Steven P. Endres
CEO

Exhaustless Inc.
4338 Hillside Dr.
Ann Arbor, MI 48105
(734) 945-9231
steve@exhaustless.com

September 20, 2021
via reginfo.gov

Office of Information and Regulatory Affairs
RIN: None
OMB Control Number: 2120-0524

Exhaustless opposes the FAA's proposed renewal of Agency Information Collection, Slot Allocation and Transfer Methods, 86 Fed. Reg. 48466 (Aug. 30, 2021)

Congress mandates the competitive market allocation of scarce airspace reservations – so-called slots – at airports, prohibits carriers from grandfathering access, and prohibits the administrative grandfathering of access. But carriers and the Federal Aviation Administration (FAA) continue to grandfather access to airports over the competitive market brought forth by Exhaustless. After consistent action by Congress to establish a competitive market for routes in the private sector, the FAA now argues that they have had a mandate to grandfather routes since 1958.

Executive Order 14036 of July 9, 2021, calls for review of slot administration specifically, and yet there is no pending rulemaking on the Department of Transportation's (DOT) Unified Agenda for which Exhaustless can request an EO12866 meeting regarding an illegal and economically significant subsidy that has been packaged for OIRA as a routine information collection for a traffic rule.

This comment will show the Administration how regulators have defied competition law and Court rulings, subsidized certain carriers, and thwarted oversight. The Administration must now show the world how Americans can own up to, and fix, our errors to ensure that fair, competitive markets work.

Exhaustless petitions for a meeting with Ron Klain, the Chief of Staff; Gina Raimondo, the Secretary of Commerce; Antony Blinken, the Secretary of State; and Pete Buttigieg, the Secretary of Transportation, regarding the migration to Exhaustless' patent-pending market-clearing service, which replaces the prohibited grandfathering with a court-reviewed allocation process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Regulations

Constitutional Provisions

GLOSSARY OF ABBREVIATIONS & ACRONYMS

Abbreviation/Acronym	Definition
CAB	Civil Aeronautics Board
DCA	Reagan National Airport, formerly Washington National Airport
DOJ	United States Department of Justice
DOT	United States Department of Transportation
EWR	Newark Liberty International Airport
FAA	Federal Aviation Administration of the U.S. Department of Transportation
HDR	High Density Rule (refers to either, or both, 14 C.F.R. Part 93 Subpart K or Subpart S)
IATA	International Air Transport Association, a global carrier trade association
ICR	Information Collection Request
JEC	Joint Economic Committee of the Senate
JFK	John F. Kennedy International Airport
LAX	Los Angeles International Airport
LGA	LaGuardia Airport
NEXTOR	National Center of Excellence for Aviation Operations Research
OIRA	Office of Information and Regulatory Affairs of the Office of Management and Budget
ORD	Chicago O'Hare International Airport
OST	Office of the Secretary of Transportation
RIN	Regulation Identifier Number

SFO	San Francisco International Airport
WASG/WSG	Worldwide (Airport) Slot Guidelines, an operating standard of the IATA

WHOLE OF GOVERNMENT

Exhaustless urges OIRA to stop an illegal subsidy that results from the administrative allocation of valuable airspace reservations when the FAA uses the information gathered from this collection. Exhaustless, the Article I, and the Article III branches have done their parts: It is past time for the Article II branch to defend the constitutional order by executing the statutes as clearly written by Congress — and supported by the President – then-senator Joseph R. Biden, Jr.

When two airlines want to reserve capacity to provide regularly scheduled flight service at the same place and future time, but there is only airspace for one aircraft at that time, how is that conflict resolved? Congress says with market competition. But the FAA says it goes to the airline that used it last year.

The FAA wrongly argues that to achieve the efficient use of airspace requires them to 1) defy the Congressional mandate to place maximum reliance on competition, 2) defy a court ruling that the FAA must comply with the mandate for competition, and 3) overrule Congressional prohibitions on grandfathering airspace reservations. The FAA's scheme *prevents the free flow of price information, to both suppliers and consumers, for routes in the market of airspace reservations— because the reservation price is fixed to zero.* The entire modern, global air transportation industry is locked into the routes that were designed by regulators between 1938-1981, and into the exclusive service by the providers that were then awarded those routes — rather than responding to competitive market forces to shape the schedules.

A. Build Back Better

Secretary Raimondo recently spoke to a community forum regarding President Biden's Build Back Better agenda, when she said: "We need to prove that capitalism and democracy CAN work for everyone — not just the wealthy and the powerful."[1]

To meet the Administration's goal to build air transportation back better requires:

- Ending the FAA's involvement in economic matters of market allocation of airspace capacity and the Office of the Secretary of Transportation's (OST) illegal grant of property rights to the airspace to so-called 'legacy' carriers.[2]
- Allocating scarce, valuable national airspace capacity in a fair and competitive market — and Exhaustless' court-reviewed market-clearing service does that by discovering and broadcasting to passengers the market price of an exclusive right, *i.e.,* the price to exclude others, to the use of airspace at the time and place of their flight at congestion-free volumes.
- Funding private sector innovations from market competition rather than the Treasury — and Exhaustless' private sector service provides

---

[1] Secretary Raimondo's Remarks on President Biden's Build Back Better Agenda to the City Club of Cleveland (Sep. 9, 2021) (emphasis in original).

[2] There is no statutory term regarding a 'legacy' or 'grandfathered' carrier regarding airspace reservations at large hub airports; this is a term predicated on the a carrier operating standard concept of carrier rights based on "historic precedence;" IATA Worldwide Slot Guidelines (WSG), 9th Edition, §1.7.2(f) at 15 (Effective Jan. 1, 2019).

that market competition among all consumers, including passenger and cargo, to fund development of its innovations in civil aerospace. Market competition at higher prices for scarce airspace capacity (i.e., the early adopters of a technology) will lead to innovations that sustainably increase capacity, leading to quality-adjusted prices.

- Reducing the unequal health and welfare burdens experienced by communities surrounding airports from the pollution caused by congestion-delays from the overscheduling of flights — and Exhaustless' market-clearing service does that by calculating and allocating the congestion-free capacity.[3]
- Reducing the unequal health and welfare burdens experienced by communities surrounding airports, and the global unequal impacts of climate change, by reducing the pollution and noise from flights — and Exhaustless has patented a grid-powered ground propulsion system to reduce fuel use and noise during takeoff.
- Developing a technology to reduce fuel use and noise during landing — and Exhaustless has a patent there, too.

---

[3] There is no legal way to reduce the volume to congestion-free without a competitive market-clearing service because Congress prohibits the FAA from reducing volume below a safety limit. And because the FAA cannot make a regulation related to carrier schedules (routes), the carrier must voluntarily relinquish the 'permanent' reservation in order to reduce the scheduled volume — without knowing if any of its competitors are giving up any of their 'permanent' reservations; s*ee* 49 U.S.C. § 41722. Even under the illegal Worldwide Slot Guidelines, the FAA cannot reduce the volume to the congestion-free capacity because they have imbued the 'legacy' carriers with a 'permanent right' to the reservation; the WSG has no process for reducing volume; *see* IATA Worldwide Slot Guidelines, 9th Edition, §6.9 at 30.

- Increasing flight capacity at land constrained airports by reducing wake intensity — and both of Exhaustless' patented inventions do that.

The catalyst to these innovations is a fair, reasonable, and non-discriminatory market of airspace reservations — which is a component of Exhaustless' market-clearing service, whose patent application now sits before the Patent Trial and Appeal Board of the Department of Commerce.[4]

The D.C. Circuit Court has confirmed that Exhaustless' private-sector market-clearing service meets the legal mandates for competition in interstate and foreign commerce.[5] Therefore, Exhaustless has the right to engage in this lawful commerce under the Constitution.

The faithful execution of the supreme law of the land demands that the Article II branch of government ceases the administrative allocation of national scarce economic resources supported by this information collection.[6]

---

[4] *See* Patent Application US15/789,585. Exhaustless' airspace reservation (options) market encompasses a primary, secondary, and spot market to maximize both carrier's flexibility to manage their resources AND the efficient use of the airspace. The primary market will competitively allocate reservations to common carriers for each biannual carrier scheduling season (each season is between 21- and 31-weeks duration) and will be allocated months in advance of the season — which follows the current industry practice for reservations allocated with grandfathering. The secondary market will facilitate the trade of any part of a primary reservation, and will be active after the primary allocation but prior to the day of scheduled flight. The spot market will allocate reservations for any additional capacity available based on actual airport operations, as well as trades of previously allocated reservations.

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

[6] *See* Executive Order 14036 of July 9, 2021, Promoting Competition in the American Economy, 86 Fed. Reg. 36987, §5(m)(ii), 36995-36996 (Jul. 14, 2021) ("[E]valuate the effectiveness of . . . consumer protections, and rules of the Federal Aviation Administration; . . . ensure competition in air transportation and the ability of new entrants to gain access; and . . . support airport development and increased capacity and improve airport congestion management . . . and "slot" administration[.]").

