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Exhaustless opposes the proposed renewal of Agency Information Collection, Slot Allocation and Transfer Methods, 86 Fed. Reg. 14515 (Mar. 16, 2021)

A. Overview

Exhaustless opposes the unlawful collection of slot and schedule information from carriers because the FAA uses this information in an illegal subsidy to administratively allocate the market of valuable, scarce reservations to the national airspace, for free, to certain domestic and foreign air carriers.[1] This illegal subsidy has shut out Exhaustless' competitive airspace reservation market.

Exhaustless urges the FAA to rescind this information collection activity, destroy the database of the historical allocation of all airspace reservations, and require carriers to obtain reservations to the airspace from Exhaustless' market-clearing service.

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[1] A slot is "a reservation for an instrument flight rule takeoff or landing by an air carrier of an aircraft in air transportation." 49 U.S.C. § 41714(h)(4).

B. The Subsidy by Regulators

The Airline Deregulation Act of 1978 requires prices, routes (origin/destination), and service quality in air transportation to be decided by market competition among carriers and among passengers in the private sector and prohibits states and federal regulators from interfering in this market. Yet despite denying carriers any regulatory path to obtain exclusive or proprietary rights to the use of the airspace,[2] and despite four decades of Congressional actions to deregulate the high density airports, the FAA continues to exceed its authority and confer 'grandfathered' carriers *de facto* exclusive rights to these airspace reservations.

The FAA supports the illegal subsidy of airspace reservations or schedules to 'grandfathered' carriers based on regulations that it classifies as air traffic rules to reduce air traffic congestion delays at seven high density[3] airports.[4] However, the information provided by carriers is not necessary for the FAA's performance because it is not used by the FAA to ensure safety or the movement of air traffic.[5]

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[2] *See* 49 U.S.C. § 41101(c).

[3] "The term "high density airport" means an airport at which the Administrator limits the number of instrument flight rule takeoffs and landings of aircraft." 49 U.S.C. § 41714(h)(2).

[4] The seven high density airports are Reagan National, LaGuardia, JFK, Newark Liberty, Los Angeles, Chicago O'Hare, and San Francisco *See* 85 Fed. Reg. 65134, Notice of Submission Deadline for Schedule (Oct. 14, 2020), 85 Fed. Reg. 58255 and 58258, Extensions to Order (Sep. 18, 2020), and 14 C.F.R. 93.123 for Reagan.

[5] *See* email from Matthew Gonabe. FAA Program Specialist, Slot Administration (Jan. 29, 2021). ("ATC [Air Traffic Control] does not use published airline schedules or allocated slot data for operational purposes. ATC facilities within the United States obtain information on flights through flight plan filings and internal FAA databases used to support and provide operational information in the National Airspace System . . . Local air traffic control facilities are responsible for the safe and efficient movement of air traffic. They are not responsible for enforcing the FAA slot rules. Operators

Additionally, Congress has authorized the FAA to restrict operations only to ensure safety, and has prohibited the FAA from imposing further artificial restrictions to reduce congestion delays.[6] The best way to prevent the overscheduling of flights is to allocate a congestion-free volume of airspace reservations. In an economically deregulated industry, the way to reduce the volume of airspace reservations to the market clearing level – to eliminate market excess – is by using a private-sector market clearing service.

Exhaustless developed and offered a competitive market for allocation but the FAA has instead chosen to continue to subsidize 'grandfathered' carriers. The market value of the subsidy is estimated to exceed $1,000,000,000 per year for reservations to the New York City airspace alone, based on bids in limited, restricted slot forfeiture auctions.[7] The subsidy also prevents Exhaustless from broadcasting and collecting consumer congestion-prevention premiums — in other words, the market price for congestion-free airspace access. The DOT-sponsored NEXTOR study estimates that passengers would be willing to pay to avoid delays in the national airspace, which

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that violate the slot rules are subject to FAA enforcement which is the administrative responsibility of FAA Headquarters.") *See also* DOT Report to Congress, A Study of the High Density Rule (May 1995) at footnote 42.

