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

Laci Verusco Resendiz
Southern Methodist University, lresendiz@mail.smu.edu

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol81/iss2/6

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

LACI VERDUSCO RESENDIZ*

TABLE OF CONTENTS

I. INTRODUCTION .................................. 322

II. WHY DO FOOD ALLERGIES MATTER? ....... 324
   A. LIFELONG AFFLICTION ........................... 324
   B. SEVERITY OF REACTION—ANAPHYLAXIS ....... 325
   C. RISING PREVALENCE OF FOOD ALLERGIES .... 327
   D. LOW THRESHOLD OF EXPOSURE TO TRIGGER A
      REACTION ...................................... 328

III. WHY ARE FOOD ALLERGIES SO PROBLEMATIC
     WHEN FLYING COMMERCIALLY? ............... 330
   A. TRIGGERS FOR FOOD ALLERGIES ON COMMERCIAL
      FLIGHTS ........................................ 330
   B. INADEQUATE TREATMENT FOR ALLERGIC
      REACTIONS WHILE ON BOARD ................. 331
   C. LACK OF FEASIBLE TRAVEL ALTERNATIVES ...... 333

IV. WHY HAS THE DEPARTMENT OF
    TRANSPORTATION NOT PROTECTED PEANUT
    ALLERGY SUFFERERS ON COMMERCIAL
    FLIGHTS?.......................................... 334

V. WHAT IS THE LEGAL FRAMEWORK FOR
   SERVICE PREEMPTION? ............................ 335
   A. SUPREME COURT PRECEDENT ................. 336
   B. CIRCUIT SPLIT OVER THE DEFINITION OF
      SERVICE ........................................ 340

* J.D. Candidate, SMU Dedman School of Law, 2017; B.S. Sociology and B.A.
Spanish, Grand Valley State University, 2009. The author would like to thank her
family, friends, professors, and mentors for their constant motivation, love, and
support.
VI. WHY SHOULD THE SUPREME COURT ADOPT
A NARROW INTERPRETATION OF SERVICE
PREEMPTION? .............................. 343
   A. LEGISLATIVE INTENT .......................... 343
   B. SUPREME COURT PRECEDENT ............... 344

VII. HOW WOULD A NARROW READING OF
SERVICE PREEMPTION BE THE BEST
SOLUTION FOR PROTECTING FOOD ALLERGY
SUFFERERS? .................................. 345

VIII. CONCLUSION ............................... 347

I. INTRODUCTION

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

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

2448682, at *1 (E.D. Cal. May 20, 2015).
² Id.
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Id.
Eastern District of California based his decision on a broad reading of the preemption provision of the Airline Deregulation Act (ADA or the Act), which reads that “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . .” The word “service” in the preemption provision has confused courts for decades, but the U.S. Supreme Court has yet to clarify the definition. The Court has, however, addressed the broad scope of the preemption provision and has noted and reaffirmed that “the key phrase ‘related to’ expresses a ‘broad pre-emptive purpose.’” The facts and outcome of Gleason v. United Airlines highlight the vulnerability of the estimated fifteen million Americans who suffer from food allergies and travel commercially.

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

---

10 See Nw. Airlines, Inc. v. Duncan, 531 U.S. 1058, 1058 (2000) (O’Connor, J., dissenting to a denial of a writ of certiorari) (“The petition for a writ of certiorari in this case presents an important issue that has divided the Courts of Appeals: the meaning of the term ‘service’ in the [ADA] that pre-empts any state law ‘related to a price, route, or service of an air carrier.’”).
12 Id. at 1428 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992)).
plains how this narrow reading offers much needed protection to food allergy sufferers.

II. WHY DO FOOD ALLERGIES MATTER\textsuperscript{15}

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

A. LIFELONG AFFLICION

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

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

\textsuperscript{16} See James, supra note 15, at 25.


\textsuperscript{18} Facts and Statistics, supra note 13.

\textsuperscript{19} Id.; see James, supra note 15, at 25.

