THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN P. ENDRES

Plaintiff

v.

AIR CANADA et al

Defendants.

Case No: 1:24-cv-00883-RBW

Judge: Reggie Walton

PLAINTIFF'S MEMORANDUM OF THE STATUTORY SCHEME IN SUPPORT OF HIS SUPPLEMENTAL BRIEF

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PLAINTIFF'S MEMORANDUM OF THE STATUTORY SCHEME

A. Summary

1. In 1926, the Congress declared that the U.S. government has complete sovereignty of the airspace over the territory of the United States. The Congress established regulations of air commerce, delegated their enforcement to the Secretary of Commerce, and prohibited the Secretary from conferring exclusive rights in the use of the public's air transportation assets, including the navigable airspace.
2. In 1938, the Congress declared that the navigable airspace was a public highway and that the people have complete sovereignty of the airspace over the territory of the United States. The Congress regulated compliance with the rules of use of the airspace of domestic air carriers through Certificates of Public Convenience and Necessity and of foreign air carriers through a permit (together called "economic certificates") issued by the Civil Aeronautics Board. The Congress additionally regulated the price, route[1], and service of air transportation through route certificates issued to all air carriers by the Civil Aeronautics Board. Congress prohibited the granting of exclusive rights to air carriers for the use of the public's air transportation assets.

[1] 'Route' in this context referred to the origination and destination points of a flight.

3. In 1966, Congress created a Department of Transportation headed by a Secretary of Transportation to facilitate progress in the coordination of transportation services by private enterprise and continued the prohibition over the grant of exclusive rights to use the airways or navigation facility under the newly created position. The enforcement of all air carrier, airport operator, and airport owner economic and safety regulations was delegated to the Secretary of Transportation.
4. In 1970, Congress created the Airport and Airways Trust Fund to support services of the airway system with taxes on users of the system.
5. In 1978, Congress deregulated air transportation by delegating to market competition the price, route, and service decisions of air transportation in air commerce, required economic certificates to be reissued without route and service restrictions, and placed the enforcement market competition in air transportation under the antitrust laws. The air carrier certificate did not confer exclusive rights to use public air transportation assets.
6. In 2000, the Congress expressly prohibited carriers from relying on the grandfathered allocation of airspace reservations and airport facilities that serve air carriers, and made the collection of passenger facility charges contingent on a showing that facility use agreements between airports and air carriers were not exclusive.
7. In 2018, Congress reauthorized the trust fund to 2023.

8. Also in 2018, Plaintiff's private market-clearing service emerged to allocate the seasonal airspace reservations required by air transportation supplier-carriers to provide scheduled service and by consumers to access the public's airspace on an individual flight at a space-time.

9. In 2024, Congress reauthorized the trust fund, and maintained their mandate for price, route, and service to be determined through competitive market forces, but then regulated air transportation at one airport outside of the market.

B. The Regulation of Air Transportation within the Constitutional Framework

10. The people authorized the Congress (i) to regulate the use of the public's airspace,[2] (ii) to regulate domestic and foreign commerce,[3] and (iii) to "promote the progress of science and useful arts" by delegating to Congress the authority to secure an exclusive right to inventors to the market for their discoveries for a limited time.[4]

> Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which, by constitutional command, must "promote the Progress of . . . useful Arts." This is the standard expressed in the Constitution, and it may not be ignored. And it is in this light that patent validity requires reference to a standard written into the Constitution. * * * The patent monopoly was not designed to secure to the inventor

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[2] *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[.]").

[3] *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.").

[4] U.S. Const. art. I, § 8, cl. 8 .

> his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge. The grant of an exclusive right to an invention was the creation of society -- at odds with the inherent free nature of disclosed ideas -- and was not to be freely given. Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly.[5]

The People have a right to the progress:

> This Court has recognized, and the parties do not dispute, that the decision to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise. * * * As this Court has long recognized, the grant of a patent is a matter between the "public, who are the grantors, and . . . the patentee." * * * Congress can grant patents itself by statute. And, from the founding to today, Congress has authorized the Executive Branch to grant patents that meet the statutory requirements for patentability. . . Accordingly, the determination to grant a patent is a "matte[r] involving public rights."[6]

11. The people prohibited the Congress from (iv) favoring a port,[7] (v) granting titles of nobility,[8] or (vi) taking private property without compensation.[9]

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[5] *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

[6] *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. ___ (2018) (references omitted, emphasis in original).