In order to promote progress in the science and art of air transportation, the Administration must relieve the FAA of its unconstitutional fiefdom over the air transportation schedules by issuing Exhaustless a patent on its market-clearing service. The patent will serve to align all branches and agencies of the federal government with the statutory scheme as decreed since the deregulation of price, route, and service in air transportation. The new industry structure will then meet the Congressional mandate for route competition and remove the barriers to commerce in airspace reservations.

Because, as Secretary Raimondo said, "the one thing we cannot afford is inaction."[7]

B. Ensuring Equity

The private sector is tasked with providing fair, non-discriminatory competition. Ensuring equity requires discrimination; therefore, Exhaustless cannot ensure equitable access to airspace. But Congress can, through subsidies.

As part of its regulation of interstate commerce and of the use of the national airspace, Congress has provided equity in air transportation through the Small Community Air Service program, which subsidizes air carriers to provide service to eligible communities that would otherwise go unserved for lack of potential profit.[8] Because the cost of this subsidy is paid directly from the Treasury to the carrier,

---

[7] Secretary Raimondo's Remarks on President Biden's Build Back Better Agenda to the City Club of Cleveland (Sep. 9, 2021) .

[8] *See* 49 U.S.C. §§41731-41748.

Congress has the information it needs to make decisions about the effectiveness of the program.

Yet the FAA runs an off-the-books, unlawful subsidy to air carriers that provide service to the *busiest large hub airports* by providing them free, exclusive access to those markets using the information in this collection.

C. Funding Transportation

The new commerce in airspace reservations will create a new source of tax revenue to the Treasury — revenue that adjusts with inflation. Congress could decide to segregate this new tax revenue for use in funding national transportation needs, such as they currently do with taxes on airfare that go to the Airport and Airway Trust Fund[9], or have it flow to the general fund.

In addition, the reduced congestion delay costs increase the potential profit margin and market capitalization of airlines;[10] the decreased airline concentration at high demand airports could lead to an increase in industry wages suppressed by monopsony;[11] and the improved efficiency of air transportation would indirectly lead

---

[9] *See* 26 U.S.C. §9502.

[10] *See* Michael Ball, et al., Total Delay Impact Study, National Center of Excellence for Aviation Operations Research ("NEXTOR") (Nov. 3, 2010) at vii, Table 0-1 (Nov. 3, 2010), which estimated the congestion delays to cost airlines $8.3 Billion in 2007. *See also* Exhaustless, Inc. Aviation 2.0 Explained (2019), Appendix A at 20.

[11] *See* Supplemental Comment of Service Employees International Union, Docket DOT-OST-2021-0001 (Sep. 10, 2021) for a discussion of the effects of monopsony on the labor market ("At the levels of concentration facilitated by the [American Airlines – JetBlue Northeast Alliance] at key airports as measured by the Herfindahl–Hirschman Index (HHI), firms are presumed to hold significant market power and may act as both price setting suppliers *and* price making purchasers, especially in geographically concentrated markets such as exist here." (emphasis in original)).

to broader GDP growth[12] — all of which would lead to increased GDP and potential tax revenue.

STATEMENT OF THE CASE

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.[13] This illegal subsidy has shut out Exhaustless' competitive airspace reservation market, restraining an estimated $40 Billion to $100 Billion of commerce per year in the U.S. alone[14] and impacting passengers in over 1.1 billion annual enplanements across the U.S. on dozens of common carriers.[15]

---

[12] *See* Michael Ball, et al., Total Delay Impact Study, NEXTOR at vii, Table 0-1, which estimated the indirect impact to GDP from congestion delays to be $4.0 Billion in 2007.

[13] 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). Instrument flight rule (IFR) operations require more time: Under inclement weather conditions, an IFR operation requires the pilot to use the instruments of the aircraft rather than just their vision (as used in visual flight rule or VFR operations). To ensure safety, the IFR conditions require greater physical separation between aircraft and therefore reduce the throughput of the airspace.

[14] *See* Michael Ball, et al., Total Delay Impact Study, NEXTOR at vii, Table 0-1, which estimated the impact to GDP from congestion delays to be $31.2 Billion in 2007, which adjusted for inflation is $41.2 Billion in 2021. Note that this study measured the cost of delays. The true market price that prevents delays — and the increase in industry margins, market cap, and wages — is unknown because airspace reservations have never been competitively allocated.

[15] *See* Bureau of Transportation Statistics, Passengers – All Carriers, All Airports, 2019.

The FAA claims that 49 U.S.C. § 40103(b) gives them exclusive authority to allocate the market of scarce national airspace reservations to particular carriers[16] — despite Congress' termination of federal regulations related to price, route, and service in 1978;[17] despite the persistent and relentless intent of Congress over the ensuing 43 years to displace the administrative allocation for these routes;[18] despite a 2021 admonishment by the U.S. Court of Appeals for the D.C. Circuit that the FAA must comply with the competition laws;[19] and despite a 2019 ruling by the same court that carriers could adopt the Exhaustless Aviation 2.0 Operating Standard and market-clearing service – *i.e.*, it is lawful commerce.[20] As the Supreme Court has said:

> Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.[21]

---

[16] *See* 86 Fed. Reg. 48466, 48467, Notice and request for comments (Aug. 30, 2021) ("The FAA's administration of the runway slot program . . . is adopted under the Administrator's mandate to efficiently manage the NAS [National Airspace System].").

[17] *See* Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (Oct. 24, 1978).

[18] *See* The Statutory Framework section, *infra*.

[19] See *Spirit Airlines, Inc. v DOT*, No. 19-1248 (D.C. Cir. 2021).

[20] *See Exhaustless, Inc. v. FAA*, 931 F.3d 1209, 1212, 1214 (D.C. Cir. 2019) ("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. * * * To the extent the company contemplates collection of the [passenger] fee by the airlines, . . . it was unlikely that carriers would [but they could] do this voluntarily." (internal quotations and reference omitted)). *See also*, the IATA Resolution on Slot Policy, 75th Annual General Meeting (Jun. 2, 2019) — the voluntary agreement by member carriers to use the IATA Worldwide Slot Guidelines.

[21] *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

Exhaustless urges OIRA to reject this information collection activity, to prevent the violation of, *inter alia*, the Airline Deregulation Act of 1978, the AIR-21 Act of 2000, and the air transport agreements such as with Australia, Canada, and the E.U. Without the slot transfer information from 'legacy' carriers, the FAA will be unable to execute the International Air Transportation Association's (IATA) Worldwide Slot Guidelines — an unlawful agreement among 'legacy' carriers to allocate the market of routes by grandfathering slots and fixing the price of slots to $0. Carriers can then either license Exhaustless' Aviation 2.0 Operating Standard to obtain reservations to the airspace from Exhaustless' nondiscriminatory market-clearing service — the only lawful, available way to obtain airspace reservations — or they can abandon routes that use slot-controlled airports.

B. The Subsidy by Regulators

Under deregulation, airlines are required to pay market prices for airspace reservations as part of route competition. Exhaustless developed and offered a competitive market for allocation. Instead, the DOT/FAA intends to grant these valuable, renewable airspace reservations for free to the carrier that self-identifies as the last user on record – who is said to "hold" the reservation.

The market value of the subsidized airspace reservations just for serving the 3 large hub airports in the New York City area exceeds $1 Billion annually, based on a

2011 FAA mini-auction of required slot forfeitures (which was restricted to new entrant and limited incumbent carriers).[22]

1. The FAA Regulations

The FAA supports the illegal subsidy of airspace capacity to 'legacy' carriers at seven large hub airports[23] based on regulations that it classifies as air traffic rules to reduce congestion delays.[24] These regulations limit the volume of flight operations and allocate future access to the scarce airspace capacity to carriers based on the grandfathering rules of the 'legacy' carriers.[25] Yet the grandfathering of routes by carriers and regulators has been prohibited since 1981,[26] and the grandfathering of routes by the FAA has been expressly prohibited since 2007 at LaGuardia, JFK and

---

[22] *See* 76 Fed. Reg. 65773, Notice of procedures for the reallocation of slots (Oct. 24, 2011). *See also* LGA Bundle A, LGA Bundle B, and DCA Bundle Bids Final, Docket FAA-2010-0109 (posted Dec. 18, 2011).

[23] *See* 49 U.S.C. § 40102(a) (29) (""large hub airport" means a commercial service airport (as defined in section 47102) that has at least 1.0 percent of the passenger boardings").

[24] *See* the regulations for the seven "high density" airports: (i) Reagan National (14 U.S.C. Part 93, Subpart K - High Density Traffic Airports, 14 C.F.R. Part 93, Subpart S - Allocation of Commuter and Air Carrier IFR Operations at High Density Traffic Airports); (ii) LaGuardia (85 Fed. Reg. 58255, Extension to Order (Sep. 18, 2020)); (iii) John F. Kennedy International (85 Fed. Reg. 58258, Extension to Order (Sep. 18, 2020)); (iv) Newark Liberty International, (v) Los Angeles International, (vi) Chicago O'Hare International, and (vii) San Francisco International (86 Fed. Reg. 24428, Notice of Submission Deadline for Schedule Information (May 6, 2021)). *See also* 49 U.S.C. § 41714(h)(2) (""high density airport" means an airport at which the Administrator limits the number of instrument flight rule takeoffs and landings of aircraft.").

