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AIRLINE DEREGULATION IN THE FOURTH CIRCUIT

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I. INTRODUCTION

The Fourth Circuit Court of Appeals has decided a wide range of cases that pertain to aviation law,[1] including accident litigation,[2] airspace,[3] airmen,[4] airports,[5] aircraft,[6] antitrust,[7] and criminal law.[8] This Article focuses on decisions by the court relating to a particular aviation law, the Airline

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1. Aviation law, as a standalone subject matter, includes all facets of the law dealing with the ownership, operation, maintenance, and use of aircraft, airports, and airspace. It also involves licensing and aeronautical issues encompassed by the Federal Aviation Act and associated Federal Aviation Regulations.

2. *E.g.*, Ridge v. Cessna Aircraft Co., 117 F.3d 126 (4th Cir. 1997); Hottle v. Beech Aircraft Corp., 47 F.3d 106 (4th Cir. 1995).

3. *E.g.*, Walsh v. Potomac Airfield Airport, 31 F. App'x 818 (4th Cir. 2002); City of Alexandria v. Helms, 728 F.2d 643 (4th Cir. 1984).

4. *E.g.*, Beauchamp v. Fed. Aviation Admin., 384 F. App'x 259 (4th Cir. 2010).

5. *E.g.*, Skydive Myrtle Beach, Inc. v. Horry Cty. Dep't of Airports, 735 F. App'x 810 (4th Cir. 2018); News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth., 597 F.3d 570 (4th Cir. 2010); All. for Legal Action v. Fed. Aviation Admin., 69 F. App'x 617 (4th Cir. 2003); Multimedia Publ'g Co. of S.C. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993); Henry v. Greenville Airport Comm'n, 279 F.2d 751 (4th Cir. 1960).

6. *E.g.*, Haynes v. General Elec. Credit Corp., 582 F.2d 689 (4th Cir. 1978).

7. *E.g.*, Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499 (4th Cir. 2002).

8. *See generally* Andrea deLorimier, Note, *Flying in the Face of Suspicionless Cell Phone Searches: Fourth Circuit Grants Airline Passengers Heightened Protection from Searches by Customs Officers*, 84 J. AIR L. & COMM. 127 (2019) (discussing *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018)).

Deregulation Act of 1978,[9] and situates the court's approach to the law among other jurisdictions.

Empirically, only nine written decisions by the court refer in any manner to the Airline Deregulation Act, with the court making a substantive determination about the law's language or policy on only four occasions—three cases in the six-year period between 1995–2001,[10] and one case in the last seventeen years,[11] most recently in 2018 in connection with an emerging national controversy respecting reimbursement for air ambulance providers.[12]

II. LEGISLATIVE HISTORY OF THE AIRLINE DEREGULATION ACT

Congress enacted the Airline Deregulation Act more than four decades ago to achieve a market-oriented approach to the commercial airline industry. The law marked a momentous change from the period of 1938 to 1978 when the federal government developed a comprehensive scheme to promote commercial aviation by vesting extensive economic (and safety) regulatory powers in the Civil Aeronautics Board ("CAB"), the predecessor entity to today's Federal Aviation Administration ("FAA").[13] The CAB set rates for *inter*state passenger air travel and controlled entry into the market through a rigorous approval process for new routes.[14] Under this scheme, Congress effectively insulated early airlines from competition.

At the same time, however, state governments had the power to regulate *intra*state airfares (including those offered by interstate air carriers) and to enforce state laws against airlines, for example laws against deceptive trade practices.[15] These dual regulatory regimes and collaboration between the federal government and states caused inefficiencies in the marketplace, however. Because the law permitted two layers of regulation, airlines were "required to charge different fares for passengers traveling between cities, depending on whether these passengers were interstate passengers whose fares [were] regulated by the CAB, or intrastate passengers, whose fare [was] regulated by a State."[16]

9. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

10. Weber v. US Airways, Inc., 11 F. App'x 56 (4th Cir. 2001); Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998); Wagman v. Fed. Express Corp., 47 F.3d 1166 (4th Cir. 1995) (unpublished table decision).

11. Air Evac EMS, Inc. v. Cheatham, 910 F.3d 751 (4th Cir. 2018).

12. *See id.*

13. *See* Stephen E. Creager, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 319–20 (1983).

14. *See* Paul Stephen Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91, 114–17 (1979).