[7] *See* U.S. Const. art. I § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.").

[8] *See* U.S. Const. art. I § 9, cl. 8 ("No Title of Nobility shall be granted by the United States[.]").

[9] *See* U.S. Const. amend. V (""Nor shall private property be taken for public use, without just compensation.").

12. The people retained (vii) the right to allocate scarce economic resources in a free market under the 1st Amendment, 9th Amendment,[10] and 10th Amendment.[11] As the U.S. Supreme Court has held:

> [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. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[12]

And also:

> Price is the central nervous system of the economy and an agreement that interferes with the setting of price by free market forces is illegal on its face.[13]

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[10] *See* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[11] *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, and prohibited by it to the States, are reserved to the people."). In other words, the powers not delegated to the United States

[12] *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) (references omitted).

[13] *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978) (internal quotations and references omitted).

And this also includes the right of consumers to pay and the right of suppliers to receive unimpeded payment in lawful commerce:

> [The Postmaster General's] right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. . . Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.[14]

And this also includes the right to pursue any lawful trade:

> [C]ertain inherent rights lie at the foundation of all action and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the declaration of independence, that new evangel of liberty to the people: "We hold these truths to be self-evident" — that is, so plain that their truth is recognized upon their mere statement — "that all men are endowed" — not by edicts of emperors, or decrees of Parliament, or acts of Congress, but "by their Creator with certain inalienable rights" — that is, rights which cannot be bartered away, or given away, or taken away, except in punishment of crime — "and that among these are life, liberty, and the pursuit of happiness, and to secure these" — not grant them, but secure them — "governments are instituted among men, deriving their just powers from the consent of the governed."
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> Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their

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[14] *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

> prosperity or develop their faculties, so as to give to them their highest enjoyment.[15]

And this includes the right to freedom of movement

> We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own states. And a tax imposed by a state for entering its territories or harbors is inconsistent with the rights which belong to citizens of other states as members of the Union and with the objects which that Union was intended to attain. Such a power in the states could produce nothing but discord and mutual irritation, and they very clearly do not possess it.[16]

13. Below are the current statutory regulations within this constitutional framework.

1. Regulation of the Use of the National Airspace (the U.S. Border)

a. The Fiduciary of the Public's Airspace

14. The Congress claimed the navigable airspace as the property of the people when it recognized that each citizen of the United States has a public right of transit through the navigable airspace and when it declared that the people have exclusive sovereignty of airspace of the United States. *See* ¶¶31, 36, *infra*.

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[15] *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 756, 758 (1884) (Justice Field, concurring).

[16] *Crandall v. State of Nevada*, 73 U.S. 35, 49 (1868) (internal quotations and reference omitted).

15. The Congress created the Airport and Airway Trust Fund to support the air traffic control, air navigation, communications, and other services of the public's airway system with taxes on users of the system.[17]

16. The Congress created the Passenger Facility Charge ("PFC") program to support the public's airport systems with taxes on users of the system.[18]

17. The Congress sets the economic and safety rules that users must follow to access the airspace "in the public interest and consistent with public convenience and necessity." 49 U.S.C. § 40101.

18. The navigable airspace includes "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(a)(32).

b. Architect of a Common System of Airways

19. The Congress tasks the Secretary of Transportation, delegated to the Administrator of the FAA, as the architect of the three-dimensional common airways: "The Administrator . . . shall develop plans and policy for the use of the 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). *See also* 49 U.S.C. § 44501(a) (The Administrator "shall make long

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[17] *See* Airport and Airway Development Act of 1970, Pub. L. 91-258, §208, 84 Stat. 219, 250 (1970), *codified as amended at* 26 U.S.C. § 9502.