[6] *See* 49 U.S.C. §§ 41715(a) and 47101(a)(9). *See also* § 41715(b)(1) ("Nothing in this section . . . shall be construed as affecting the Federal Aviation Administration's authority for safety and the movement of air traffic.")

[7] *See* 76 Fed. Reg. 65773, Notice of procedures for the reallocation of slots (Oct. 24, 2011). *See also* the final bids on LGA A, LGA B, and DCA bundles at Docket FAA-2010-0109 (posted Dec. 18, 2011).

currently cost them more than $16,000,000,000 per year.[8] Which means the regulations that use this information collection at high density airports are economically significant, yet the FAA has not submitted them for Congressional or Secretarial review as required by statutes.[9]

This breakdown in the separation of powers has substituted the FAA's goal "to provide continuity" in routes over Congress' clear intent for market competition to determine price, route, and service quality.[10]

1. The FAA Process

To manage excess supply of flights by carriers ("the advance management of air traffic demand"[11]), the FAA operates an airspace reservation service, which allocates valuable, scarce reservations to carriers months in advance of flight.[12] The FAA generally follows the Worldwide Slot Guidelines of the International Air Transport Association (IATA) for allocating airspace reservations.[13]

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[8] Michael Ball, et al., Total Delay Impact Study, National Center of Excellence for Aviation Operations Research ("NEXTOR") at 3, Table 1-1 (Nov. 3, 2010). *See also, Id*. at 11 ("In general, passengers are willing to pay a higher price for less delayed flights"). http://www.nextor.org/pubs/TDI_Report_Final_11_03_10.pdf.

[9] *See* 5 U.S.C. § 801(a) and 49 U.S.C. § 106(f)(3)(B)(i).

[10] 80 Fed. Reg. 1274, 1275, Slot Management and Transparency (proposed Jan. 8, 2015).

[11] 86 Fed. Reg. 14515, Agency Information Collection Activities: High Density Traffic Airports; Slot Allocation and Transfer Methods (Mar. 16, 2021).

[12] *See* Notice of Submission Deadline for Schedule Information, 86 Fed. Reg. 24428 (May 6, 2021) ("Access to EWR and the New York City area generally remains coveted.").

[13] IATA Worldwide Slot Guidelines, 9th Edition, Part 3: Process at 45 (Effective Jan. 1, 2019) (at Docket FAA-2020-0862, Dec. 17, 2020). *See also*, 85 Fed. Reg. 58258 at 58259. ("[T]he FAA continues to apply version 9 of the IATA WSG (Jan. 1, 2019) to inform its slot administration decisions[.]")

Carriers report to the FAA a list of all airspace reservations "held by the carrier",[14] and the FAA updates their slot database with any changes.[15]

The FAA requires carriers . . . "to submit their planned schedules or slot requests for the summer and winter scheduling seasons."[16]

The FAA then compares the schedules submitted by the carriers to their slot database; for requested slots that correspond as 'held' by that carrier, the FAA approves the schedule. For requested slots that do not correspond as 'held' by that carrier – if the slot is available, the FAA approves the schedule, and that carrier now 'holds' the slot; if the slot is not available, the FAA denies the schedule (and offers the carrier another reservation time if one is available).[17]

The FAA then attends the IATA "slot conference. . . for discussions of slots and schedule adjustments."[18]

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[14] 85 Fed. Reg. 58258, 9.b. at 58260.

[15] *See* DOT/FAA Supporting Statement, OMB Control No. 2120-0524, 4. ("The FAA uses this information on a daily basis in order to maintain an accurate slot base. * * * "There are no other data sources that would assign carrier operations to specific slots as these determinations are made by the carriers in most cases.")

[16] *Id*. at 7. *See also, e.g*., 85 Fed. Reg. 65134.