[25] *See* 85 Fed. Reg. 58258, 58260 (Sep. 18, 2020) ("Historical rights to Operating Authorizations and withdrawal of those rights due to insufficient usage will be determined on a seasonal basis and in accordance with the schedule approved by the FAA prior to the commencement of the applicable season." (emphasis added) (note that the FAA follows the schedule approval process of the IATA WSG.)).

[26] *See* Airline Deregulation Act of 1978, Pub. L. 95-504, §12, amending §401(d)(7)(C), 92 Stat. 1705, 1718; and §40(a), adding §1601(a)(1)(C), 92 Stat. 1705, 1744.

O'Hare. [27] In addition, Congress has authorized the FAA to restrict operations only to ensure safety, prohibiting the FAA from imposing further artificial restrictions to reduce congestion delays.[28]

To effect the grandfathered allocation, these "unlawful"[29] regulations limiting operations require carriers to submit information to the FAA regarding operations from the prior season's schedules (so-called 'slot holdings').[30] The FAA then relies on these unlawful regulations to support the agency request to OIRA for an information collection of slot allocations.[31]

---

[27] *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) ("The rules contained in subpar[t] S . . . of part 93, title 14, Code of Federal Regulations, shall not apply" after July 1, 2002, at O'Hare and after January 1, 2007, at LaGuardia or JFK.).

[28] *See* 49 U.S.C. § 41715(a) ("The rules contained in . . . subpar[t] K of part 93, title 14, Code of Federal Regulations, shall not apply" after July 1, 2002, at O'Hare and after January 1, 2007, at LaGuardia or JFK.). *See also* 49 U.S.C. § 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.")

[29] See *Exhaustless, Inc. v FAA*, 931 F. 3d. 1209, 1212 (D.C. Cir. 2019) ("[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." (emphasis in original, internal quotations omitted)).

[30] *See*, for example, 85 Fed. Reg. 58258, 58260 ("Each carrier holding an Operating Authorization must forward in writing to the FAA Slot Administration Office a list of all Operating Authorizations held by the carrier[.]")

[31] *See* OMB Control No. 2120-0524, ICR No. 202108-2120-002, DOT/FAA Supporting Statement A, (Aug. 26, 2021) at 1-2 ("[O]nly DCA remain[s] subject to the HDR. . . The FAA has issued Orders limiting operations at JFK, EWR, and LGA.[4] . . . [T]he FAA announced the decision to reduce slot controls and designate EWR as a Level 2, schedule-facilitated airport under the International Air Transport Association (IATA) Worldwide Airport Slot Guidelines (WASG)[.][5]. . . [T]he FAA has also designated Los Angeles International Airport (LAX), ORD, and San Francisco International Airport (SFO) as Level 2 airports[.][6]").

Crucially, 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.[32]

2. The FAA's Allocation of the Market

To manage excess supply of flights by carriers,[33] the FAA operates an airspace reservation service that allocates valuable, scarce reservations to carriers,[34] months in advance of flight for regularly scheduled (referred to as 'scheduled') service, and days in advance of flight for so-called 'unscheduled' service.

a. Regularly Scheduled Flights

The FAA generally follows the Worldwide Slot Guidelines of the International Air Transport Association (IATA) for allocating scheduled airspace reservations.[35]

---

[32] *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 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 3 ("Changing the [High Density Rule] will not affect air safety." (emphasis in original)).

[33] *See* 86 Fed. Reg. 14515, Notice and request for comments (Mar. 15, 2021) (Agency Information Collection Activities: Slot Allocation and Transfer Methods) ("the advance management of air traffic demand").

[34] *See* 86 Fed. Reg. 24428, 24429, Notice of Submission Deadline for Schedule Information, (May 6, 2021) ("Access to EWR and the New York City area generally remains coveted.").

[35] IATA Worldwide Slot Guidelines, 9th Edition, Part 3: Process at 45 (Effective Jan. 1, 2019) (posted to 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",[36] and the FAA updates their reservation database with any changes.[37]

The FAA requires carriers "to submit their planned schedules or slot requests for the summer and winter scheduling seasons" according to an IATA schedule.[38]

The FAA then compares the schedules submitted by the carriers to their reservation database: For requested reservations that correspond as 'held' by that carrier, the FAA approves the schedule.[39] For those that do not correspond as 'held' by that carrier – if the reservation is available, the FAA approves the schedule, and that carrier now 'holds' the reservation; if the reservation is not available, the FAA denies the schedule.[40]

The FAA then attends the IATA slot conference "for discussions of slots and schedule adjustments."[41]

---

[36] 85 Fed. Reg. 58258, 9.b. at 58260.

[37] *See* OMB Control No. 2120-0524, DOT/FAA Supporting Statement A (Aug. 26, 2021), at 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.").

[38] *Id*. at 3. *See also, e.g*., 86 Fed. Reg. 24428, Notice of Submission Deadline for Schedule Information ("Under this notice, the FAA announces the submission deadline of May 13, 2021, for Winter 2021/2022 flight schedules[.]").

[39] *See* Email from Matthew Gonabe, FAA Program Specialist, Slot Administration (Jan. 29, 2021). *See also*, 86 Fed. Reg. 24428, 24429, Notice of Submission Deadline for Schedule Information, (May 6, 2021) ("The FAA considers several factors and priorities as it reviews schedule and slot requests at Level 2 and Level 3 airports, which are consistent with the WSG, including—historic slots or services from the previous equivalent season[.]").

[40] *See id*.

[41] IATA Worldwide Slot Guidelines, 9th Edition, § 9.11 at 50 (note that the WSG is opaque as to what actually happens at this conference; "bilateral discussions" are mentioned, which appears to refer to discussions between the FAA and international parties). *See also* OMB Control No. 2120-0524, ICR

Carriers must submit reports to "ensure compliance with the usage requirements", which serve as production quotas.[42] The 'holding' extends indefinitely if the carrier continues to honor the reservation within the minimum-usage requirement, or if the FAA waives the usage requirement.[43]

b. 'Unscheduled' Flights

So-called 'unscheduled' flight reservations, which comprise 20% of the allocated airspace reservations at DCA in our nation's capital, are allocated up to 3 days in advance of flight to the first requesting carrier.[44] The FAA does not report which carriers were allocated these 'unscheduled' reservations.

C. 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,

---

No. 201805-2120-013, DOT/FAA Supporting Statement A, (May 31, 2018), Item 8. at 6 ("Representatives from FAA's Slot Administration Office meet at least semi-annually for the winter and summer IATA slot conferences.") (Note that the DOT/FAA has not published rules or regulations relative to the international slot conference, nor does it appear to coordinate with the Department of State.)

[42] OMB Control No. 2120-0524, DOT/FAA Supporting Statement A (Aug. 26, 2021), at 5. *See also, e.g.*, 85 Fed. Reg. 58258, 9.b.ii. at 58260.

[43] The FAA has reserved the market allocation for the 'legacy' 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). *See also*, 86 Fed. Reg. 52114, Notice of proposed extension of a limited, conditional waiver of the minimum slot usage requirement for all international operations (Sep. 20, 2021) ("The FAA proposes to extend through March 26, 2022, the Coronavirus (COVID19)-related limited, conditional waiver of the minimum slot usage requirement . . . for all international operations.").

[44] *See* https://www.fly.faa.gov/ecvrs/.

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 and its new commerce, Exhaustless disclosed its discovery in a patent application in the U.S. and Canada.[45]

1. Slot Auction Announcement

On August 19, 2021, Exhaustless announced an auction to carriers, to be held on September 29, 2021, of airspace reservations for the Summer 2022 carrier scheduling season that begins March 27, 2022.[46] Then on August 30, 2021, the FAA announced it would seek renewal of the slot information collection from carriers, continuing its illegal subsidy of free slots; so, carriers have not engaged Exhaustless' market-clearing service that allocates slots at competitive market prices.[47]

---

[45] *See* Patent Application US15/789,585.

[46] *See* Exhaustless Inc. Comment, Docket DOT-OST-2001-9849 (Aug. 19, 2021) to 66 Fed. Reg. 43947, Request for public comment on possible market-based actions to relieve airport congestion and delay, (Aug. 21, 2001). *See also*, Exhaustless Inc. Comment, Docket FAA-2021-0067 (Aug. 20, 2021) to 86 Fed. Reg. 14515, Notice and request for comments (Mar. 15, 2021) (Agency Information Collection Activities: Slot Allocation and Transfer Methods).

[47] *See* 86 Fed. Reg. 48466.