15. *See Air Evac EMS, Inc.*, 910 F.3d at 755.

16. *Id.*

In 1978, Congress abandoned this dual administrative system, recognizing how common and accessible airline travel had become and how relatively more able the airlines were to compete with one another on open terms in a free market.[17] Finding 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," Congress eliminated the CAB and its rigid economic oversight by enacting the Airline Deregulation Act. Critically, Congress included a preemption clause in the Airline Deregulation Act to ensure that states would not undo federal deregulation with regulation of their own. The clause broadly prohibits any entity other than the federal government from enacting or enforcing any law "relating to prices, routes, or services" of any air carrier.[18]

III. JUDICIAL APPLICATION OF THE AIRLINE DEREGULATION ACT

The Supreme Court addressed the scope of the Airline Deregulation Act's preemption clause for the first time in the mid-1990s in *Morales v. Trans World Airlines, Inc.*[19] *Morales* established the general proposition that claims that have "a connection with, or reference to" an airline's prices, routes, or services are preempted under the Airline Deregulation Act.[20] Correlatively, state actions that affect airline prices, routes, or services "'in too tenuous, remote, or peripheral" a manner are not preempted.[21] In any case, as Justice Scalia made clear in *Morales*, the preemption clause in the Airline Deregulation Act is so vast that even statutes of general application, when particularly applied to the airline industry, are preempted in the interest of implementing the national legislature's policy of "ensuring that states would not undo federal deregulation with regulation of their own."[22]

American Airlines, Inc. v. Wolens,[23] decided three years after *Morales*, offered an important nuance to the preemption doctrine under the Airline Deregulation Act. Specifically, *Wolens* carved out an exception to preemption for contract claims against airlines such as those involving frequent flyer programs, even when related to prices, routes, or services.[24] Writing for the Supreme Court, Justice Ginsberg stated that lawsuits that sought

17. *Id.*
18. Airline Deregulation Act of 1978, Pub. L. No. 95-504, sec. 3(a), § 102(a), 92 Stat. 1705, 1706–07.
19. Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).
20. *Id.* at 384.
21. *Id.* at 390 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).
22. *Id.* at 378.
23. Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).
24. *Id.* at 222.

fundamentally to enforce the parties' "own, self-imposed undertakings" could escape the preemptive effect of the Airline Deregulation Act.[25]

Importantly, the breach-of-contract exception expressed in *Wolens* is confined to the terms of the parties' bargain, "with no enlargement or enhancement based on state laws or policies external to the agreement."[26] Thus, under *Wolens*, a contract claim would survive preemption if the parties limited their dispute to the terms of their bargain; however, if a court could adjudicate a contract claim only by resorting to outside sources of law, the claim would be preempted under the Airline Deregulation Act.[27]

IV. FOURTH CIRCUIT REVIEW

A. Airline Boarding Procedures

A few years after the Supreme Court established the analytical framework expressed in *Morales* and *Wolens*, and twenty years after Congress enacted the Airline Deregulation Act, the Fourth Circuit considered the issue of federal preemption in aviation in 1998, in *Smith v. Comair, Inc.*[28] At issue in *Smith* were a passenger's claims against Delta Airlines and its subsidiary,

25. *Id.* at 228. Justice Scalia, author of the *Morales* decision, took no part in *Wolens*.

26. *Id.* at 233.

27. *See id.* at 228; Northwest, Inc. v. Ginsberg, 572 U.S. 273, 276 (2014) (unanimous decision) ("The Airline Deregulation Act pre-empts a state-law claim for breach of the implied covenant of good faith and fair dealing if it seeks to enlarge the contractual obligations that the parties voluntarily adopt.").

28. Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998). The *Smith* court stated that "[t]he scope of federal preemption under the Airline Deregulation Act has not been considered in this circuit." *Id.* But, three years before *Smith*, the Fourth Circuit had, in fact, decided a case arising under the Airline Deregulation Act, in an unpublished *per curiam* opinion, Wagman v. Fed. Express Corp., 47 F.3d 1166 (4th Cir. 1995) (unpublished table decision), by applying the Airline Deregulation Act's preemption clause. There, the Wagman family intended to file a lawsuit based on an automobile accident in which they were involved in 1986 in New Jersey. *Id.* at *1. They sent a complaint to their attorney in Pennsylvania via Federal Express. *Id.* "The complaint had to be filed the next delivery day to avoid the statute of limitations, but Federal Express delivered the package one day too late." *Id.* Federal Express's airbill limited its liability for lost packages to $100, unless the Wagmans, as the shipper, declared a value in excess of $100 and paid an additional value (they did not). *Id.* The Wagman family then filed a $100,000 diversity action against Federal Express for negligence, breach of contract, and misleading advertising under state consumer protection law; they alleged that "Federal Express's advertising campaign misled its potential customers into believing packages would always be delivered when promised." *Id.* The U.S. District Court for the District of Maryland "granted summary judgment in favor of Federal Express, finding the state law claims preempted and limiting Federal Express's liability to the $100 set in the contract." *Id.* On appeal (of the deceptive advertising claim only), the Fourth Circuit affirmed under the authority of *Morales* and *Wolens*, holding that "the Airline Deregulation Act's preemption provision prohibit[ed] state regulation of airline advertising pertaining to services—such as Federal Express's overnight delivery guarantee—as well as to airline fares." *Id.* at *2.

Comair, Inc., for breach of contract, false imprisonment, and intentional infliction of emotional distress in connection with the airline's boarding process.[29] The plaintiff, a businessman named James Smith, was traveling on a Comair flight operated from Roanoke, Virginia, to Minneapolis, Minnesota, with a layover in Cincinnati.[30] The airline refused to allow him to board the Cincinnati–Minneapolis leg of the trip because, according to the airline, he did not match the physical description contained in his frequent-flyer account.[31] That was untrue, however.

After watching his flight depart without him and after waiting three hours at the Cincinnati airport, Smith was told by the airline's supervisor that the real reason he was denied permission to board was that airline representative in Roanoke had failed to ask for photo identification.[32] The airline representative further explained that the FAA required photo identification pursuant to security regulations.[33] Smith, then unable to produce his driver's license (because it was in the glove compartment of his car parked in Virginia), offered to have his physical description faxed by the Virginia Department of Motor Vehicles or to pay for the airline to retrieve his driver's license in his car at the Roanoke airport, but the airline declined both.[34] Instead, the airline arranged to fly Smith back to Roanoke from Cincinnati.[35]

Smith's frustration boiled over as he waited to board the flight to Roanoke and he told the airline representative that he was so angry he "would like to punch [him] in the mouth."[36] The airline supervisor then motioned for two security guards—both of whom had been observing Smith close by for hours.[37] When they apprehended and restrained Smith, the airline representative asked them to remove him from the airport terminal.[38] After Smith explained his situation to the guard and police officer, however, the officer intervened on Smith's behalf and convinced the airline representative to permit Smith to fly to Roanoke and Smith ultimately flew to Roanoke.[39]

Sometime later Smith filed suit in the Circuit Court for the City of Roanoke.[40] The airline defendant removed the case from state court to the U.S. District Court for the Western District of Virginia where the district court judge granted summary judgment in favor of Comair, finding that Smith's

29. *Smith*, 134 F.3d at 256.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 256–57.
39. *Id.*
40. *Id.*

claims were preempted by the Airline Deregulation Act and that his tort-based claims failed to state a claim.[41] Smith appealed, arguing that by refusing him permission to board his flight, Comair had breached a general contractual duty to transport him to Minneapolis.[42]

Framing the case in terms of *Morales*, *Wolens*, and applicable federal aviation safety laws, the Fourth Circuit affirmed summary judgment against Smith on his breach of contract claim.[43] It reasoned, "Because Smith's contract claim [was] based upon Comair's refusal to permit him to board, it directly implicates the airline's discretion and/or duty under federal law. Accordingly, the claim [was] preempted."[44] In reaching this decision, the court gave considerable weight to the airline's position that it was entitled to prevent Smith from boarding: (1) under federal statutory law giving airlines wide discretion to deny boarding for safety-related reasons; and (2) pursuant to an FAA security directive that became effective the evening before Smith's flight.[45] In fact, because Comair invoked defenses provided by federal law, the court concluded that Smith's contract claim could only be adjudicated by reference to law and policies external to the parties' bargain and, therefore, was preempted under the Airline Deregulation Act.[46]