[17] *See* Email from Matthew Gonabe, FAA Program Specialist, Slot Administration (Jan. 29, 2021). *See also* DOT/FAA Supporting Statement, OMB Control No. 2120-0524, 4 ("The FAA has implemented a coordination system that has minimized the reporting burden for carriers by receiving, processing, and responding to schedule requests in industry standard format.')

[18] IATA Worldwide Slot Guidelines, 9th Edition, § 9.11.1 at 50. *See also* DOT/FAA Supporting Statement, OMB Control No. 2120-0524, 6.

Carriers must submit reports to "ensure compliance with the usage requirements."[19] The 'holding' extends indefinitely as long as the carrier continues to honor the reservation within the minimum-usage requirement.[20]

C. The Statutory Framework

1. The Federal Aviation Act of 1958

Congressional hearings for the legislation leading to the Federal Aviation Act focused on consolidating the safety oversight of air commerce into a new independent agency under the executive branch. "The paramount purpose of a Federal Aviation Agency is to provide a single focal point where problems related to the aviation community, *other than economic regulation*, can be resolved."[21]

Congress retained the statute that the economic certificate "does not confer a proprietary or exclusive right to use airspace, an airway of the United States, or an air navigation facility."[22] 49 U.S.C. § 41101(c).

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[19] DOT/FAA Supporting Statement, OMB Control No. 2120-0524, 5. *See also, e.g.*, 85 Fed. Reg. 58258, 9.b.ii. at 58260.

[20] The FAA has reserved the market allocation for the 'grandfathered' carriers at the high density airports through the COVID-19 pandemic by waiving the usage requirements beginning March 16, 2020 and currently extended through October 30, 2021. *See* 85 Fed. Reg. 63335, Extension of limited waiver of the minimum slot usage requirement (Oct. 7, 2020) and FAA Policy Statement, Docket FAA-2020-0862 (Jan. 14, 2021).

[21] House Subcommittee on Transportation and Communications Hearings on H.R. 12616, Statement of Gen. E. R. Quesada, Chairman, Airways Modernization Board, Consolidation of Safety Rulemaking, page 31 (June 24, 1958) (emphasis added). (Gen. Quesada became the first FAA Administrator.)

[22] Federal Aviation Act of 1958, Pub. L. 85-726, §401(i), 72 Stat. 731, 756 (Aug. 23, 1958). *See also* Air Commerce Act of 1926, Pub. L. 69-254, §5(b), 44 Stat. 568, 571 (May 20, 1926); Civil Aeronautics Act of 1938, Pub. L. 75-706, §302(a), 52 Stat 973, 990 (Jun. 23, 1938).

2. The Airline Deregulation Act of 1978

Congress deregulated air transportation in 1978; the Supreme Court found that:

> Congress, determining that maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality . . . of air transportation services, enacted the Airline Deregulation Act (ADA). To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier.[23]

Congress authorized the Secretary to prescribe terms of the carrier certificate except that the Secretary "may not prescribe a term preventing an air carrier from adding or changing schedules . . . and facilities for providing the authorized transportation to satisfy business development and public demand." 49 U.S.C. § 41109(a)(2)(B).

To help transition the industry from the Civil Aeronautics Board's (CAB) route authority to market competition for routes, Congress granted airlines a method to assert transitional grandfathered rights over limited routes: A carrier with prior route authority "which wants to preclude any other air carrier from obtaining authority. . . to engage in nonstop service between such pair of points during such

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[23] *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992) (internal quotation marks and citations omitted).

calendar year may . . . file written notice to the Board which sets forth such pair of points . . . [for no] more than one pair of points" for calendar years 1979 to 1981.[24]

On December 31, 1981, the certificated route authorities that had been issued by the CAB were terminated, and "carriers holding domestic certificates received authority to serve any domestic or territorial point."[25]