D. The Constitutional Framework

The Constitution gives Congress the authority to regulate the use of the national airspace[48] and to regulate interstate and foreign commerce[49] — within the bounds of the First Amendment rights of its citizens. Exhaustless' market-clearing service in no way interferes with the use of airspace, *i.e.*, the physical movement of aircraft during navigation, but — due to the competitive market allocation — creates and confers a limited-term/seasonal exclusive and proprietary right to the highest bidding carriers[50] for the <u>future</u> use of the airspace at a given time and place.

1. Regulation of the Use of the National Airspace

c. U.S. Sovereignty

From the earliest economic regulation in civil aviation, Congress has clearly claimed the airspace as the property of the people: "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1).

d. Architect of a Common System of Airways

Congress tasked the FAA as the architect of the three-dimensional common airways: "The Administrator . . . shall develop plans and policy for the use of the

---

[48] *See* U.S. Const. art. IV § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]").

[49] *See* U.S. Const. art. I § 8, cl. 3 ("The Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[50] In this case, the economic right is the reservation of the airspace, which is a type of financial option. The economic right to the use of the airport facilities is conferred by airport operators through leases and use agreements.

navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace" and "shall prescribe air traffic regulations on the flight of aircraft[.]" 49 U.S.C. § 40103(b).[51] *See also* 49 U.S.C. § 44501(a) (The Administrator "shall make long range plans and policy for the orderly development and use of the navigable airspace, and the orderly development and location of air navigation facilities [.]")

e. Safe Use of the Airspace

Congress regulates the safe use of the airspace through safety certifications administered by the FAA of pilots, aircraft, airports, and the operations of common carriers through an operating certificate. *See* 49 U.S.C. §§ 44702 and 44705.

f. Coordination of All Users

Congress requires the Administrator to "develop . . . systems . . . to meet the needs for safe and efficient navigation and traffic control of civil and military aviation[.]" 49 U.S.C. § 44505(a).

2. Regulation of Interstate and Foreign Commerce

a. Air Transportation

U.S. citizens that wish to operate as an air carrier are required to hold an economic certificate under 49 U.S.C. § 41101(a), and foreign citizens are required to hold a foreign carrier permit under 49 U.S.C. § 41301, in order to provide air

---

[51] *See* 14 C.F.R. Part 77 - Safe, Efficient Use, and Preservation of the Navigable Airspace for these regulations.

transportation (as defined at 49 U.S.C. § 40102(a)(5), (23), and (25)). There are three relevant statutes related to the terms of the certificate:

i. 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." 49 U.S.C. § 41101(c).[52]

ii. The Secretary "may not prescribe a term preventing an air carrier from adding or changing schedules." 49 U.S.C. § 41109(a)(2)(B)[53]; and

iii. The Secretary "may revoke any part of a certificate if the Secretary finds that the holder of the certificate intentionally does not comply with [Chapter 411]." 49 U.S.C. § 41110(a)(2)(B).

b. Administration of the Economic Certificates

The Secretary enforces carrier compliance with statutory economic regulations and with DOT regulations by adjudicating the issuance, the periodic review, and the revocation of the economic certificate/permit, including monetary fines for violations. *See* 49 U.S.C. § 40101(a), (b), and 49 U.S.C. §§ 41101-42304. The only authority that

---

[52] Federal Aviation Act of 1958, Pub. L. 85-726, §401(i), 72 Stat. 731, 756 (1958). *See also* Civil Aeronautics Act of 1938, Pub. L. 75-706, §302(a), 52 Stat 973, 990 (1938); and Air Commerce Act of 1926, Pub. L. 69-254, §5(b), 44 Stat. 568, 571 (May 20, 1926). *See also* 49 U.S.C. § 40102(a)(4)(a) (An air navigation facility includes a landing area.").

[53] Federal Aviation Act of 1958, Pub. L. 85-726, §401(e), 72 Stat. 731, 798 (Aug. 23, 1958). *See also* Civil Aeronautics Act of 1938, Pub. L. 75-706, §401(f), 52 Stat 973, 989 (Jun. 23, 1938).

Congress has conferred to the DOT in the economic regulation of carriers is through the administration of the economic certificate.

3. The First Amendment

Congress shall "make no law abridging the freedom of speech."[54] The Court has recognized that the right to free speech includes the right to hear, as well as to announce, commercial information:

> [I]n the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. . . As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[55]

4. The Fifth Amendment

According to the Fifth Amendment, "Nor shall private property be taken for public use, without just compensation."[56] The Court has ruled that property includes

---

[54] U.S. Const. amend. I.

[55] *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) (internal quotations and reference omitted).

[56] U.S. Const. amend. V.

an owner's right to exploit the property — that is to say, their beneficial ownership of it.[57]

E. 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."[58]

The authority over the economic regulation of carriers was placed with the Civil Aeronautics Board (CAB),[59] including authority over the design of routes and service:[60] "Each certificate issued under this section shall specify the terminal points

---

[57] See *United States v. Causby*, 328 U.S. 256 (1946) ("The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance[.]").

[58] 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.)

[59] *See* Federal Aviation Act of 1958, Pub. L. 85-726, Title IV, 72 Stat. 731, 754 (1958).

[60] Note that in this context, "service" means the service of the air transportation over the route, such as size of plane, the required number and place of stops, and whether the service needed to be regularly scheduled. The CAB certificate showing the origin, destination, and intermediate airports was called a "Route Certificate" and came to be called the "route", as opposed to a physical route traversed by a pilot following air traffic. In short, the *economic route* refers to the *ends*, and the *physical route* refers to the *means*. *See additional document* Excerpts from CAB Reports Economic Cases Dec 1969 to Apr 1970, for an example of how the CAB identified a specific route, issued a route certificate to a carrier, and dictated the service to be provided. *See also* 14 C.F.R. § 71.13 Classification of Air Traffic Service (ATS) routes

and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered[.]"[61]

2. The Department of Transportation Act: 1966

Congress established the Department of Transportation, in part, "to facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible[.]"[62] Congress also established the Federal Aviation Administration within the DOT.[63] All of the authorities of the Federal Aviation Agency were transferred to the Secretary:

> *Provided, however*, That there are hereby transferred to the Federal Aviation Administrator, and it shall be his duty to exercise the functions, powers, and duties of the Secretary pertaining to aviation safety[.] . . . In exercising these enumerated functions, powers, and duties, the Administrator shall be guided by the declaration of policy[.][64]

3. 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 . .

---

[61] *Id.*, §401(e), 72 Stat. 731, 755 (1958) (Note that this was a continuation of the CAB's authority from the Civil Aeronautics Act of 1938, Pub. L. 75-706, §401(f), 52 Stat 973, 988 (1938).

[62] Department of Transportation Act, Pub. L. 89-670, § 2(b)(1), 80 Stat. 931 (1966), codified at 49 U.S.C. § 101(b)(2).

[63] *See id.*, § 3(e)(1), 80 Stat. 932.

[64] *Id.*, § 6(c)(1), 80 Stat. 938 (underlined emphasis added, italics emphasis in original), codified at 49 U.S.C. § 106(g).

> . 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.[65]

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 CAB's 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 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."[66]

---

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

[66] 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.*, §40(a), Title XVI – Sunset Provisions, adding §1601(a)(1)(C), 92 Stat. 1705, 1744.

4. 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."[67] The U.S. currently has over 100 air transport agreements under this Open Skies framework; "Open Skies agreements [promote economic growth] by eliminating government intervention in the commercial decisions of air carriers about routes, capacity, and pricing, thereby freeing the carriers to provide more affordable, convenient, and efficient air service for consumers and shippers."[68] Below are excerpts from three such agreements.

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.[69]
>
> 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 basis and imposed only when necessary to fulfill requirements under the domestic law of either Party.[70]

---

[67] 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).

[68] https://www.state.gov/civil-air-transport-agreements

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

[70] *Id*., Art. 11 §4.

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.[71]

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.[72]

> 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.[73]

5. Policy to Deregulate High Density Airports: 1982-1987

Following deregulation, Congress searched for a competitive way to allocate airspace reservations. To understand this fully requires going back to the allocation process in place at the time of deregulation.

---

[71] 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) .

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

[73] *Id.*, Art. 20 § 1.

a. Order Limiting Flight Volumes: 1968

In 1968, the FAA began limiting flight volumes at five airports, called "high density airports", to reduce flight delays by "regulatory control of demand"; overscheduling was prevented by the central planning process. [74]

b. Airline Scheduling Committees: 1968-1985

Airlines initially allocated airspace reservations at high density airports "through airline scheduling committees, operating under then-authorized antitrust immunity, and the airlines would agree to the allocation." [75] These scheduling committee agreements allocated the reservation market primarily by grandfathering. Before airline economic deregulation, there was very little competition for these reservations because only a few airlines held route certificates for the high density airports. Once Congress enacted the Airline Deregulation Act and terminated route authorities, any certificated carrier could schedule service at any high density airport, which "made it even more difficult for airlines to reach agreement, and the scheduling committees began to deadlock." [76]

---

[74] 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."), codified at 14 C.F.R. Part 93, Subpart K. Note that the new era of jet engines increased separation requirements at takeoff and landing, leading to a reduction of capacity for the existing route certificates that had been allocated to carriers.