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

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

\textsuperscript{22} Hugh A. Sampson, Update on Food Allergy, 113 J. ALLERGY & CLINICAL IMMUNOLOGY 805, 807 (2004).
B. SEVERITY OF REACTION—ANAPHYLAXIS

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

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

23 James, supra note 15, at 25.
27 Gold & Sainsbury, supra note 24, at 172; see infra text accompanying note 40.
28 Simons, supra note 26, at 837.
29 Jennifer S. Kim et al., Parental Use of EpiPen for Children with Food Allergies, 116 J. ALLERGY & CLINICAL IMMUNOLOGY 164, 164 (2005); see also Gold & Sainsbury, supra note 24, at 171 (finding that food is a more common trigger for anaphylaxis than insect venom). IgE stands for immunoglobulin E, an antibody produced by the immune system when it overreacts to an allergen that releases chemicals into cells. Immunoglobulin E (IgE), AM. ACAD. OF ALLERGY ASTHMA & IMMUNOLOGY, https://www.aaaai.org/conditions-and-treatments/conditions-dictionary/immunoglobulin-e-(ige) [https://perma.cc/SG2A-VJD2].
31 See Hourihane, supra note 20, at 1240 (citations omitted) (“Peanut accounts for the majority of food-related anaphylactic fatalities and for between 24% and 30% of all cases of anaphylaxis in the community (i.e. excluding intravenous drugs and anaesthetics given in hospitals).”); see also Sampson, supra note 22, at 811 (“Generalized anaphylaxis caused by food allergies accounts for at least
Symptoms of anaphylaxis can be divided according to the systems in the body that are affected. Respiratory symptoms include “a hoarse voice, persistent cough, and difficult or noisy breathing”; laryngeal oedema (a “feeling of fullness in the throat”); airway tract obstruction; wheezing; and, although uncommon, asthma and acute bronchospasms (“abnormal contraction of the smooth muscle of the bronchi, resulting in an acute narrowing . . . of the respiratory airway”). Cardiovascular symptoms include “dizziness or loss of consciousness,” cardiovascular collapse, and hypertension. Cutaneous and gastrointestinal symptoms often manifest during anaphylaxis but are also characteristic of non-anaphylactic reactions. Cutaneous symptoms include cyanosis (“bluish” coloration of skin “usually due to lack of oxygen”); rash; facial or limb swelling; urticaria (hives); pruritus (itchiness); wheal (red, raised lump on the skin); and flare (red, inflamed area surrounding a wheal). “Gastrointestinal symptoms include vomiting, nausea, [and] diarrhea.”

An illustration of the severity of food allergy reactions can actually be found in the lack of double-blind oral challenge studies one[-]third to one[-]half of anaphylaxis cases seen in hospital emergency departments.

32 See Gold & Sainsbury, supra note 24, at 172.
33 Id.
35 J. O’B Hourihane et al., Clinical Characteristics of Peanut Allergy, 27 Clinical & Experimental Allergy 634, 636 (1997).
37 Gold & Sainsbury, supra note 24, at 172.
38 Id. at 171.
39 Sampson, supra note 22, at 811.
40 Gold & Sainsbury, supra note 24, at 172.
42 Gold & Sainsbury, supra note 24, at 172.
44 Gold & Sainsbury, supra note 24, at 172.
of food allergy sufferers.\textsuperscript{45} Many double-blind studies are disallowed because of the potential dangerousness of a reaction.\textsuperscript{46} And, in illustration of the increasing severity of reactions over time, a self-reported study of successive reactions to peanut allergies revealed that over one-third of respondents (201 respondents accounting for 38\% of all respondents) felt that their reactions to peanuts were getting successively worse with each reaction, as compared with only 2.5\% of respondents who felt their reactions were successively improving.\textsuperscript{47}

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

C. Rising Prevalence of Food Allergies

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

\begin{itemize}
\item[\textsuperscript{45}] See Hourihane, \textit{supra} note 20, at 1242 (noting the danger for double-blind testing with peanut allergies).
\item[\textsuperscript{46}] Id.
\item[\textsuperscript{47}] Hourihane et al., \textit{supra} note 35, at 636.
\item[\textsuperscript{48}] Kim et al., \textit{supra} note 29, at 167.
\item[\textsuperscript{49}] \textit{Facts and Statistics, supra} note 13.
\item[\textsuperscript{50}] Kim et al., \textit{supra} note 29, at 167.
\item[\textsuperscript{53}] \textit{Facts and Statistics, supra} note 13.
\item[\textsuperscript{54}] Sampson, \textit{supra} note 22, at 805.
\item[\textsuperscript{55}] Gold & Sainsbury, \textit{supra} note 24, at 171.
\end{itemize}
anaphylaxis are four times as likely to have had recurrent generalized reactions than those with insect venom anaphylaxis.\textsuperscript{56} One-third to one-half of anaphylaxis cases seen in hospital emergency rooms are triggered by food allergies.\textsuperscript{57} Also, one study found that once children were identified as at-risk for anaphylaxis, they averaged 0.98 allergic reactions per year, per child.\textsuperscript{58}