3. International Air Transportation Competition Act of 1979

To promote competition in international air transportation, Congress directed that "the Secretaries of State and Transportation shall develop a negotiating policy emphasizing the greatest degree of competition", including "developing . . .a viable, privately-owned United States air transport industry."[26] The U.S. currently has over 100 air transport agreements under this Open Skies framework.

a. Australia Air Transport Agreement Excerpts

> Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.[27]
>
> Any requirements for the filing of schedules, applications for programs for charter flights, or operational plans by airlines of the other Party shall be on a non-discriminatory

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[24] Airline Deregulation Act of 1978, Pub. L. 95-504, §12, amending §401(d)(7)(C), 92 Stat. 1705, 1718 (Oct. 24, 1978). (emphasis added). *See also Id.*, Title XVI – Sunset Provisions, §40(a), adding §1601(a)(1)(C), 92 Stat. 1705, 1744.

[25] Civil Aeronautics Board Fiscal Year 1981/1982 Reports to Congress, page 1 (Feb. 1983).

[26] International Air Transportation Competition Act of 1979, Pub. L. 96-192, §17, 92 Stat. 35, 42 (Feb. 15, 1980), codified at 49 U.S.C. § 40101(e)(10).

[27] Air Transport Agreement Between the U.S. and Australia, T.I.A.S. No. 13-618, Art. 11 § 1 (Mar. 31, 2008).

basis and imposed only when necessary to fulfill requirements under the domestic law of either Party. If a Party requires filings, it shall minimize the administrative burdens of filing requirements and procedures on air transportation intermediaries and on airlines of the other Party.[28]

b. Canada Air Transport Agreement Excerpt

The Parties acknowledge that market forces shall be the primary consideration in the establishment of prices for air transportation.[29]

c. European Union Air Transport Agreement Excerpts

The Parties recognize that government subsidies and support may adversely affect the fair and equal opportunity of airlines to compete in providing the international air transportation governed by this Agreement.[30]

The Parties recognize that competition among airlines in the transatlantic market is important to promote the objectives of this Agreement, and confirm that they apply their respective competition regimes to protect and enhance overall competition and not individual competitors.[31]

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[28] *Id*., Art. 11 §4.

[29] Air Transport Agreement Between the Government of the United States and the Government of Canada, T.I.A.S. No. 07-312, Art. 6 (Mar. 12, 2007).

[30] U.S. – E.U. Air Transport Agreement, Art. 14 §1 (Apr. 30, 2007).

[31] *Id*., Art. 20 § 1.

4. Policy to Deregulate High Density Airports 1987

The House Subcommittee on Aviation held hearings on how the Federal government should allocate airspace reservations at airports at which the Federal government limits operations.[32] Chairman Norman Mineta stated,

> The effect of these DOT-FAA policies has been that the incumbent carriers now have [the] equivalent of 'grandfather' rights to their slots, and the incumbents are now able to freeze out most new entrants into the high-density airports. . . We must go forward with new policies which will make the high-density airports a part of the deregulated system.[33]

In 1987, Congress adopted a policy that "artificial restrictions on airport capacity are not in the public interest and should not be imposed to alleviate air traffic delays unless other reasonably available and less burdensome alternatives have first been attempted."[34]

5. AIR-21 Act of 2000

In 1968, the FAA began limiting flight volumes at certain airports to reduce flight delays by "regulatory control of demand"; overscheduling was prevented by the

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[32] Hearing on Government Policies on the Transfer of Operating Rights Granted by the Federal Government, Particularly Certificates of Public Convenience and Necessity and Airport Slots, Sep. 10, 19; Oct. 22, 1985.

[33] *Id*., page 2, Sep. 10, 1985.