[75] 71 Fed. Reg. 51359, 51361, Congestion Management Rule for LaGuardia Airport (Proposed Aug. 29, 2006).

[76] *Id.*

In October 1980, in response to "concerns expressed by the Chairman of the Civil Aeronautics Board and the Department of Justice about continuing the antitrust immunity under which the airline scheduling committees currently allocate slots at the high density airports," the Acting Secretary proposed various alternatives to grandfathering, including administrative allocation rules or a federal slot auction, at Washington National Airport.[77] No subsequent rule was issued.

In October 1981, as a result of an investigation of airline scheduling committees, the CAB:

> [D]irected that various commuter carriers *terminate their practice of "grandfathering" slots in favor of incumbent commuter airlines* at Washington National Airport, a practice it found substantially reduced competition. The Board also directed that the certificated carriers attempt to devise a mechanism that could be used if carriers could not agree to an allocation that satisfied all participants. The Board noted that the carriers' success in developing a pro-competitive scheme along these lines could have a bearing on the question of whether it would continue to approve their agreements.[78]

---

[77] 45 Fed. Reg. 71236, Special Air Traffic Rules and Airport Traffic Patterns (Proposed Oct. 27, 1980).

[78] Civil Aeronautics Board Fiscal Year 1981/1982 Reports to Congress (Feb. 1983), page 32 (emphasis added).

c. Regulated Routes Terminated: 1981

On December 31, 1981, the certificated route authorities that had been issued by the CAB were terminated,[79] and "carriers holding domestic certificates received authority to serve any domestic or territorial point."[80]

d. Task Force to Study Airspace Slot Allocation: May 1983

In 1982, Congress directed the Secretary of Transportation to form a task force to study the problems of allocating the use of airport facilities and airspace slots, and to "make recommendations for improving those methods and for resolving disputes with respect to the use of such facilities."[81] Congress mandated that the task force include the chairman of the CAB and representatives of the DOT, Department of Justice (DOJ), state and local governments, aviation investors, various types of carriers, and airports (and excluded the FAA).

In May 1983, at a hearing before the House Subcommittee on Investigations and Oversight, members of the task force presented their report. Dan McKinnon, the Chairman of the CAB and the chairman of the task force, testified:

---

[79] *See* Airline Deregulation Act of 1978, Pub. L. 95-504, §40(a), adding §1601(a)(1)(C), 92 Stat. 1705, 1744 ("The following provisions of this Act (to the extent such provisions relate to interstate and overseas air transportation of persons) and the authority of the Board with respect to such provisions (to the same extent) shall cease to be in effect on December 31, 1981: Section 401(e)(1) of this Act (insofar as such section permits the Board to specify terminal and intermediate points).")

[80] Civil Aeronautics Board Fiscal Year 1981/1982 Reports to Congress, page 1.

[81] Airport and Airway Improvement Act of 1982, Pub. L. 97-248, §527, 96 Stat. 671, 698 (1982).

> Even before the Airline Deregulation Act was passed, it was widely recognized that ready access to the Nation's airports was an essential component of deregulation. The domestic route flexibility which Congress has provided the Nation's air carriers would mean little without their ability to obtain landing slots at airports, as well as the necessary gate and terminal facilities to support their operations. In addition, passengers must be able to move into and out of these airports both quickly and efficiently.[82]

Norman Philion, Executive Vice President of Air Transport Association (now Airlines For America) presented the recommendations of the assigned working group on airport access, which included, a) to fund capacity improvements as soon as possible, and b) the continuation of a "user scheduling committee system, embodying an acceptable fail-safe mechanism" to solve a committee dead-lock — in other words continuing to allocate by grandfathering.[83] No fail-safe mechanism was recommended.

The DOJ Assistant Attorney General Antitrust Division stated:

> [W]e are in substantial disagreement on one important point: the role of market-based proposals in the resolution of the issues Congress placed before the task force.

---

[82] Report of the Airport Access Task Force, Hearing before the Subcommittee on Investigations and Oversight of the Committee of Public Works and Transportation, House of Representatives (98-6), page 3 (May 17, 1983).

[83] *Id.*, page 9, (May 17, 1983).

> The primary difference between the working groups' proposals and that of the Department, is the extent with which the working groups rely on government-sponsored allocations and subsidies to resolve the problems that have been identified. Such government intervention is unnecessary since the marketplace can be relied upon to solve much of the problems. Further, government intervention is significantly less efficient and more costly than requiring the users of aircraft and airports to balance the costs and benefits of access to what are, in essence, scarce resources.[84]

Secretary of Transportation Elizabeth Dole's written comments included:

> The report suggests that the solution to airport capacity constraints is to build enough capacity to meet all demands. This suggestion ignores competing land uses and the fact that expansion is not always practical, economic, or desired by the affected communities. Therefore, instances where demand exceeds capacity are likely to occur in the future." * * * The Department also finds unsatisfactory the conclusion of the report that the use of market mechanisms for the allocation of resources

---

[84] *Id.*, page 61.

would "likely be highly disruptive to public service and almost surely would add to the cost of air transportation.[85]

e. No Alternative to Grandfathering Exists: June 1983

After the CAB's 1981 directive to terminate their practice of "grandfathering" slots at DCA, *supra*, airlines held a series of meetings (for which the CAB granted antitrust immunity) to develop a solution to slot allocation. On May 13, 1983, the airlines filed a scheduling committee agreement with a deadlock mechanism for allocating slots at DCA.[86] In the event of a deadlock, the agreement installed a drawing by lot to select one of eight mechanisms to allocate the slots; all of the mechanisms grandfathered slots to some degree.

In June 1983, a month after the task force report, the CAB approved the agreement, explaining, "We find the agreement is *substantially anticompetitive* but that it must be approved because it satisfies serious transportation needs and secures public benefits, and *no reasonably available less anticompetitive alternative currently exists*."[87]

f. FAA Proposes Administrative Allocation

While Congress, the CAB, the DOT, and the DOJ were looking for competitive market solutions to allocation, the FAA was developing regulatory solutions to the

---

[85] *Id.*, page 55.

[86] *See* Civil Aeronautics Board Reports Volume 102, Economics Cases of the Civil Aeronautics Board June to July 1983, Order 83-6-43; National Commuter-Carrier Agreement, Agreement CAB 29016 (June 15, 1983) at 594.]

[87] *Id.,* at 601 (emphasis added).

allocation of airspace slots to replace the scheduling committees — by asking the carriers for ideas on how to circumvent the central competition policy of deregulation.[88]

g. CAB Sunset: Jan. 1985

Effective January 1, 1985, the CAB's authority over the economic regulations through the economic certificate was transferred to the DOT.[89]

h. FAA Intervenes in Slot Market Allocation: Dec. 1985

In 1985, the FAA adopted the slot allocation procedures for high density traffic airports, codified as 14 C.F.R. Part 93, Subpart S, designated as an air traffic rule.[90] The Subpart S rule put the burden on regulators to facilitate the allocation of slots according to the rules of the Worldwide Slot Guidelines,[91] which grandfather the

---

[88] *See, e.g.,* 49 Fed. Reg. 23788, 23791 Slot Transfer Methods (Proposed Jun. 7, 1984); ("In deciding slot allocation issues where airport capacity is constrained, what if any consideration should be given to the policy of the Airline Deregulation Act favoring maximum reliance on competitive market forces and on actual and potential competition?"). *See also*, 49 Fed. Reg. 23806, Slot Allocation Alternative Methods (Proposed Jun. 7, 1984).

[89] *See* Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98-443, §3(e), 98 Stat. 1703, 1704 (1984).

[90] 50 Fed. Reg. 52180, High Density Traffic Airports; Slot Allocation and Transfer Methods (Dec. 20, 1985). (Note that this rule and the 14 C.F.R. Part 93, Subpart K rule, together, are referred to as the 'High Density Rules' (HDR). For clarity, the term 'HDR framework' is used in this document to refer to both rules.). *See also*, OMB Control No. 2120-0524, ICR No. 198512-2120-003 (Dec. 13, 1985) for the initial information collection request.

[91] The WSG originated in 1974 per the preface to the 10th edition. *See also* 83 Fed. Reg. 46865, Extension to order (Sep. 17, 2018), which was the first time the FAA mentioned that they use the WSG ("The FAA has received multiple inquiries (both informal and formal) recently from carriers as well as the Port Authority of New York and New Jersey requesting information on the FAA's current process for establishing and allocating available capacity. The Order is the equivalent of limited local rules as referenced in the Worldwide Slot Guidelines (WSG) published by the International Air Transport Association and takes precedence over the WSG where there are differences.").

majority of slots. In other words, regulator judgment became the deadlock breaking mechanism. This rule replaced the scheduling committees.[92]

> When the [airlines] fail to agree on an allocation * * * the responsibility for accomplishing allocation falls to the Government. The slot allocation alternatives available to the Government without additional regulatory authority are limited, however, and administrative processes for allocation have proven to have significant drawbacks.[93]

i. Policy to remove artificial restrictions: 1987

The House Subcommittee on Aviation held hearings on how the Federal government should allocate airspace reservations at high density airports.[94] 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.[95]

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

---

[92] *See* 50 Fed. Reg. 52180, 52182 (Dec. 20, 1985) ("As a result of this amendment, the role of the scheduling committees in the allocation of slots is eliminated.*")*.