Moreover, the number of food allergy sufferers is rising.\textsuperscript{59} A study by the Centers for Disease Control and Prevention (CDC) revealed that food allergies in children increased by approximately 50\% between 1997 and 2011.\textsuperscript{60} For example, the U.S. population has seen the number of child peanut allergy sufferers double and even triple in just over a decade.\textsuperscript{61} As of 2004, 0.8\% of young children and 0.6\% of adults suffered from a peanut allergy.\textsuperscript{62} And a more comprehensive study, published in 2010, reported even more staggering statistics.\textsuperscript{63} This study used identical methodology in 1997, 2002, and 2008 to compare the prevalence of peanut allergies in those years.\textsuperscript{64} Although the rate of peanut allergies and the prevalence among the total population stayed rather constant,\textsuperscript{65} the percentage of reported peanut allergies in children under eighteen years of age more than \textit{tripled} from 1997 to 2008, going from 0.6\% to 2.1\% in just eleven years.\textsuperscript{66}

\section*{D. Low Threshold of Exposure to Trigger a Reaction}

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

\begin{footnotes}
\item[56] Id. at 172–74.
\item[57] See Sampson, supra note 22, at 811.
\item[58] Gold & Sainsbury, supra note 24, at 172.
\item[59] See Sampson, supra note 22, at 806; see also Facts and Statistics, supra note 13.
\item[60] See Facts and Statistics, supra note 13.
\item[61] See, e.g., Sampson, supra note 22, at 806; Sicherer et al., supra note 51, at 1324.
\item[62] Sampson, supra note 22, at 806.
\item[63] See Sicherer et al., supra note 51, at 1324.
\item[64] Id.
\item[65] Id. (estimating that the percentages of adults with peanut allergies were 1.6\%, 1.3\%, and 1.3\% in 1997, 2002, and 2008, respectively, and estimating that the percentages of the total population with peanut allergies were 1.4\%, 1.2\%, and 1.4\%, in 1997, 2002, and 2008, respectively).
\item[66] Id.
\item[67] See Morisset et al., supra note 17, at 1047–48.
\item[68] Id.
\end{footnotes}
with intact skin,\(^69\) or even through inhalation,\(^70\) making allergy-afflicted passengers especially vulnerable in compact areas, like the cabin of an airplane.

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

Importantly for airlines and their passengers, food allergy sufferers not only react to contact with peanut protein through ingestion, but also contact with intact skin\(^77\) and contact through inhalation.\(^78\) Studies of food allergy reactions on airplanes have mostly focused on peanut allergies.\(^79\) When researchers contacted 150 people who had reported experiencing a reaction to peanuts on an airplane, 15.7% reported a reaction through ingestion, 48.6% through inhalation, 27.9% through skin contact, and 7.8% were unsure of the means of exposure.\(^80\) Markedly, a

---

\(^{69}\) Hourihane, supra note 20, at 1241; Hourihane et al., supra note 35, at 637; Simonte et al., supra note 43, at 181.


\(^{71}\) See Hourihane, supra note 20, at 1241.

\(^{72}\) See Morisset et al., supra note 17, at 1048.

\(^{73}\) Id. at 1047–48.

\(^{74}\) Id. at 1050.

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

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

\(^{77}\) See Simonte et al., supra note 43, at 181.

\(^{78}\) Peanut Allergy: Causes, supra note 70; Shellfish Allergy, supra note 70.