[18] Aviation safety and Capacity Expansion Act of 1990, Pub. L. 101-508, Title IX, Subtitle B, 104 Stat. 1388-357, §9110, *codified as amended at* 49 U.S.C. § 40117.

range plans and policy for the orderly development and use of the navigable airspace, and the orderly development and location of air navigation facilities [.]")

c. Safe Use of the Airspace

20. The Congress regulates the safe use of the airspace through operating certificates, administered by the Secretary of Transportation, delegated to the Administrator of the FAA, of pilots, aircraft, airport operators, and carriers, *inter alia*. *See* 49 U.S.C. §§ 44702 and 44705.

d. Coordination of Civil and Military Users

21. The Congress requires the Secretary of Transportation, delegated to the Administrator of the FAA, 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), considering "the public right of freedom of transit through the navigable airspace." 49 U.S.C. § 40101(c)(2).

2. Regulation of Air Transportation

a. Air Carrier Certificate or Foreign Air Carrier Permit

22. U.S. citizens that wish to operate as an air carrier are required to hold a certificate of public convenience and necessity (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 transportation (as defined at 49 U.S.C. § 40102(a) (5), (23), and (25)).

23. The Secretary of Transportation enforces carrier compliance with statutory economic 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 the Congress has conferred to the Secretary of Transportation in the economic regulation of air carriers and foreign air carriers is through the administration of the economic certificate or foreign carrier permit.

24. 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);[19] (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)[20]; 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]."[21] 49 U.S.C. § 41110(a)(2)(B).

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[19] 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.").

[20] *Id.*, §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).

[21] *Id.*

b. Regulation of Commerce and Trade

25. The regulation of price, route, and service is delegated to market competition and is therefore subject to the laws codified at Title 15, Commerce and Trade, of the U.S. Code. 49 U.S.C. § 40101(a) (6), (12).

C. The Evolution of the Statutory Framework

3. The Clayton Act of 1914

26. In 1914, in Section 4 of "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," known as the Clayton Act, the Congress established a private right of action "[t]hat any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained[.]"[22]

27. The Clayton Act, as amended, established that "No order of the . . . Secretary [of Transportation] or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws."[23]

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[22] Oct. 15, 1914, ch. 323, §4, 38 Stat. 730, 731, *codified at* 15 U.S.C. § 15.

[23] *Id.*, § 11, 38 Stat. 730, 736, *codified at* 15 U.S.C. § 21(e).

4. Air Commerce Act of 1926

28. In 1926, in "An Act To encourage and regulate the use of aircraft in commerce," the Air Commerce Act of 1926 declared a public right of freedom of interstate and foreign air navigation in the navigable airspace.[24] The law declared that the U.S. Government "has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States,"[25] and shared that sovereignty with the domestic states.[26]

29. The Congress required the registration of aircraft and the establishment of air traffic rules, and established regulations of aircraft, airmen, and air navigation facilities in the nascent field of air commerce, delegating their enforcement to the Secretary of Commerce.[27] The Secretary of Commerce was obligated to encourage the establishment of airports, civil airways, and other air navigation facilities.[28] The Secretary of Commerce was authorized to establish civil airways and all necessary air navigation facilities along the airways except airports and prohibited the Secretary from conferring an exclusive right "for the use of any civil airway, airport, emergency landing field, or other air navigation

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[24] *See id.*, 44 Stat. 574, §10.

[25] *See id.*, 44 Stat. 572, §6.

[26] *See id.*, 44 Stat. 570, §4 ("The several States may set apart and provide for the protection of necessary airspace reservations in addition to and not in conflict either with airspace reservations established by the President under this section or with any civil or military airway designated under the provisions of this Act.") (*note that* "airspace reservations" in this context was not a reservation of an aircraft to takeoff or land at a space in time but a set-aside of a portion of the airspace by a domestic state).

[27] *See id.*, 44 Stat. 569, §3.

[28] *See id.*, 44 Stat. 569, §2(a).

facility."[29] The Secretary of the Treasury was authorized to designate places in the U.S. as ports of entry for the arrival of foreign civil aircraft and to establish customs service at those places.[30]

30. The Congress reserved part of the airspace for military airways as designated by the Secretary of War, and postal airways as designated by the Postmaster General.[31]

5. The Civil Aeronautics Act of 1938

31. "An act to create a Civil Aeronautics Authority, and to promote the development and safety and to provide for the regulation of civil aeronautics," the Civil Aeronautics Act of 1938 ("CAA-1938") "recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."[32] The CAA-1938 also amended the Air Commerce Act of 1926 to declare that the "United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national

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29 *See id.*, 44 Stat. 571, §5(b).