[93] *Id.*, 52181.

[94] 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.

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

delays unless other reasonably available and less burdensome alternatives have first been attempted."[96]

6. AIR-21 Act of 2000

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.[97] 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."[98] Congress directed the Secretary to study the High Density Rule framework,[99] and to conduct a rulemaking based on the results of the study.[100]

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

---

[96] 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).

[97] 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).

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

[99] 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).

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

> 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.[101]

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."[102]

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 view that it is up to Congress and local authorities to decide whether to modify these longstanding arrangements."[103]

So, in 2000, Congress enacted the 'phase out' option by directing carriers to cease using the High Density Rule framework at O'Hare airport after July 1, 2002, and at JFK and LaGuardia airports after January 1, 2007[104] — because "it is clear

---

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

[102] *Id*., page 18.

[103] 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

[104] *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).

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."[105]

Additionally, Congress codified its reasoning to phasing out the HDR:

> The Congress makes the following findings: (1) Major airports must be available on a reasonable basis to all air carriers wishing to serve those airports. (2) 15 large hub airports today are each dominated by one air carrier, with each such carrier controlling more than 50 percent of the traffic at the hub. (3) The General Accounting Office has found that such levels of concentration lead to higher air fares. (4) The United States Government must take every step necessary to reduce those levels of concentration.[106]

a. DOT/FAA Response to AIR-21 Act

In June 2001, the FAA issued a Notice of Alternative Policy Options, which requested comments on "effective, comprehensive solutions that represent the best public policy for controlling congestion and allocating operating rights at LGA."[107] In August 2001, the DOT issued a notice requesting information on market-based approaches "to reduce delays, improve airport capacity management, enhance competition and promote the efficiency of the overall aviation system." [108]

---

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

[106] AIR-21, Pub. L. No. 106-181, §155, 114 Stat. 61, 88 (2000), codified at 49 U.S.C. § 40117(note) Competition Plans.

[107] 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).

[108] 66 Fed. Reg. 43947, Request for public comment on possible market-based actions to relieve airport congestion and delay (Aug. 21, 2001) (Market-based approaches were "defined to include all market-pricing regimes that could encourage air carriers to use limited capacity in a more efficient manner.").

In August 2006, the FAA proposed a semi-permanent administrative solution for managing airport congestion by, *inter alia*, establishing operating limits at LGA and requiring carriers to use larger aircraft (the "2006 Proposal").[109] Shortly thereafter, 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."[110]

In April 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").[111]

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

> Mr. OBERSTAR. I read your testimony last night. . . Slots are public assets.
>
> Mr. GRIBBIN. That is correct.

---

[109] 71 Fed. Reg. 51359, Congestion Management Rule for LaGuardia Airport (Proposed Aug. 29, 2006).

[110] 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).

[111] *See* 73 Fed. Reg. 20846, Congestion Management Rule for LaGuardia (Proposed Apr. 17, 2008).

> 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.
>
> * * *
>
> 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.
>
> Mr. OBERSTAR. I know that, and I think that is wrong.
>
> Mr. GRIBBIN. So our proposal actually limits—
>
> Mr. OBERSTAR. Comes the time, we are going to make sure that never happens again.[112]

In October 2008, the FAA issued a Final Rule, having chosen the option in which the FAA retains the proceeds from the auction.[113] 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.[114]

The 2009 omnibus appropriations law prohibited funds to be used by the FAA to "implement any regulation that would promulgate new aviation user fees[115] not

---

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

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

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

[115] Note that '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).

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 airpor[t]."[116]

In October 2009, the FAA rescinded the rule.[117]

Regulatory efforts regarding airspace reservations at JFK Airport started out a little differently but "ended in much the same place."[118]

The FAA has continuously extended its interim orders at LaGuardia and JFK since their first implementation.[119] 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."[120]

---

[116][116] Omnibus Appropriations Act, 2009, Pub. L. 111-8, Division I, § 105 and § 115, 123 Stat. 524, 918, 921 (2009) .

[117] 74 Fed. Reg. 52132, Rescission of Congestion Management Rule for LaGuardia (Oct. 9, 2009).

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

[119] *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.")

[120] 85 Fed. Reg. 58255, 58256, Extension to order (Sep. 18, 2020). *See also* 85 Fed. Reg. 58258, Extension to order (Sep. 18, 2020).

ARGUMENT

A. Approval of the requested information collection would lead to the violation of First Amendment Rights

Congress requires market competition to determine price, route, and service quality in air transportation.[121] The Court has recognized that the free flow of market information is protected speech under the First Amendment.[122] Therefore, the FAA cannot have a mandate to allocate airspace reservations as that would violate Exhaustless' First Amendment right to discover and broadcast both the supplier and consumer market-clearing price for the reservations for the future use of airspace; and it would violate air carriers and other citizens First Amendment rights to hear the market price of exclusive airspace reservations.

As a privately-owned corporation in good standing in the State of Delaware,[123] Exhaustless has the Constitutional right to displace the current anticompetitive allocation with its demand-calibrated market-clearing service — which will provide for a competitive and consistent international system of commerce in air transportation.[124]

---

[121] See 49 U.S.C. § 40101(a)(12).

[122] See *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976).

[123] *See* Exhaustless, Inc. Certificate of Incorporation, State of Delaware, Art. 3 (2012) ("The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of Delaware.").

[124] *See* the seven different processes for the seven high density airports.

B. Approval of the requested information collection would lead to a regulatory taking under the Fifth Amendment

The statutory purpose of the DOT includes to "make easier the development and improvement of coordinated transportation service to be provided by private enterprise."[125] Exhaustless is a business that provides a market-clearing service to carriers. Now that Exhaustless' competitive method is available in the market, the DOT/FAA should require carriers to obtain airspace reservations from market competition pursuant to the public interest cited in 49 U.S.C. § 40101(a)(12).

No agency can overrule the law and create a different system of commerce:

> The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."[126]

The approval of this unlawful information collection would lead to the DOT/FAA's administrative allocation of airspace reservations for the Summer 2022

---

[125] 49 U.S.C. § 101(b)(2).

[126] *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935).

carrier scheduling season[127] and beyond, which would be a regulatory taking of Exhaustless' proprietary right to allocate the airspace reservation market, requiring compensation to Exhaustless under the Fifth Amendment — *and would be the largest regulatory taking in history*. Worse, it would occur right after the administration declared its intention of ending such anticompetitive practices.[128]

C. Approval of the requested information collection would lead to a violation of the Airline Deregulation Act of 1978

When the FAA first began administratively allocating airspace reservations to carriers in 1985, they understood they were bridging a market failure:

> When the [airlines] fail to agree on an allocation . . . the responsibility for accomplishing allocation falls to the Government. The slot allocation alternatives available to the Government without additional regulatory authority are limited, however, and administrative processes for allocation have proven to have significant drawbacks. * * * DOJ in their comments stated that both the Airline Deregulation Act and the Federal Aviation Act require DOT to rely, to the maximum extent possible, on market mechanisms to create an efficient procompetitive system for allocating slots. * * * [T]he Department [of Transportation] believes that an unrestricted slot market may represent the most effective opportunity for new entry at high density airports[.][129]

---

[127] *See* IATA Calendar of Coordination Activities (Aug. 1, 2021) https://www.iata.org/contentassets/4ede2aabfcc14a55919e468054d714fe/calendar-coordination-activities.pdf (**the FAA's notice of schedule submission deadline is due Sep. 30, 2021, and the allocation of slots (SAL) is due Nov. 4, 2021**.*)*

[128] *See* Executive Order 14036 of July 9, 2021.

[129] 50 Fed. Reg. 52180, Final rule, request for comments: High Density Traffic Airports; Slot Allocation and Transfer Methods, at 52181 and 52185 (Dec. 20, 1985).

Exhaustless has spent almost a decade in developing and defending its private-sector solutions, including the airspace reservation system, and has twice taken the FAA to court to try to stop them from administratively allocating airspace reservations.[130]

But now, for the first time, the FAA claims that 49 U.S.C. § 40103(b) — a statute enacted in 1958, or ten years before the FAA first required airspace reservations[131] — gives them a mandate, *i.e.*, an exclusive right, to administratively allocate carrier airspace reservations, while ignoring all other statutes and treaties: "The FAA's administration of the runway slot program . . . is adopted under the Administrators mandate to efficiently manage the [National Airspace System]."[132]

In other words, *while the Federal Aviation Act of 1958 clearly authorized the CAB to regulate the routes of air carriers,[133] and the Airline Deregulation Act of 1978 clearly terminated the CAB route authorities,[134] the FAA would have OIRA believe that Congress actually intended for the FAA to have this authority since 1958!* The Supreme Court has stated that:

---

[130] See *Exhaustless, Inc. v FAA*, 931 F. 3d. 1209 (D.C. Cir. 2019) and *Exhaustless, Inc. v FAA*, No. 19-1158 (D.C. Cir. 2020).