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

\(^{80}\) Id.
full one-third of those individuals reported symptoms consistent with anaphylaxis.81

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

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

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

A. TRIGGERS FOR FOOD ALLERGIES ON COMMERCIAL FLIGHTS

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

81 Id.
82 See id. at 599; see also Simonte et al., supra note 43, at 181.
83 See Simonte et al., supra note 43, at 181.
84 See Morisset et al., supra note 17, at 1048.
85 See Kim et al., supra note 29, at 167; Simonte et al., supra note 43, at 181; Policies by Airlines, Allergy Safe Travel, http://allergysafetravel.com/policies-by-airlines/ [https://perma.cc/L7BV-S9DB].
86 See Kim et al., supra note 29, at 164 (noting that “available studies in the medical literature exploring the effect of childhood food allergy report that quality of life appears to be diminished in this population”).
87 See Simonte et al., supra note 43, at 181.
88 Kim et al., supra note 29, at 167.
89 See Policies by Airlines, supra note 85.
90 See supra Part II.D.
lion bags of peanuts. For individuals with sensitivity to trace ingestion or inhalation exposure, peanut dust in the air is a serious issue. An associate professor of pediatrics at Mt. Sinai School of Medicine’s Jaffe Food Allergy Institute, Dr. Anna Nowak-Wegrzyn, opined that because of the re-circulated air in the small, confined space of an airplane cabin, “[i]f people five rows behind you are releasing peanut dust[,] it doesn’t matter[;] at the end of the flight the peanut is in the air everywhere.” In fact, traces of peanut allergen have been collected from the ventilation filters of commercial airplanes, confirming that peanut protein is present in the air.

B. INADEQUATE TREATMENT FOR ALLERGIC REACTIONS WHILE ON BOARD

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

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

---


93 Id.

94 James, supra note 15, at 25.

95 See id. at 26.

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

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

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

99 James, supra note 15, at 26 (“There are no contraindications for [EpiPen] use in a life-threatening allergic reaction . . . .”).
Unfortunately, although epinephrine effectively addresses the severe symptoms associated with anaphylaxis,\(^{100}\) it has its own limitations. Epinephrine falls short in the areas of dosage, usage when situations call for its use, and knowledge, or lack thereof, of caregivers expected to administer the drug.

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

In addition to problems with dosage amounts, epinephrine must be administered every five to fifteen minutes as necessary, which requires that multiple doses be available.\(^{104}\) However, airplanes are only required to carry two doses of epinephrine\(^ {105}\) (which many passengers do not know about),\(^ {106}\) and it may be cost-prohibitive for an individual to carry multiple doses.\(^ {107}\)

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

\(^{100}\) See Gold & Sainsbury, supra note 24, at 171.

\(^{101}\) See Simons, supra note 26, at 840.

\(^{102}\) See id. at 839.

\(^{103}\) See Sampson et al., supra note 25, at 375.

\(^{104}\) 14 C.F.R. § 121.803 (requiring passenger-carrying airplanes to carry an emergency medical kit); 14 C.F.R. pt. 121, app. A (defining an “emergency medical kit” so as to require two different doses of epinephrine).

\(^{105}\) See Greenhawt et al., supra note 79, at 598.


\(^{107}\) See Simons, supra note 26, at 841; see also Gold & Sainsbury, supra note 24, at 171.

\(^{108}\) Simons, supra note 26, at 842.
not administered as first aid treatment. A study of peanut and tree nut allergic reactions on commercial airlines reported that although one-third of cases reported symptoms consistent with anaphylaxis, only 10% of respondents received epinephrine despite its availability aboard the aircraft, probably due to lack of knowledge of its availability aboard or a passenger’s unwillingness to bother the flight staff.

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

C. Lack of Feasible Travel Alternatives

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

110 Gold & Sainsbury, supra note 24, at 174.
111 Greenhawt et al., supra note 79, at 598.
112 See Kim et al., supra note 29, at 164.
113 See Gold & Sainsbury, supra note 24, at 172.
114 See id.
115 See Policies by Airlines, supra note 85.
Additionally, flying private is not an option for most passengers. An estimation of the flight for Gleason, the plaintiff in the case referenced at the beginning of this article, would be between $2,060 and $44,020 one-way.\footnote{118}{See Private Jet Flight Search, PrivateFly, http://www.privatefly.com/us/private-jet-charter/estimate-prices?flightSearch=2911908 [https://perma.cc/C2MA-USX5] (returning an estimate of between $2,060 and $44,020 for a one-way flight from Chicago O’Hare Airport to any airport in Orlando, Florida).}

A recent survey of those who had experienced a reaction to peanuts while aboard a commercial aircraft illustrates this lack of alternatives.\footnote{119}{See Greenhawt et al., supra note 79, at 599.} In spite of experiencing a reaction to peanuts while flying commercially, more than 50\% of respondents did not change their flying behavior, about 25\% no longer consume food served on board, about 25\% clean their personal seating area, and 20\% request an allergen-free flight (despite little success); but a mere 12\% were discouraged enough by a past reaction to no longer fly commercially.\footnote{120}{Id. at 598.}

