in the ADA will allow consumers to protect themselves by enabling them to bring private rights of action under general breach of contract theories for self-imposed undertakings.

Courts are encouraged to interpret implied covenants as an actionable tort when breached side by side with other common law breach of contract claims for self-imposed undertakings between private parties. A narrower interpretation of federal preemption related to airline prices, routes, and services would benefit consumers' rights to enforce ticket refund policies where significant delays and changes disrupt their air travel plans through no fault of their own.

Finally, consumers should be granted a federal private right of action to hold airlines accountable to DOT's regulations without having to wait for DOT enforcement that may never rise to the highest passenger complaint category. In this way, consum-

ers can truly be a part of the market forces intended by the ADA to play a role in a deregulated airline industry.