Finally, the court recognized a practical reason for rejecting Smith's contract claim: If the court held that passengers could challenge airline boarding procedures under general contract claims alleging failure to transport, it would effectively allow every state to regulate an area of unique federal concern—airline boarding practices.[47] Allowing Smith's claim to proceed would thus frustrate an important federal objective, the court wrote, and "[a]irlines might hesitate to refuse passage in cases of potential danger for fear of state law contract actions claiming refusal to transport."[48]

After disposing of Smith's contract claims, the court turned to Smith's tort claims, which fared no better as a matter of law. Smith conceded that an airline's boarding practices were properly considered a "service" under section 41713(b)(1) of the Airline Deregulation Act, but that the airline's particular conduct was so outrageous as to be unrelated to the provision of a

41. *Id.*

42. *Id.* at 257–58.

43. *Id.*

44. *Id.*

45. *Id.*; *see also* Air Transportation Security Act of 1974, Pub. L. No. 93–366, sec. 204, § 1111(b), 88 Stat. 409, 418 (describing right to refuse transportation for various reasons including "when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight."). Under 49 U.S.C. § 44902(b) (2012 & Supp. 2018), airlines have the power of "permissive refusal" and an "an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety."

46. *Smith*, 134 F.3d at 258.

47. *Id.* at 258–59.

48. *Id.* at 259.

service and, thus, not preempted under the Second Circuit's decision in *Rombom v. United Airlines, Inc.*[49] The Fourth Circuit Court of Appeals disagreed, concluding that Smith failed to state a claim even if his tort actions somehow could escape the preemptive sweep of the Airline Deregulation Act.[50]

First, as to Smith's false imprisonment claim, the Fourth Circuit applied the law of Kentucky (where Smith's claims occurred) as it was required to do pursuant to Virginia's *lex loci delicti* standard.[51] While the airline representative told Smith that he was not permitted to board the flight out of Cincinnati, the passenger's evidence failed to "show that he was compelled either to remain or to go anywhere he did not wish" under state law, according to the court.[52] In fact, Smith conceded that no Comair representative told him that he was required to remain in any specific part of the airport or that he was not free to leave the airport.[53] For that matter, while Smith asserted that restraint by the security officers constituted false imprisonment, even he admitted that the officers grabbed his arms only momentarily and nonforcefully, and then immediately interceded on his behalf to permit Smith to board a flight back to Roanoke.[54]

Next, Smith argued that the airline representative's "outrageous behavior—lying and rudely failing to assist him—constitute[d] intentional infliction of emotional distress."[55] The Fourth Circuit disagreed, however, relying on the Kentucky Supreme Court's adoption of *Restatement (Second) of Torts*, pursuant to which "'the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality.'"[56] While the airline representative's conduct was "unquestionably rude and unprofessional," Judge Wilkinson wrote for the majority, "it was not so outrageous and intolerable as to satisfy the high standard set by the Kentucky Supreme Court."[57] Additionally, Smith failed to show that his

49. *Id.* (citing Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 222 (S.D.N.Y. 1994), for the proposition that suits are not preempted under the ADA if the airline's conduct "too tenuously relates or is unnecessary to an airline's services").

50. *Id.* at 259.

51. *Id.*

52. *Id.* at 259–60 (quoting Wal-Mart Stores, Inc. v. Mitchell, 877 S.W.2d 616, 617 (Ky. App. 1994) ("Kentucky defines false imprisonment as '[a]ny exercise of force, by which in fact the other person is deprived of his liberty and compelled to remain where he does not wish to remain or to go where he does not wish to go.'").

53. *Id.* at 260.

54. *Id.*

55. *Id.*

56. *Id.* at 259 (quoting Humana of Ky., Inc. v. Seitz, 796 S.W.2d 1, 2 (Ky. 1990)); RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

57. *Id.* at 260.

alleged emotional distress was severe.[58] In fact, in his deposition, Smith conceded that the events at issue had almost no effect on his life: "[P]ersonally it has not affected me."[59] Because Smith failed to satisfy at least two elements of an intentional infliction of emotional distress action, therefore, the Fourth Circuit found that the district court properly granted summary judgment in favor of Comair.[60]

B. Defining "Price" and "Service"

In 2001, three years after deciding *Smith*, the Fourth Circuit Court of Appeals was asked to decide another customer service issue that could have been—and perhaps should have been—resolved at the ticket counter instead of the courtroom. The case, *Weber v. US Airways, Inc.*,[61] involved an overbooked flight and centered on the meaning of "price" and "service" under the Airline Deregulation Act.