[131] *See* 33 Fed. Reg. 17896 (Dec. 3, 1968).

[132] 86 Fed. Reg. 48466, 48467.

[133] *See* Federal Aviation Act of 1958, Pub. L. 85-726, §401(e), 72 Stat. 731, 755 (1958).

[134] *See* Airline Deregulation Act of 1978, Pub. L. 95-504, §40(a), adding §1601(a)(1)(C), 92 Stat. 1705, 1744.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.[135]

And Congress has spoken clearly, time and time again: **(a)** the Federal Aviation Act carried forward the provision in place since 1926 that the air carrier economic "certificate does not confer a proprietary or exclusive right to use airspace,"[136] **(b)** the Airline Deregulation Act terminated the grandfathering of routes to realize "an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices" [137] by "placing maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system;" [138] **(c)** the International Air Transportation Competition Act of 1979 eliminated the economic distinction between interstate and foreign air transportation provided by domestic air carriers so that we, the people of the U.S., can provide to the global public "a viable, privately-owned United States air transport industry;" [139] **(d)** the AIR-21 Act prohibits the administrative grandfathering of airspace reservations and the administrative setting of flight limits

---

[135] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (internal quotations and reference omitted).

[136] 49 U.S.C. § 41101(c).

[137] 49 U.S.C. § 40101(a)(12).

[138] 49 U.S.C. § 40101(a)(6).

[139] 49 U.S.C. § 40101(a)(14).

for any reason other than safety; [140] and **(e)** Congress prohibited the FAA from using its then-appropriated funds to *de facto* sell title to capacity of the national airspace to carriers by auctioning permanent reservations.[141]

The Courts, too, have clearly spoken: Congress prohibits both federal regulations and state laws "relating to rates, routes, or services of any air carrier";[142] the FAA orders limiting operations at LaGuardia and JFK resemble the HDR framework by grandfathering and Congress has prohibited grandfathering; [143] Exhaustless can provide this service to carriers;[144] and the FAA must comply with competition mandates.[145]

---

[140] *See* 49 U.S.C. § 41715(a), (b) ("The rules contained in subparts S and K of part 93, title 14, Code of Federal Regulations, shall not apply—(1) after July 1, 2002, at Chicago O'Hare International Airport; and (2) after January 1, 2007, at LaGuardia Airport or John F. Kennedy International Airport. . . Nothing in this section . . . shall be construed—(1) as affecting the Federal Aviation Administration's authority for safety and the movement of air traffic.").

[141] *See* Omnibus Appropriations Act, 2009, Pub. L. 111-8, §115, 123 Stat. 524, 921 (2009).

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

[143] *See Exhaustless, Inc. v FAA*, 931 F. 3d 1209, 1210, 1211 (D.C. Cir. 2019) ("[C]ongress prohibited the use of the High Density Rule at LaGuardia or JFK Airports after January 1, 2007. * * * The interim rule resembled the High Density Rule and generally grandfathered the slots held by airlines under the previous regime.").

[144] *See Id.*, 1212, 1214 ("Petitioner Exhaustless, Inc., as noted, has developed a patent-pending product called Aviation 2.0 Operating Standard for allocating airline slots at airports. 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. * * * To the extent the company contemplates collection of the [passenger] fee by the airlines, . . . it was unlikely that carriers would do this voluntarily." (internal quotations and reference omitted). However, it is not voluntary to compete; *see* 15 U.S.C. § 1 ("Every . . . conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[145] See *Spirit Airlines, Inc. v DOT*, No. 19-1248 (D.C. Cir. 2021) ("Given our discussion thus far we need not decide whether the FAA was bound by statute to consider competition. But see *Am. Airlines*

These regulations limiting operations are related to price, route, and service quality — the market price to exclude other passengers, the fair access of carriers to an origin and/or destination point, and the queue for the service — and therefore are unlawful. The FAA operates without regard to the Constitution, laws, treaties, or rulings of federal courts. Now it tries to gaslight this administration into believing in a made-up mandate that is at complete odds with the entire Congressional record in which the current President of the United States voted. This breakdown in the separation of powers would substitute the FAA's goal to recognize past patronage at airports as equity rights in routes to the exclusion of other carriers[146] over Congress' clear intent for market competition to determine price, route, and service quality to spur innovation and progress in air transportation.[147]

The cartel is foreign and domestic 'legacy' carriers and a captured part of a Federal Agency. Because the carrier economic certificates and regulatory activity are under the purview of the White House, this Administration now has the tools needed to deregulate all large hub airports – by denying this information collection request and issuing the pending patent.

---

v. Civil Aeronautics Bd., 192 F.2d 417, 420 (D.C. Cir. 1951) Whatever belittling significance may be attached to the fact that provisions detailing factors for the agency to consider were under a title 'Declaration of Policy', they are in the statute, are peremptory, and are as much an enactment by the Congress as is any other section of the statute." (internal quotations omitted)). *Per* https://dictionary.law.com/; the definition of peremptory means absolute, final and not entitled to delay or reconsideration.

[146] *See* 80 Fed. Reg. 1274, 1275, Slot Management and Transparency (Proposed Jan. 8, 2015) to compare the statutory policy of "placing maximum reliance on competitive market forces and on actual and potential competition" to the "FAA's policy of "balancing between promoting competition and recognizing historical investments in the airport and the need to provide continuity."

[147] *See* 49 U.S.C. § 40101(a)(12).

D. Approval of the requested information collection would lead to a violation of the AIR-21 Act of 2000

The FAA acknowledges that under the AIR-21 Act, the HDR framework (14 C.F.R. Part 93, Subparts K and S) is prohibited — yet in the eleven information collections, they cite 14 C.F.R. Part 93 as their authority.[148] That is because the current orders that the FAA cites as authority for JFK and LaGuardia are *de facto* extensions of the HDR framework at those airports.[149] The FAA cites no statutory authority for the information collection at O'Hare, Newark, Los Angeles, and San Francisco airports; rather, they cite an agreement among a global cartel — the member carriers of the International Air Transport Association (IATA).[150]

In the FAA's Information Collection Review package, the reported burden is actually the cost borne by the 'legacy' carriers — an estimated cost of $592,043 — for being guaranteed the market by the FAA of the seven highest demand airports in the

---

[148] *See* OMB Control No. 2120-0524, DOT/FAA Supporting Statement A (Aug. 26, 2021), at 1, 2 ("AIR-21 phased out the [High Density Traffic Airports Rule, 14 CFR part 93 subparts K] at JFK, LGA, and ORD, and only DCA remained subject to the HDR. * * * Subpart S of 14 CFR part 93 . . . remains applicable to DCA only[.]"). *See also,* OMB Control No. 2120-0524, ICR No. 202108-2120-002, Information Collection Instrument File. *See also*, 14 C.F.R. Part 93, Subpart K and Subpart S, which have not been amended to reflect that they are no longer in effect at O'Hare, LaGuardia, and JFK.

[149] See *Exhaustless, Inc. v FAA*, 931 F. 3d 1209 (D.C. Cir. 2019) (The interim rule resembled the High Density Rule and generally grandfathered the slots held by airlines under the previous regime."). *See also* 71 Fed. Reg. 77854 (Dec. 27, 2006) ("The temporary limits are intended to prevent the congestion-related delays that would otherwise occur during the interval between the expiration of the High Density Rule and the effective date of a long-term regulation.").

[150] *See* OMB Control No. 2120-0524, DOT/FAA Supporting Statement A (Aug. 26, 2021), at 2 ("In addition to . . . EWR, the FAA has also designated Los Angeles International Airport (LAX), ORD, and San Francisco International Airport (SFO) as Level 2 airports (schedule-facilitated) under the IATA WASG.")

country.[151] There is no line item to report the burden to the public, including other carriers, of suppressing competition; nor of the cost of congestion delays to passengers and the 'legacy' carriers, which was estimated to cost the economy between $31 Billion to $41 Billion in 2007.[152] The reported gifts to respondents for the information collection excluded an estimate of the market value of the airspace reservation that the FAA intends to provide to them for free and simply stated, "There are no monetary considerations for this collection of information."[153] This is a subsidy for which the airlines pay nothing except their time to update a schedule to the FAA.

Additionally, the DOT would require money from the Treasury to process the information collection and to administratively allocate the airspace reservations.[154] No agency can spend from the Treasury without an appropriation:

> However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.[155]

---

[151] *See* OMB Control No. 2120-0524, DOT/FAA Supporting Statement A (Aug. 26, 2021), Item 12 at 19.

[152] *See* Michael Ball, et al., Total Delay Impact Study, NEXTOR at 3, Table 1-1 (comparing the estimates to a Senate Joint Economic Committee (JEC) study).

[153] OMB Control No. 2120-0524, DOT/FAA Supporting Statement A (Aug. 26, 2021), Item 9 at 9.