30 *See id.*, 44 Stat. 572, §7(b).

31 *See id.*, 44 Stat. 570, §§4-5.

32 Civil Aeronautics Act of 1938, Pub. L. 75-706, §3, 52 Stat. 973, 980 (1938).

jurisdiction."[33] These declarations of the public's interest and sovereignty overturned the common law rule that property rights extended above the land infinitely, as explained by the Supreme Court in 1946:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe – *cujus est solum ejus est usque and coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.[34]

32. The CAA-1938 enacted economic regulations of air carriers, including the regulation of price, route, and service;[35] and delegated the enforcement of those regulations to a five-member Civil Aeronautics Authority, replacing the authority of the Secretary of Commerce.[36]

33. The CAA-1938 delegated the authority to encourage and foster the development of civil aeronautics and air commerce to an Administrator of the Civil Aeronautics Authority.[37]

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[33] *Id.*, §1107(i)(3), 52 Stat. 1028.

[34] *U.S. v. Causby*, 328 U.S. 256, 260 (1946) (referencing, *inter alia*, 2 Blackstone, Commentaries, Lewis Ed.1902, p. 18 for the common law principle).

[35] *See* Civil Aeronautics Act of 1938, Pub. L. 75-706, Title IV, 52 Stat. 973, 987 (1938). *See also*, *id.* at §401(f) (routes), §403, .

[36] *See id.*, §1002, 52 Stat. 1018. *See also*, *id.*, § 1107(h)(i), 52 Stat. 1028.

[37] *See id.*, §301, 52 Stat. 985.

6. Reorganization Plan IV 1940

34. The Civil Aviation Authority was transferred under the Secretary of Commerce and renamed the Civil Aeronautics Board.[38]

7. The Federal Aviation Act of 1958

35. The Federal Aviation Act of 1958 ("FAA-1958") repealed the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938.[39] FAA-1958 continued the authority of the regulation of price, route, and service of air transportation in the Civil Aeronautics Board (CAB),[40] and created an independent Federal Aviation Agency "to provide a single focal point where problems related to the aviation community, other than economic regulation, can be resolved."[41]

36. FAA-1958 modified slightly from CAA-1938 that "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States," substituting "through the navigable airspace" for "in air commerce."[42]

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[38] *See* Reorganization Plan IV, 54 Stat. 1235-1236, §7 (1940).

[39] *See* Federal Aviation Act of 1958, Pub. L. 85-726, §1401(a), (b),72 Stat. 731, 806 (1958).

[40] Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 731, *codified at* 49 U.S.C. §§ 1301-1542 (1958). See, *e.g.*, 49 U.S.C. § 1302(c); § 1371(e) (routes); § 1373 and § 1482(d)-(i) (rates); and § 1374 (service).

[41] Federal Aviation Act, Hearing before House Subcommittee on Transportation and Communications, Committee on Interstate and Foreign Commerce, H.R. 12616, 85 Cong. 31 (1958) (Statement of Gen. E. R. Quesada). (*Note that* Gen. Quesada became the first FAA Administrator.) *See also* 49 U.S.C. § 1303 (1958).

[42] Federal Aviation Act of 1958, Pub. L. 85-726, §104, 72 Stat. 731, 740 (1958), *codified at* 49 U.S.C. § 40103(a)(2).

37. FAA-1958 kept from CAA-1938 that "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States,"[43] revised without substantive law in error in 1994 to "The United States Government has exclusive sovereignty in the airspace of the United States."[44] Clearly, we the people as the owners have exclusive sovereignty in the airspace of the United States.[45]

8. The Department of Transportation Act 1966

38. In 1966, the Department of Transportation (DOT) was established to, *inter alia*, "facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible."[46] The Federal Aviation Agency was terminated and its authorities were transferred to the Secretary of Transportation.[47] A Federal Aviation Administration (FAA) was established within the DOT,[48] and the "duties of the

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[43] Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 731 (1958).