[34] Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. 100-223, §102(c)(13), 101 Stat. 1486, 1488 (Dec. 30, 1987), now codified at 49 U.S.C. § 47101(a)(9).

central planning process.[35] After deregulation, the CAB and the DOJ declined to grant antitrust immunity to carrier scheduling committees.[36] In 1985, the FAA adopted the airline scheduling committee grandfathering rules to allocate airspace reservations and appointed itself as the deadlock breaker.[37]

In 1992, finding that the "continued success of a deregulated airline system requires the spur of effective actual and potential competition to force airlines to provide high quality service at the lowest possible fares," Congress created the National Commission to Ensure a Strong Competitive Airline Industry.[38] The Commission recommended that the FAA "review the rule that limits operations at "high density" airports with the aim of either removing these artificial limits or raising them to the highest practicable level consistent with safety requirements."[39]

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[35] 33 Fed. Reg. 12580, 12581, High Density Traffic Airports (Proposed Sep. 5, 1968). *See also,* 33 Fed. Reg. 17896, High Density Traffic Airports (Dec. 3, 1968) ("The proposals . . . were intended to provide relief from excessive delays at certain major terminals. They were not . . . intended to correct a safety problem.")

[36] *See* 45 Fed. Reg. 71236, 71237, Special Air Traffic Rules and Airport Traffic Patterns (Proposed Oct. 27, 1980) (Both the CAB and the DOJ "advised the DOT of their concerns about the anticompetitive aspects of the airline scheduling committee process"). *See also,* 49 Fed. Reg. 23806, Slot Allocation Alternative Methods (Proposed Jun. 7, 1984).

[37] *See* 50 Fed. Reg. 52180, High Density Traffic Airports; Slot Allocation and Transfer Methods (Dec. 20, 1985). S*ee also* 14 C.F.R. Part 93 Subpart S. *See also*, RIN 2120-0524 submitted Dec. 13, 1985.

[38] Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, Pub. L. 102-581, 106 Stat. 4872, 4891 §204(a)(6) (Oct. 31, 1992), codified at 49 U.S.C. § 40101(note).

[39] National Commission to Ensure a Strong Competitive Airline Industry*, Change, Challenge and Competition*, page 9, August 1993.

Congress directed the Secretary to study the High Density Rule framework,[40] and to conduct a rulemaking based on the results of the study.[41]

The DOT reported that:

> Changing the [High Density Rule] will not affect air safety. Today's sophisticated traffic management system limits demand to operationally safe levels through a variety of air traffic control programs and procedures that are implemented independently of the limits imposed by the HDR." * * * [E]liminating . . . the High Density Rule is likely to result in . . . [a]n increase in travel delay time and costs -- for consumers and airlines -- due to increased "peaking" of demand in airport operations as users opt to fly at their most desired times. * * * If lifting the HDR precipitates significant travel delays, consumers, airlines and the airports will be motivated to adjust their behavior in response to market forces, as happens at non-HDR airports across the United States.[42]

One alternative the DOT presented to immediately lifting the High Density Rule was the "Phase Out Over Time" option: "A phase out could be implemented by gradually reducing slot-controlled hours at the airport or by gradually increasing the number of slots to the point demand (or available capacity) is satiated."[43]

In 1997, a representative of the DOT testified that,

> Following the release of [the 1995 High Density Rule study], the Department made no recommendations to modify or repeal the high-density rule. . . We are of the

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[40] Federal Aviation Reauthorization Act of 1994, Pub. L. 103-305, §206(a)(1), 108 Stat. 1569, 1585, codified at 49 U.S.C. § 41714(e).

[41] *Id.,* §206(a)(1), 108 Stat. 1569, 1587, codified at 49 U.S.C. § 41714(f).

[42] DOT Report to Congress, A Study of the High Density Rule, page 3 (May 1995) (emphasis in original.)

[43] *Id*., page 18.