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

With the risks and lack of alternatives for food allergy sufferers traveling commercially, one would think that the DOT might step in to offer protection for those individuals. However, history has shown that political pressures will never permit the DOT to offer such protection.\footnote{121}{James, supra note 15, at 25 (describing the political backlash to the DOT’s proposed regulation to mandate the ten major U.S. airlines to provide “peanut-free zones”).}

In 1998, the DOT proposed a regulation that would require the ten major commercial airlines to provide “peanut-free zones” for allergic passengers.\footnote{122}{Id.} The Air Transportation Association, a trade organization for major U.S. airlines, strongly resisted the proposed regulation.\footnote{123}{Id.} On September 11, 1998, Senators Coverdell and Shelby, who submitted Senate Resolution 117, called the establishment of peanut-free zones “excessive regulation” for three reasons: (1) regulations on peanuts
would “unfairly single[] out [one] product while ignoring all other allergens”; (2) regulation would infringe on the “rights of the 99.9[%] of the traveling public who are not allergic to peanuts”; and (3) peanut-free zones “might needlessly establish allergen-free zones for all public transportation.” Consequently, Congress enacted Public Law 106-69, an appropriations bill prohibiting the use of funds to carry out regulations that “provide peanut-free buffer zone[s] . . . or . . . restrict the distribution of peanuts.”

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

V. WHAT IS THE LEGAL FRAMEWORK FOR SERVICE PREEMPTION?

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

---

125 Appropriations, 2000—Department of Transportation and Related Agencies, Pub. L. No. 106-69, § 346, 113 Stat. 986, 1023–24 (The funds cannot be used for such purposes until Congress receives a “peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft.”).
126 See 75 Fed. Reg. 32318 (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, and 399).
128 Id.
tion on board a commercial aircraft. The ADA requires that “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . .” So, is it all but impossible to sue an airline? Although the court in Gleason determined that all of Gleason’s claims were preempted by this provision, the U.S. Supreme Court has held that breach of contract claims are allowable, and, more importantly for this discussion, the question remains open as to what qualifies as a service for the purpose of determining preemption under the ADA.

A. Supreme Court Precedent

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

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

---

135 Morales, 504 U.S. at 391.
136 Id. at 385.
137 Id. at 386.
138 Wolens, 513 U.S. at 219.
consumer fraud act claims, but it affirmed the decision in that it allowed plaintiffs’ breach of contract action to proceed. In Wolens, the plaintiffs, all members of American Airlines’ frequent flyer program, sued for an injunction and monetary damages under the Illinois Consumer Fraud and Deceptive Business Practices Act after American Airlines changed their frequent flyer program and retroactively applied the modifications to the plaintiffs.

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

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

---

139 Id. at 226.
140 Id.
141 Id. at 224–25 (suing under 815 Ill. Comp. Stat. 505 (1992)).
142 Id. at 225.
143 Id.
144 Id. at 226 (quoting Wolens v. Am. Airlines, Inc., 157 Ill. 2d 466, 472 (1993)).
145 Id.
147 Wolens, 513 U.S. at 228 (alteration in original) (quoting Brief for Petitioner at 27, Wolens, 513 U.S. 219 (No. 93-1286)).
the preemption provision by observing, in agreement with the United States as amicus curiae, that “[t]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.”148 This case illustrates that the Court maintains a broad view of preemption under the ADA, but it leaves room for some exceptions.

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

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

---

148 *Id.* at 230 (quoting Brief for United States as Amicus Curiae Supporting Respondents at 23, *Wolens*, 513 U.S. 219 (No. 93-1286)).
149 *Id.*
150 *Id.*
151 *Id.* at 1427.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.* at 1428 (quoting Ginsberg v. Northwest, Inc., 695 F.3d 873, 879 (9th Cir. 2012)).
156 *Id.* at 1433–34.
expressly preempts any “law, regulation, or provision having the force and effect of law.” Additionally, the Court recognized
that placing common law claims outside the scope of the preemption provision would negate the central purpose of the provision—to ensure that states would not undo the deregulation of the airline industry that Congress sought to accomplish. Once the Court had determined that common law claims fell comfortably within the realm of preemption, the Court found that the implied covenant claim was not just limited to obligations that the parties voluntarily assumed, but also was subject to state-imposed standards, primarily because the implied covenant could not be contracted out of an agreement between the parties. Thus, the implied covenant claim was subject to the full preemptive effect of the ADA. The Court did note Ginsberg’s “claim of ill treatment by Northwest might have been vindicated if he had pursued his [breach of contract] claim,” rather than voluntarily giving up on that claim.