The dispute in *Weber* arose after an airline asked for volunteers to relinquish their seats in exchange for free round-trip tickets on a future US Airways flight to anywhere in the continental United States.[62] Paul Weber, a passenger on a Charleston, West Virginia, to Jacksonville, Florida, flight volunteered.[63] When he ultimately went to redeem his travel voucher for a trip during Thanksgiving weekend, however, he was told that the voucher was limited to "Z-class" seats and that no such seats were available on the requested flight.[64]

Weber, claiming that he was never told there would be restrictions on the use of his voucher, sued in West Virginia state court for breach of contract and fraud.[65] After removing the case to the U.S. District Court of West Virginia, US Airways moved to dismiss the fraud claim on preemption grounds.[66] The district court granted the motion, dismissing the fraud claim while remanding the breach of contract claim back to the state court.[67] Weber appealed.[68]

Reviewing the district court's dismissal under a de novo standard, the Fourth Circuit affirmed under the authority of *Morales* and *Wolens*.[69] The

58. *Id.*
59. *Id.*
60. *Id.*
61. Weber v. US Airways, Inc., 11 F. App'x 56 (4th Cir. 2001).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 56–57.
66. *Id.* at 57.
67. *Id.*
68. *Id.*
69. *Id.*

court, in a *per curiam* opinion held that the passenger's claim "related to" pricing and servicing (i.e., the provision of tickets to bumped passengers) and was barred by the preemption clause of the Airline Deregulation Act Additionally, Weber's claim for fraud was preempted because it sought to enforce a legal duty on the defendant that was independent of the parties' contract.[70] The court explained that Weber's claim—essentially that the airline had a duty to disclose the Z-class restriction before he gave up his seat—was "no different than if the West Virginia legislature had enacted a statute, like Illinois did in *Wolens*, writing that duty into the legislative code."[71]

In deciding *Weber* and *Smith*, the Fourth Circuit Court of Appeals employed the analytical approach adopted by a majority of federal circuits—one that gives far-reaching and maximum preemptive effect to the statutory language of the Airline Deregulation Act.

Additionally, the court's decision in *Weber* was consistent with its earlier ruling in *Smith*. The *Weber* court concluded that a passenger's breach of contract claim stemming from a denial of boarding was preempted because it could only be adjudicated by reference to law and polices external to the parties' bargain in contravention of *Wolens*. This was similar to *Smith*, in which the court decided that an airline passenger's fraud claim, ostensibly for an omission relating to the pricing and servicing of his ticket, was preempted because it sought to enforce a legal duty on the carrier that was independent of the parties' contract.

Both *Smith* and *Weber* presented situations in which allowing the private causes of action to proceed would have: (1) run afoul of the explicit language of the Airline Deregulation Act and the language of *Morales* disallowing the enforcement of state laws "relating to" airline prices and services; and (2) contradicted the holding of *Wolens* pursuant to which courts should enforce a contract based on an airline's "own, self-imposed undertakings," but not actions that require courts to resort to sources of law external to the airline-passenger bargain.

C. *Air Ambulances:* Air Evac EMS, Inc. v. Cheatham

Air Evac EMS, Inc. v. Cheatham is the Fourth Circuit's most recent decision arising from the Airline Deregulation Act.[72] The case arose in an area of active innovation "healthcare aviation"—in which air ambulances are now a familiar part of emergency healthcare response.[73] All over the country, but

70. *Id.* at 57.
71. *Id.* at 57–58.
72. 910 F.3d 751 (4th Cir. 2018).
73. *Id.* at 757.

particularly in rural areas, air ambulances can play a vital and life-saving role in responding to medical emergencies.[74] Air ambulance services are exceedingly expensive, however, as a single flight can cost tens of thousands of dollars.[75] Consequently, some insurance companies have refused to pay the full reimbursement costs, and in response, air ambulance companies have sought payment directly from the patients, a practice known as "balance-billing."[76] To prevent covered patients from receiving these bills, some insurers have agreed to pay more to the air ambulance company.[77] For those insurers that did not agree, covered patients were regrettably often stuck with the bill for the remainder.[78]