[44] Pub. L. 103-272, 108 Stat. 745, 1101 (1994) ("To revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49,") *codified at* 49 U.S.C. § 40103(a) (*Note that* the historical and revision notes state the reasons for the other changes to the statute but is silent as to the change from U.S.A. to U.S. government).

[45] *Affirmed at* Convention on International Civil Aviation, done at Chicago December 7, 1944, as amended through 2006 in the Convention on International Civil Aviation, Doc 7300-9, Ninth Edition, Article 1 (2006) at https://www.icao.int/publications/Documents/7300_cons.pdf ("The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.")

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

[47] *Id.* §6(c)(1), *codified at* 49 U.S.C. § 1655(c) (Suppl. 2 1964).

[48] *See id.*, §3(e)(1), 80 Stat. 932, *codified at* 49 U.S.C. § 1652(e)(1) (Suppl. 2 1964).

Secretary pertaining to aviation safety" were transferred to the newly established FAA Administrator.[49]

9. The Airline Deregulation Act of 1978 and the Race to a Competitive Market Allocation of Airspace Reservations

39. The Airline Deregulation Act of 1978 terminated the economic regulation of price, route, and service of air transportation.[50] In an attempt by a domestic state to regulate air commerce, the Supreme Court ruled that:

> Congress, determining that maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality . . . of air transportation services, enacted the Airline Deregulation Act (ADA). To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier.[51]

40. To help transition the industry from the CAB's authority to "specify the terminal points and intermediate points . . . and the service to be rendered"[52] to market competition for routes and service, Congress granted airlines a method

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[49] *See id.*, §6(c)(1), 80 Stat. 938, *codified at* 49 U.S.C. § 1655(c) (Suppl. 2 1964) ("In exercising these enumerated functions, powers, and duties, the Administrator shall be guided by the declaration of policy in section 103 of the Federal Aviation Act of 1958, as amended."), and *currently codified at* 49 U.S.C. § 106(g)(1).

[50] Airline Deregulation Act of 1978, Pub. L. 95-504, §40(a), 92 Stat. 1705, 1744, *codified at* 49 U.S.C. § 1551(a) (Suppl. 2 1976), *e.g.*, (a)(1)(C) (routes), (a)(2)(A) and (a)(2)(D) (rates), and (a)(2)(B) (service).

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

[52] 49 U.S.C. § 1371(e) (1958).

to assert grandfathered rights for three consecutive one-year terms over one specified route:

> [A]ny air 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 [for each calendar year from 1979 to 1981] . . . file written notice to the Board which sets forth such pair of points . . . [for no] more than one pair of points[.][53]

10. International Air Transportation Competition Act of 1979

41. To promote competition in international air transportation, Congress integrated the economic policies of domestic and international air transport[54] and directed the Secretaries of State and Transportation to "develop a negotiating policy emphasizing the greatest degree of competition", including "developing . . .a viable, privately-owned United States air transport industry."[55] The "open skies" agreements have been designed to provide airlines bilateral access to fair market competition:

> The Parties acknowledge that market forces shall be the primary consideration in the establishment of prices for air transportation.[56]

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[53] Airline Deregulation Act of 1978, Pub. L. 95-504, §12, 92 Stat. 1705, 1718, *codified at* 49 U.S.C. § 1371(d)(7)(C) (Suppl. 2 1976) (emphasis added).

[54] *See* International Air Transportation Competition Act of 1979, Pub. L. 96-192, §2, 92 Stat. 35 (1980), *codified at* 49 U.S.C. § 40101(a)(1)-(15). *See also*, *id.*, §3, 92 Stat. 36 (repealing 49 U.S.C. § 1302(c)).

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

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

> INTENDING to build upon the framework of existing agreements with the goal of opening access to markets and maximizing benefits for consumers, airlines, labor, and communities on both sides of the Atlantic . . . 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.[57]
>
> 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.[58]
>
> 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.[59]

c. Airline scheduling committees directed to terminate grandfathering

42. 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 auction of semi-annual airspace reservations with a secondary

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[57] U.S. – E.U. Air Transport Agreement, Preamble and Art. 2 (Apr. 30, 2007).