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

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

---

157 Id. at 1428.
158 Id. at 1430.
159 Id. at 1432.
160 Id.
161 Id. at 1433.
164 See Wolens, 513 U.S. at 226 (finding that “access to flights and class-of-service upgrades” were included under service preemption but declining to further define services).
B. CIRCUIT SPLIT OVER THE DEFINITION OF SERVICE

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

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

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

---

166 Compare Ventress v. Japan Airlines, 603 F.3d 676, 682 (9th Cir. 2010) (citing Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc)), with Malik v. Cont’l Airlines, Inc., 305 F. App’x 165, 168 (5th Cir. 2008) (citing Hodges v. Delta Airlines, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)).
167 See, e.g., Ventress, 603 F.3d at 682.
168 Charas, 160 F.3d at 1261.
169 Id.
170 See Bower v. EgyptAir Airlines Co., 731 F.3d 85, 93 (1st Cir. 2013); DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 87 (1st Cir. 2011); Elassaad v. Independence Air, Inc., 613 F.3d 119, 127 (3d Cir. 2010).
171 49 U.S.C.S. § 40120(c) (“A remedy under this part is in addition to any other remedies provided by law.” (emphasis added)).
172 See Taj Mahal Travel v. Delta Airlines, Inc., 164 F.3d 186, 194 (3d Cir. 1998); see also Charas, 160 F.3d at 1265.
tained in air crashes.”173 The Third Circuit justified a con-
strained reading of preemption of tort law by pointing out that “‘the [DOT] has neither the authority nor the apparatus re-
quired to superintend’ tort disputes.”174

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

“Services” generally represent a bargained-for or anticipated pro-
vision of labor from one party to another. If the element of bar-
gain or agreement is incorporated in our understanding of
services, it leads to a concern with the contractual arrangement
between the airline and the user of the service. Elements of the
air carrier service bargain include items such as ticketing, board-
ing procedures, provision of food and drink, and baggage han-
dl ling, in addition to the transportation itself. These matters are
all appurtenant and necessarily included with the contract of car-
riage between the passenger or shipper and the airline. It is these
[contractual] features of air transportation that we believe Con-
gress intended to de-regulate as “services” and broadly to protect
from state regulation.176

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

173 Elassaad, 613 F.3d at 126 (internal quotation marks omitted) (quoting Taj
Mahal Travel, 164 F.3d at 194).
174 Id. at 127 (quoting Taj Mahal Travel, 164 F.3d at 194).
175 See Air Transp. Ass’n of Am. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008).
176 Malik v. Cont’l Airlines, Inc., 305 F. App’x 165, 168 (5th Cir. 2008) (quot-
ing Hodges v. Delta Airlines, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)).
177 Tobin v. Fed. Express Corp., 775 F.3d 448, 453 (1st Cir. 2014) (citing Bower
v. EgyptAir Airlines Co., 731 F.3d 85, 93–95, 98 (1st Cir. 2013)); Cuomo, 520 F.3d
at 223 (holding that claims arising from provisions for passengers during lengthy
ground delays relate to services of an air carrier and were therefore preempted);
Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1257 (11th Cir. 2003) (finding
the arguments for a broader definition of services more compelling than the
alternative); Arapahoe Cty. Pub. Airport Auth. v. Fed. Aviation Admin., 242 F.3d
1213, 1222 (10th Cir. 2001) (finding that a ban on scheduled passenger service
related to both routes and services and was thus preempted); Travel All Over the
World v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996) (adopting
the Hodges definition of services).
cludes all claims related to a service, even if those claims are based on state standards, either from statutory or common law.\textsuperscript{178} And personal injury from an allergic reaction to food would be related to food and beverage service, and negligence is a state common law standard.