[154] *See* OMB Control No. 2120-0524, DOT/FAA Supporting Statement A (Aug. 26, 2021), Item14 at 23.

[155] *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

E. Approval of the requested information collection would serve regulations that are not legally in effect

The FAA recognizes that the regulations limiting operations allocate "coveted" access to airports, for free, to 'legacy' carriers, or are economically significant.[156] Yet these regulations have never seen the light of day because the FAA has not submitted them for review pursuant to the multiple processes that Congress and the Executive office have instituted to prevent regulator overreach — the Administrative Procedures Act,[157] the Congressional Review Act,[158] review by the Secretary of Transportation,[159] and EO12866.[160] Therefore, these regulations are not legally in effect.[161]

---

[156] 86 Fed. Reg. 24428, 24429.

[157] *See* 5 U.S.C. § 553. Although the FAA has issued the orders limiting operations at LGA and JFK every two years since 2007, they have not taken comments, as are required, since 2009; *see* 74 Fed. Reg. 28772, Notice of order to show cause and request for information (Jun. 17, 2009). These APA requirements apply with the same force when an agency extends an existing rule ; *see Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter such a rule without notice and comment." (internal quotations and citation omitted)).

[158] *See* 5 U.S.C. §§ 801-808.

[159] *See* 49 U.S.C. § 106(f)(3)(B). *See also*, Exhaustless Inc. v FAA, D.C. Cir. No. 18-1303, Brief for Respondent, 35 (Mar. 18, 2019) ("The purpose of that provision is merely to internally allocate power within the Department of Transportation. . . And here both the Secretary and Administrator have continually operated on the understanding that the orders here are "orders," not regulations, and so neither has ever determined that section 106(f)(3)(A)'s significance criteria has been met.").

[160] *See* Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, §§6 and 8.

[161] *See* 5 U.S.C. § 801(a)(1)(A).

F. Approval of the requested information collection would lead to violations of air transport agreements

The information collection requires the filing of schedules by airlines contrary to the air transport agreement with Australia that "[a]ny requirements for the filing of schedules . . . shall be . . . imposed only when necessary to fulfill requirements under the domestic law of either Party."[162]

The information collection serves regulations that allocate the market of seven airports with grandfathering contrary to the air transport agreement with Canada to "allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement."[163]

The information collection serves regulations that protect the market share of 'legacy' carriers, contrary to the air transport agreement with the E.U. that requires both governments to "apply their respective competition regimes to protect and enhance overall competition and not individual competitors."[164]

---

[162] Air Transport Agreement Between the U.S. and Australia, T.I.A.S. No. 13-618, Art. 11 § 4 (Mar. 31, 2008) .

[163] Air Transport Agreement Between the Government of the United States of America and the Government of Canada, T.I.A.S. No. 07-312, Art. 5 § 1 (Mar. 12, 2007).

[164] U.S. – E.U. Air Transport Agreement, Art. 20 §1 (Apr. 30, 2007).

The global carrier alliances (such as oneworld,[165] Star Alliance,[166] and SkyTeam[167]) have been granted antitrust immunity by the Secretary of Transportation pursuant to their alliance agreements.[168] These alliance members have not submitted the IATA Worldwide Slot Guidelines agreement for review by the Secretary of Transportation pursuant to 49 U.S.C. § 40109, and therefore *no antitrust immunity* has been conferred pursuant to 49 U.S.C. § 40108[169] regarding the IATA agreement to grandfather allocation of the U.S. airspace reservation market—as well as at 353 major airports worldwide,[170] which accommodate 61% of international air transportation.[171]

---

[165] *See* https://www.oneworld.com/members (An alliance of 14 member airlines including American, Alaska, British Airways (UK), Finnair (Finland/EU), Iberia (Spain/EU), Japan, and Qantas (Australia)).

[166] *See* https://www.staralliance.com/en/home#member-airlines (An alliance of 26 member airlines including United, Air Canada, Austrian (Austria/EU), Brussels (Belgium/EU), Air China, Air India, Lufthansa (Germany/EU), SAS (Denmark-Norway-Sweeden/EU), South African, and Swiss (Switzerland/EU)).

[167] See https://www.skyteam.com/EN/about/people-and-planet (An alliance of 19 member airlines including Delta, China Airlines, Air Europa (Spain/EU), Air France (EU), Alitalia (Italy/EU), and KLM (The Netherlands/EU).

[168] *See* https://www.transportation.gov/office-policy/aviation-policy/dot-aviation-anti-trust-immunity-cases for the list of active immunized alliances and the dockets of the proceedings.

[169] *See* Order 2007-2-16, Docket DOT-OST-2005-22922, at 2 (Feb. 13, 2007) ("Open-skies agreements create a situation in which pricing, capacity, frequency, routing, new entry, and quality of airline service are determined by market forces, not government restrictions or the threat of government restrictions. Without an open-skies framework, airlines operating with antitrust immunity may not be subject to competitive market forces, which could compel the Department to reconsider its prior grants of immunity.").

[170] *See* Worldwide Airport Slot Guidelines (WASG) - Annex 12.7 - Contact List for Level 2/3 Airports (Aug. 31, 2021) (The IATA only lists airports with international transportation, so LGA and DCA are not listed; however, Orlando and Seattle-Tacoma are listed as level 2 airports.).

[171] *See* IATA Global Media Days, Slots Update, at 4 (July 7-8, 2021).

CONCLUSION

As ordinary as this information collection may seem, it is vitally important to the integrity of our democracy, as the duties of OIRA under the Paperwork Reduction Act include to "ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws[.]"[172]

Congress has put in place a statutory scheme that relies on market competition in interstate and foreign commerce. Exhaustless urges OIRA to reject this information collection to terminate the unlawful allocation of slots to prevent any interference with the lawful commerce provided by Exhaustless' market-clearing service.

[172] 44 U.S.C. §3501(8).

APPENDIX – OTHER PROCEEDINGS

In addition to the public record referred to above, proceedings in the following dockets are related to the illegal subsidy of reservations to use the national airspace to certain carriers.

1. **66 Fed. Reg. 43947, Request for public comment on possible market-based actions to relieve airport congestion and delay, Docket DOT-OST-2001-9849 (Aug. 21, 2001)**

    a. Comment from Exhaustless Inc. (Jan. 19, 2021)

Recommended ways the OST could help migrate to our market allocation of airspace reservations.

b. Comment from Exhaustless Inc. (Jul. 7, 2021)

Amendment to Jan. 19, 2021, recommendations.

c. Comment from Exhaustless Inc. (Aug. 19, 2021)

Announcement of competitive allocation of airspace reservations at the seven high density airports for the Summer 2022 carrier scheduling season with an auction scheduled for Sep. 29, 2021.

2. Order 2020-11-9, Order to Show Cause, Docket DOT-OST-2008-0252 (Nov. 16, 2020)

d. Exhaustless Objects to DOT Approval of American, et al Joint Motion to Extend ATI (Nov. 30, 2020)

The agreement for extended antitrust immunity to the Oneworld Immunized Alliance should not be extended because, *inter alia*, a competitive alternative is available for airlines to obtain airspace slots without regulatory intervention in the slot market, and there can be no legal U.S. reciprocity to the U.K. government's collection of slot auction proceeds.

e. Exhaustless Inc. - Response to Comments of Delta Air Lines and JetBlue Airways Corporation (Dec. 9, 2020)

"[A]ll carriers that hold slots at any airport are participating in a *de facto* domestic and international market allocation agreement, the IATA Worldwide Slot Guidelines."

3. Notice, Complaint for Investigation of American Airlines and JetBlue Alliance, Docket DOT-OST-2021-0001 (Jan. 12, 2021)

The OST opened this docket related to Spirit Airlines' request for an investigation under 49 U.S.C. § 41712 of a joint venture agreement between American Airlines and JetBlue. The Notice also announced a Jan. 10, 2021, agreement that the OST had made with American Airlines and JetBlue to terminate

its review of the joint venture agreement, including the *de facto* conference of proprietary rights to 'grandfathered' reservations to use the national airspace.

4. 85 Fed. Reg. 83672, Notice of proposed extension of a limited, conditional waiver of the minimum slot usage requirement, Docket FAA-2020-0862 (Dec. 22, 2020)

f. Exhaustless Inc. - Objection to Extension of Waiver to Summer 2021 (Dec. 28, 2020)

The administrative allocation of slots is a regulatory taking of Exhaustless' proprietary right to allocate the slot market.

5. Order 2020-10-13, Order to Show Cause, Docket DOT-OST-2018-0154 (Oct. 23, 2020)

The OST tentatively approved an immunized alliance between Delta Air Lines and WestJet, a Canadian airline, including tentatively conferring *de facto* proprietary rights to U.S. national airspace reservations to a foreign carrier.

g. Objection of Exhaustless Inc. to Order to Show Cause 2020-10-13 (Nov. 9, 2020)

The administrative allocation of slots is a regulatory taking of Exhaustless' proprietary right to allocate the slot market.