[58] *Id.*, Art. 14 §1.

[59] *Id.*, Art. 20 § 1.

reservation exchange for service at Washington National Airport, with the proceeds going to the U.S. Treasury.[60] No subsequent rule was issued.

43. In October 1981, as a result of an investigation of airline scheduling committee practices, 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.[61]

d. Route Certificates Revoked 1981

44. On December 31, 1981, pursuant to the Airline Deregulation Act of 1978, the certificated route authorities that had been issued by the CAB were terminated,[62] and "carriers holding domestic certificates received authority to serve any domestic or territorial point."[63]

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[60] 45 Fed. Reg. 71236, Special Air Traffic Rules and Airport Traffic Patterns (Proposed Oct. 27, 1980).

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

[62] *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).")

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

11. Extension of Airport and Airway Trust Fund 1982

45. In 1982, Congress recodified and extended the Airport and Airway Trust Fund to collect taxes on, *inter alia*, air transportation with which to fund maintenance and improvements in "air traffic control, air navigation, communications, or supporting services for the airway system."[64]

e. Task Force for a Competitive Market Allocation of Airspace Reservations

46. Also in the 1982 law, Congress directed the Secretary of Transportation to form a task force to study the problems of allocating the use of airport facilities and airspace reservations, and to "make recommendations for improving those methods and for resolving disputes with respect to the use of such facilities."[65] 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 airport owners and operators (and excluded the FAA).[66]

47. In May 1983, at a hearing before the House Subcommittee on Investigations and Oversight, members of the task force presented their report. Dan

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[64] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, §281, 96 Stat. 324, 565 (1982), *codified* at 26 U.S.C. § 9502(d)(1)(B) and recently extended to Oct. 1, 2028.

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

[66] *See* id.

McKinnon, the Chairman of the CAB and the chairman of the task force, testified:

> 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.[67]

48. Norman Philion, Executive Vice President of Air Transport Association (now doing business as Airlines For America) presented the recommendations of the assigned working group on airport access, which included, (i) to fund capacity improvements as soon as possible and (ii) the continuation of a "user [carrier] scheduling committee system, embodying an acceptable fail-safe mechanism" to solve a committee dead-lock — in other words continuing to allocate by grandfathering.[68] No fail-safe mechanism was recommended.

49. 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.
>
> 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

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[67] 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).

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

> 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.[69]

50. Secretary of Transportation Elizabeth Dole commented:

> 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 would "likely be highly disruptive to public service and almost surely would add to the cost of air transportation."[70]

f. No Less Anticompetitive Alternative Exists 1983

51. After the CAB's 1981 directive to terminate their practice of "grandfathering" slots at DCA, ¶42 *supra*, airlines held a series of meetings (for which the CAB granted antitrust immunity) to develop a solution to the allocation of airspace reservations. On May 13, 1983, the airlines filed a scheduling committee agreement with a deadlock mechanism for allocating airspace reservations at

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[69] *Id.*, page 61 (*note that* no name of the DOJ Assistant Attorney General Antitrust Division was provided in this source).

[70] *Id.*, page 55.

DCA.[71] In the event of a deadlock, the agreement installed a drawing by lot to select one of eight mechanisms to allocate the reservations; each of the mechanisms grandfathered reservations to some degree.

52. In June 1983, a month after the task force report, and pursuant to its authority, 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*."[72]

12. CAB Sunset Act of 1984

53. Effective January 1, 1985, the CAB's authority over the remaining economic regulations through the economic certificate was transferred to the Secretary of Transportation and the CAB was dissolved.[73]

54. The CAB Sunset Act of 1984 amended Section 11 of the Clayton Act Pub. L. 98–443, §9(m)(1)

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[71] *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.]

[72] *Id.,* at 601 (emphasis added). *See also*, Airline Deregulation Act of 1978, Pub. L. 95-504, §28(c), 92 Stat. 1705, 1729, *codified at* 49 U.S.C. § 41309(b)(1).