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

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

\textsuperscript{178} Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1429 (2014).
\textsuperscript{179} See, e.g., Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998).
\textsuperscript{180} See id.
\textsuperscript{181} See id.
\textsuperscript{183} See id.
\textsuperscript{185} Compare Malik v. Cont’l Airlines, Inc., 305 F. App’x 165, 168 (5th Cir. 2008) (quoting Hodges v. Delta Airlines, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)), with Ventress v. Japan Airlines, 603 F.3d 676, 682 (9th Cir. 2010) (citing Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc)).
dent of state law.\textsuperscript{186} Although the Supreme Court has affirmatively stated that breach of contract claims are not subject to preemption,\textsuperscript{187} not all courts abide by that ruling.\textsuperscript{188}

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

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

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

A. LEGISLATIVE INTENT

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

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


\textsuperscript{188} See Gleason, 2015 WL 2448682, at *2.


\textsuperscript{191} Id.
a “remedy under this part . . . is *in addition to* any other remedies provided by law.” 192 Moreover, Congress mandates that airlines maintain insurance coverage “sufficient to pay . . . for bodily injury to, or death of, an individual . . . resulting from the operation or maintenance of the aircraft . . . .” 193 It would be odd indeed if Congress intended to preempt all claims relating to personal injury from an airline’s negligence in “ticketing, boarding procedures, provision of food and drink, and baggage handling,” 194 when, as noted above, they have expressed a commitment to safety and protection for passengers from personal injury. 195

**B. Supreme Court Precedent**

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

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

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

---

192 49 U.S.C. § 40120(c) (emphasis added).
194 Malik v. Cont’l Airlines, Inc., 305 F. App’x 165, 168 (5th Cir. 2008) (citing Hodges v. Delta Airlines, 44 F.3d 334, 336 (5th Cir. 1995)) (finding a broad definition of services for preemptive purposes).
195 See *supra* notes 191–92 and accompanying text.
196 Nw. Airlines, Inc. v. Duncan, 531 U.S. 1058, 1058 (2000) (O’Connor, J., dissenting to a denial of a writ of certiorari) (declining to resolve the circuit split over the definition of services).
198 Id.
199 See Malik, 305 F. App’x at 168.
200 See *Wolens*, 513 U.S. at 231 n.7, 234 n.9.
the public as engaged in the business of transporting persons or property from place to place, for compensation, offering [their] services to the public generally,” attaches a heightened standard of care to those individuals or companies. And the Supreme Court has found that commercial airlines qualify as common carriers. It is doubtful that the Court will find that a heightened standard of care applies to commercial airlines and then turn around and preempt all claims involving an airline’s negligence.

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

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

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

201 D. E. Buckner, Annotation, Air Carrier as Common or Private Carrier, and Resulting Duties as to Passenger’s Safety, 73 A.L.R. Fed. 2d 346 (1960).
202 THOMAS A. DICKERSON, TRAVEL LAW § 2.05 (2016).
206 Id.
Up to this point, legal scholarship has exclusively focused on weighing the merits of potential DOT regulations for peanut restriction\(^{208}\) and considering the extent to which individuals can claim peanut allergies as a disability under the Air Carrier Access Act of 1986 or the Americans with Disabilities Act.\(^{209}\) However, not only do the corresponding solutions ignore all other food allergens, but also the solutions are not feasible. The DOT has its hands tied by congressional appropriations that forbid it to promulgate regulations restricting access to peanuts on airplanes,\(^{210}\) so the merits of any DOT regulations are likely irrelevant. And although food allergies seemingly fit the medical definition of disability,\(^{211}\) courts have found that food allergies do not fit the legal definition of disability.\(^{212}\)

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

Also, dealing with the concerns of allergic individuals through limiting the preemptive effect of the ADA addresses the concerns that Congress announced in Senate Resolution 117.\(^{214}\) The Senators submitting that resolution pointed out that peanut regulations ignored the rights of the majority of airline passengers, “single[d] out” one product among many allergens, and might set a policy of having allergen-free zones in other forms of public transportation.\(^{215}\) Here, a narrow interpretation of service preemption merely opens the door for claims against an

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


\(^{211}\) See Browning, supra note 91, at 34.


\(^{215}\) Id.
airline from any passenger who suffers a personal injury resulting from the airline’s tortious conduct,\textsuperscript{216} without singling out any products, passengers, airlines, or industries. And allowing tort claims would not have any effect on the standard of care applied to other public transportation services. Congressional concern over the effect of peanut regulation is eliminated with a narrow interpretation of service preemption under the ADA.

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

\textbf{VIII. CONCLUSION}

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

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


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