> view that it is up to Congress and local authorities to decide whether to modify these longstanding arrangements."[44]

So, in 2000, Congress enacted the 'phase out' option by directing carriers to cease using the High Density Rule framework at JFK and LaGuardia airports after January 1, 2007[45] — because "it is clear that this rule no longer serves any legitimate aviation purpose. Rather, it merely acts as an unnecessary constraint on operations, barring new entry, *limiting competition* and inflating prices at slot-controlled airports."[46]

a. FAA Response to AIR-21 Act

In June 2001, the FAA issued a Notice of Alternative Policy Options, which requested comments on the feasibility and effectiveness of several regulatory solutions for "effective, comprehensive solutions that represent the best public policy for controlling congestion and allocating operating rights at LGA."[47]

On August 29, 2006, the FAA proposed a semi-permanent administrative solution for managing airport congestion by establishing operating limits at LGA and requiring carriers to use larger aircraft (the "2006 Proposal").[48] Shortly thereafter,

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[44] Hearings before the Subcommittee on Transportation and Related Agencies on Airline Competition, page 36 (Oct. 21, 1997).

https://www.govinfo.gov/content/pkg/CHRG-105shrg53117/pdf/CHRG-105shrg53117.pdf

[45] *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. No. 106-181, §231, 114 Stat. 61, 108 (2000), codified at 49 U.S.C. § 41715(a).

[46] H.R. Rep. 106-167(1), 78 (1999) (emphasis added).

[47] 66 Fed. Reg. 31731, 31740, Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation (proposed Jun. 12, 2001).

[48] 71 Fed. Reg. 51359, Congestion Management Rule for LaGuardia (proposed Aug. 29, 2006).

the FAA installed "Interim Measures" that "temporarily maintai[n] LaGuardia's current operational limits during the interval between the High Density Rule's expiration and the effective date of the proposed replacement rule."[49]

On April 17, 2008, the FAA modified the 2006 Proposal to administratively allocate most slots by grandfathering them for free to incumbent carriers and then to allocate the remaining slots with a one-time, *permanent*, FAA auction; in one option, the FAA would retain the proceeds from the auction, and in a second option the incumbent carriers would retain the proceeds (the "2008 SNPRM").[50]

In June 2008, during the House Aviation Subcommittee hearing regarding the 2008 SNPRM, Rep. Jim Oberstar questioned D.J. Gribbin, General Counsel of the Office of the Secretary of Transportation (OST):

> Mr. OBERSTAR. I read your testimony last night. . . Slots are public assets.
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> Mr. GRIBBIN. That is correct.
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> Mr. OBERSTAR. The airspace is the common heritage of all Americans. The notion that airlines can make slots their private property to accrue value, then to be able to sell or lease that asset and pocket the value is repugnant, the only way I can describe it, to me and to the notion of a value of an airspace held and used for the benefit of all Americans and for our national and regional economy.
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[49] 71 Fed. Reg. 54331, 54333, 54332, Operating Limitations at LaGuardia (proposed Sept. 14, 2006). *See also* 71 Fed. Reg. 77854, Operating Limitations at LaGuardia (Dec. 27, 2006).

[50] 73 Fed. Reg. 20846, Congestion Management Rule for LaGuardia (proposed Apr. 17, 2008).

> Mr. GRIBBIN. You should know, historically, slots have been held by the airlines and have been traded by the airlines and sold by the airlines.
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> Mr. OBERSTAR. I know that, and I think that is wrong.
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> Mr. GRIBBIN. So our proposal actually limits—
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> Mr. OBERSTAR. Comes the time, we are going to make sure that never happens again.[51]

On October 10, 2008, the FAA issued a Final Rule.[52] This Rule never went into effect, however, because several parties filed suit challenging it, and the D.C. Circuit issued a stay on December 8, 2008.[53]

The 2009 omnibus appropriations law prohibited funds to be used by the FAA to "implement any regulation that would promulgate new aviation user fees[54] not specifically authorized by law after the date of the enactment of this Act * * * [or by the] Secretary . . . to promulgate regulations or take any action regarding the scheduling of airline operations . . . involv[ing]: (1) the auctioning by the Secretary or the FAA Administrator of rights or permission to conduct airline operations at such an airport . . ."[55]

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[51] Hearing before the Subcommittee on Aviation of the Committee on Transportation and Infrastructure House of Representatives, 26 (Jun. 18, 2008).