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

13. Policy to remove artificial restrictions 1985 - 1987

55. In 1985, the House Subcommittee on Aviation held hearings on how the Federal government should allocate airspace reservations at high density airports.[74] 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.[75]

56. In 1987, Congress adopted a policy that "artificial restrictions on airport capacity are not in the public interest and should not be imposed to alleviate air traffic delays unless other reasonably available and less burdensome alternatives have first been attempted."[76]

14. Texas attempts to regulate air commerce.

57. In 1988, the Attorney General for Texas adopted and enforced the Air Travel Industry Enforcement Guidelines (the "NAAG Guidelines") of the National Association of Attorneys General (NAAG), a private confederation of the attorneys general of all 50 states and the District of Columbia claiming non-

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[74] Hearing before the House Subcommittee on Aviation, Committee on Public Works and Transportation, Government Policies on the Transfer of Operating Rights Granted by the Federal Government, Particularly Certificates of Public Convenience and Necessity and Airport Slots, (Serial 99-33), 99 Cong. 2, Sep. 10, 19; Oct. 22, 1985.

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

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

profit status.[77] The NAAG Guidelines described how to apply existing state laws to the regulation of air fare advertising and frequent flyer programs.[78]

58. The Supreme Court held that the enforcement actions of Texas and the NAAG Guidelines were "related to" the price of air transportation and enjoined the enforcement action as preempted by the ADA-1978.[79]

15. The Congress' Commission 1992 - 1997

59. 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 "to make a complete investigation and study of financial condition of the airline industry, adequacy of competition in the airline industry, and legal impediments to a financially strong and competitive airline industry."[80] In 1994, Congress directed the Secretary to study the High Density Rule framework,[81] and to conduct a rulemaking based on the results of the study.[82]

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[77] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) at 379. *See also*, National Assoc. of Attorneys General IRS Form 990 for 2022 (Nov. 3, 2023), from https://projects.propublica.org/nonprofits/organizations/300088843/202313099349300151/full.

[78] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) at 379.

[79] *See id*. at 391.

[80] 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).

[81] Federal Aviation Reauthorization Act of 1994, Pub. L. 103-305, §206(a)(1), 108 Stat. 1569, 1585 (Aug. 23, 1994), *codified at* 49 U.S.C. § 41714(e).

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

60. In 1995, the DOT reported that:

> Changing the [High Density Rule] will not affect air safety. Today's sophisticated traffic management system limits demand to operationally safe levels through a variety of air traffic control programs and procedures that are implemented independently of the limits imposed by the HDR." * * * [E]liminating . . . the High Density Rule is likely to result in . . . [a]n increase in travel delay time and costs -- for consumers and airlines -- due to increased "peaking" of demand in airport operations as users opt to fly at their most desired times. * * * If lifting the HDR precipitates significant travel delays, consumers, airlines and the airports will be motivated to adjust their behavior in response to market forces, as happens at non-HDR airports across the United States.[83]

61. No rulemaking was conducted by the DOT after the study was published. 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."[84]

16. ICC Termination Act 1995

62. In 1995, the Congress deregulated motor carrier markets with the ICC Termination Act of 1995, delegating the setting of price, route, and service of motor carriers to market competition — and terminated the Interstate

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

[84] Hearings before the Subcommittee on Transportation and Related Agencies, Committee on Appropriations, Airline Competition, S. Hrg. 105-936, 105 Cong. 36 (Oct. 21, 1997) from https://www.govinfo.gov/content/pkg/CHRG-105shrg53117/pdf/CHRG-105shrg53117.pdf

Commerce Commission's authority over those decisions.[85] Congress placed jurisdiction of the regulation of the competitive market for motor carrier operations under either the Secretary of Transportation or the Surface Transportation Board.[86] A preemption clause preclude States from regulating the price, route, or schedule of transportation by motor carrier.[87]

63. In response to a New Hampshire law regulating the transportation of tobacco, the U.S. Supreme Court upheld the preemption clause, ruling that:

> The Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for "competitive market forces" in determining (to a significant degree) the services that motor carriers will provide. substitution of its own governmental commands for "competitive market forces" in determining (to a significant degree) the services that motor carriers will provide [88]

17. AIR-21 Act of 2000

64. In 2000, Congress directed carriers to cease using the High Density Rule framework at O'Hare airport after July 1, 2002, and at JFK and LaGuardia

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[85] *See* ICC Termination Act of 1995, Pub. L. 104–88, 109 Stat. 803 (1995), *codified at* 49 U.S.C. § 13101(a)(2).