[52] 73 Fed. Reg. 60573, Congestion Management Rule for LaGuardia (Oct. 10, 2008).

[53] *See Port Auth. of N.Y. & N.J. v. F.A.A.*, No. 08-1333 (D.C. Cir. 2008).

[54] Aviation user fees are fees paid to the FAA by carriers for air traffic services. *See* 49 U.S.C. § 45301(a) and § 45303(a), (g)(3)(A), and (g)(4).

[55] Omnibus Appropriations Act, 2009, Public Law 111–8, Division I, [§ 105 and § 115,] 123 Stat. 524, 918, 921 (2009) .

In October 2009, the FAA rescinded the rule.[56]

Regulatory efforts regarding airspace reservations at JFK Airport started out a little differently but "ended in much the same place."[57]

The FAA has continuously extended its interim orders at LaGuardia and JFK since their first implementation.[58] The current orders expire on October 29, 2022, and the FAA again found that "notice and comment procedures under 5 U.S.C. 553(b) are impracticable, unnecessary, and contrary to the public interest, as carriers have begun planning schedules for the winter 2020/2021 season and no substantive changes are included in this action."[59]

D. Exhaustless' Market-Clearing Service

Exhaustless developed a market-clearing service to meet the Congressional policy to maximize competitive market forces; it calculates the capacity that would support the highest volume of flights and passengers while minimizing the queue, and upgrades both the carrier and passenger reservation systems to discover, broadcast, and collect the premium needed to clear excess passenger and cargo demand and excess carrier supply. Consequent to the development of the solution

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56 74 Fed. Reg. 52132, Rescission of Congestion Management Rule for LaGuardia (Oct. 9, 2009).

57 *Exhaustless, Inc. v. FAA*, 931 F. 3d. 1209, 1211 (D.C. Cir. 2019).

58 *Id*. at 1211 ("The agency extended the interim orders for both LaGuardia and JFK Airports until October 2011 * * * In September 2018, the FAA once more extended the interim orders for LaGuardia and JFK Airports.")

59 85 Fed. Reg. 58255, 58256, Extension to order (Sep. 18, 2020). *See also* 85 Fed. Reg. 58258, Extension to order (Sep. 18, 2020).

and its new commerce, Exhaustless disclosed its discovery in a patent application in the U.S. and Canada.[60]

As a privately-owned corporation in good standing in the State of Delaware, Exhaustless has the right to displace the current anticompetitive allocation with its demand-calibrated market-clearing service — to provide for a nationally and internationally consistent air commerce system.[61]

E. Recent Actions

1. Slot Auction Announcements

The FAA interim orders at LaGuardia and JFK were set to expire on October 27, 2018.[62] On May 28, 2018, Exhaustless announced that it would hold an auction on July 18, 2018 for airspace reservations for the Winter 2018 airline scheduling-season beginning October 28, 2018.[63]

Exhaustless then discovered that the FAA had already notified carriers of its intent to extend the interim orders and had requested schedules from airlines for the

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[60] Patent Application US15/789,585.

[61] Compared to, for example, the five different processes for information reporting for the seven high density airports.

[62] *See* 81 Fed. Reg. 33126, Extension to order (May 25, 2016) and 81 Fed. Reg. 40167, Notice of amendment to order (Jun. 21, 2016).

[63] *See* Exhaustless slot auction announcement (May 28, 2018) Note that carriers were then using IATA Worldwide Slot Guidelines, 8th Edition (Effective Jan. 1, 2017).

Winter 2018 season to continue to administratively allocate the slots.[64] Exhaustless notified the FAA of the scheduled auction and objected to this extension.[65]

Nevertheless, citing the public interest, the FAA extended the orders for two more years.[66]

Most recently, Exhaustless' announced a slot auction to be held on April 7, 2021 for New York City airspace reservations for the Winter scheduling season that begins October 31, 2021.[67] But since the FAA has not discontinued its illegal subsidy, carriers have not engaged Exhaustless' service.

2. FAA Expands Information Collection

In May 2018, the FAA requested an expansion of a slot and schedule Information Collection for Reagan airport to add the other six high density airports, explaining that the "FAA uses this information to allocate and withdraw takeoff and landing slots . . . and to confirm transfers of slots made among the operators, thus maintaining an accurate slot base[.]"[68]

The application stated that this process costs $450,000 from the U.S. Treasury annually and that "[t]here are no monetary considerations for this collection of

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64 *See* 83 Fed. Reg. 21335, Notice of Submission Deadline for Schedule (May 9, 2018). ("The FAA intends to extend the effective date of the JFK Order prior to the expiration of the current Order.")

65 *See* Exhaustless' comments in Docket FAA-2013-0259 (Jun. 4, 2018 and Jun. 18, 2018), and Dockets FAA-2006-25755 and FAA-2007-29320 (Jun. 25, 2018).

66 *See* 83 Fed. Reg. 47065, Extension to order (Sep. 18, 2018) and 83 Fed. Reg. 46865, Extension to order (Sep. 17, 2018).

67 *See* Exhaustless Inc. Comment, Docket FAA-2020-0862 (Dec. 28, 2020).

68 83 Fed. Reg. 24842, Notice and request for comments (May 30, 2018).

information" — which excluded the market value of the scarce, renewable airspace reservations which were granted for free to certain carriers by using the slot 'holding' information collected from carriers.[69]

OIRA approved the request.[70]

3. Exhaustless v. FAA

In November 2018, Exhaustless challenged the FAA's extension of the interim orders at LaGuardia and JFK airports. In its ruling, the court defined the Aviation 2.0 market-clearing service:

> Using Aviation 2.0, carriers would compete in semi-annual auctions to purchase slots for a six-month period, with the total number of slots determined by Exhaustless using its proprietary technology. Passengers would then pay demand-calibrated congestion premiums (on top of their airfare) when purchasing tickets. Both the congestion premiums and the auction proceeds would go to Exhaustless.[71]

In addition, the court declared that the "interim rule resembled the High Density Rule and generally grandfathered the slots held by airlines under the previous regime."[72]

The Court dismissed the petition without the carriers present because:

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[69] DOT/FAA Supporting Statement, High Density Traffic Airports; Slot Allocation and Transfer Methods, OMB Control No. 2120-0524, Item 9 Payments or gifts to respondents, 6 (May 31, 2018); *see also* page 15 for the total annual cost.

[70] *See* Notice of Office of Management and Budget Action, ICR Reference No: 201805-2120-013 (Sep. 24, 2018).

[71] *Exhaustless, Inc. v. FAA*, 931 F. 3d. 1209, 1212 (D.C. Cir. 2019).

[72] *Id.* at 1211.

> [W]hen a petitioner's injury arises from an *agency's unlawful regulation* (or lack of regulation) of someone else, causation often is substantially more difficult to establish because the petitioner must demonstrate that the injury does not result from the independent action of some third party not before the court.[73]

However, neither Exhaustless nor the FAA had notified the Court of the FAA process of denying airspace reservations to non-grandfathered carriers.

F. Conclusion

Congress has put in place a statutory scheme that relies on market competition in interstate and foreign commerce, including air commerce. Exhaustless urges the FAA to follow the law by rescinding this information collection, destroying the underlying database, and instructing carriers to obtain airspace reservations from the market competition provided by Exhaustless' market-clearing service.

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[73] *Id.* at 1212 (internal quotations and citation omitted, emphasis added).