[86] *See* ICC Termination Act of 1995, Pub. L. 104–88, §103, 109 Stat. 803, 852, 859 (1995), codified at 49 U.S.C. § 13501(2) ("The Secretary and the [Surface Transportation] Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier—on a public highway.").

[87] See *id*. 109 Stat. 899, codified at, 49 U.S.C. § 14501.

[88] See *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364 (2008).

airports after January 1, 2007[89] — because "it is clear that this rule no longer serves any legitimate aviation purpose. Rather, it merely acts as an unnecessary constraint on operations, barring new entry, *limiting competition* and inflating prices at slot-controlled airports."[90]

65. Congress codified its reasoning to phasing out the HDR framework:

> 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.[91]

66. The AIR-21 Act was silent as to phasing out the HDR at Reagan National Airport in Washington, D.C.

18. Omnibus Appropriations Act 2009

67. On March 11, 2009, the 2009 omnibus appropriations law was enacted, which prohibited funds to be used by the FAA to "implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act[92] * * * [or by the] Secretary . . . to

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89 *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).

90 H.R. Rep. 106-167(1), 78 (1999) (emphasis added).

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

92 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).

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]."[93]

19. Plaintiff's market-clearing service emerged 2018

68. On May 28, 2018, Plaintiff announced an auction for supplier airspace reservations for the Winter 2018 carrier scheduling season. ECF 1 ¶31.

69. On August 2, 2019, the U.S. Court of Appeals for the D.C. Circuit indirectly declared Plaintiff's auction of the public's airspace reservations to the public to be lawful commerce as it found no hurdles to carriers or consumers paying the winning bid to obtain congestion-free airspace reservations:

> 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.[94]

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

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

20. FAARA-2018

70. On October 5, 2018, the President and the Congress enacted the FAA Reauthorization Act of 2018 ("FAARA-2018"), which did not amend the policy of placing the decisions for price, routes, and service in the competitive market at 49 U.S.C. § 40101(a).[95]

71. FAARA-2018 extended the trust fund to 2023.[96]

21. FAARA-2024

72. On May 16, 2024, the FAA Reauthorization Act of 2024 ("FAARA-2024") was signed into law, which did not amend the policy of placing the decisions for price, routes, and service in the competitive market at 49 U.S.C. § 40101(a); in other words, Congress maintained their prohibition on grandfathering airspace reservations.[97]

73. The Congress extended the Airport and Airway Trust Fund to 2028.[98]

74. However, Congress artificially increased the number of airspace reservations at Reagan National Airport in Washington, D.C. and instructed the Secretary of

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95 *See* FAA Reauthorization Act of 2018, Pub. L. 115-254, 132 Stat. 3186 (2018).

96 *See id.*, §801(a)(1), 132 Stat. 3428, *codified at* 26 U.S.C. § 9502.

97 *See* Securing Growth and Robust Leadership in American Aviation Act, Cong. Record. H3050-3164 (May 14, 2024), signed into law as the FAA Reauthorization Act of 2024, Pub. L. 118–63 (May 16, 2024). *Note that* at the time of filing this document, Pub. L. 118-63 (May 16, 2024) had not been published.

98 *See id.*, §1301(a)(1), *codified at* 26 U.S.C. § 9502.

Transportation to allocate those reservations outside of Plaintiff Endres' existing market.[99]

D. OATH

I declare under penalty of perjury that the foregoing is true and correct.

Signed on August 26, 2024.

/s/ Steven P. Endres
Steven P. Endres — PRO SE

4338 Hillside Dr
Ann Arbor, Michigan 48105
steve@exhaustless.com
1-(734) 945-9231

[99] *See id.*, §502(a), *codified at* 49 U.S.C. § 41718(i).