Congress addressed air ambulance billing concerns directly by enacting the FAA Reauthorization Act of 2018.[79] The law empowered the Secretary of Transportation to collect more data on air ambulance pricing and provide additional information to consumers.[80] Additionally, "it invite[d] stakeholders, including states, into the policymaking process by forming a committee to advise the Secretary of Transportation on air ambulance billing practices."[81] Third, the law gave the Secretary authority to regulate air ambulance companies directly, both to ensure transparency around costs and to provide other consumer protections for customers of air ambulance operators.[82]

Many states have also responded, attempting to both lower their own costs and prevent the balance-billing of their citizens.[83] In recent years, states have tried to lower prices either by regulating the amount that air ambulance companies can charge private parties or by requiring air ambulance companies to accept lower reimbursement rates.[84] *Air Evac EMS, Inc.* concerned the efforts of one such state, West Virginia.[85]

At issue in *Air Evac EMS, Inc.* were West Virginia laws designed to limit the reimbursement rates of air ambulance companies in two contexts—one for private employees and one public employees.[86] The first was the state

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*; *see also* EagleMed, LLC v. Cox, 868 F.3d 893, 903 (10th Cir. 2017).
79. Pub. L. No. 115-254, 132 Stat. 3186 (2018).
80. *See Air Evac EMS, Inc.*, 910 F.3d at 757.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 757–58.
85. *Id.* at 754.
86. *See* W. VA. CODE § 5-16-5(c)(1) (2007) ("All financial plans required by this section shall establish . . . [m]aximum levels of reimbursement which the [PEIA] makes to categories

workers' compensation system, which covered employees of private companies and was managed by the state's Office of the Insurance Commissioner ("OIC").[87] Because the West Virginia workers' compensation system was privatized, private insurers could negotiate and reach separate agreements on reimbursement rates with medical service providers, including air ambulance companies.[88] But, for private insurers that did not reach separate agreements, the reimbursement rates developed by the West Virginia OIC applied to air ambulance services.[89]

The second context was West Virginia's program for paying the medical expenses of its own government employees, administered by the Public Employees Insurance Agency ("PEIA").[90]

The measures used to lower costs were similar across the two programs.[91] For both the OIC and the PEIA, West Virginia adopted a fee schedule covering reimbursement rates for air ambulance services that was pegged to the federal Medicare schedule.[92] Under state law, these reimbursement rates were the maximum allowable recovery for air ambulance services reimbursed under the two programs.[93] Importantly, the law also established a ban on balance-billing, such that employees covered under the OIC or PEIA plans could not be billed directly.[94] Violations of these regulations subjected an air ambulance company to criminal and civil enforcement actions by the state.[95]

As a final cost containment measure, West Virginia also enacted a law stating that the PEIA would not reimburse any air ambulance costs for covered employees who entered into a separate subscription agreement with an air

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of health care services."); *id.* § 5-16-8a(a) ("[A]ny air ambulance provider . . . may not collect from the [PEIA] and the covered employee or dependent of the employee, a combined amount for those services which exceeds the reimbursement amount then in effect for the federal Medicare program."); *id.* § 5-16-8a(b) ("[T]he air-ambulance provider shall accept the fee or cost of the subscription service agreement as payment in full for any air-ambulance transport and related emergency treatment or services."); *id.* § 23-4-3(a) (2005) ("[The OIC] shall establish . . . a schedule of the maximum reasonable amounts to be paid to health care providers . . . for the rendering of treatment or services to injured employees."); *id.* § 23-4-3(a)(2) ("[T]he person, firm, or corporation rendering the treatment may not make any charge . . . against the injured employee or any other person, firm, or corporation which would result in a total charge for the treatment rendered in excess of the maximum amount set forth [in the OIC] schedule.").

87. *Air Evac EMS, Inc.*, 910 F.3d at 758.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*; *see, e.g.*, W. VA. CODE §§ 5-16-12(a), 16-29D-8, 23-1-19(a).

ambulance provider like Air Evac.[96] For these patients, the law effectively capped the reimbursement at the subscription price agreed to by the individual patient and the air ambulance company, typically about $100 per year.[97]

Air Evac, an air ambulance company and registered air carrier, had objected to the air ambulance rates for years, but stopped balance billing after being referred to the state Attorney General for possible enforcement after it attempted to bill state employees directly.[98] In 2016, however, Air Evac, sued to enjoin enforcement of the West Virginia scheme as preempted by the Airline Deregulation Act and violative of the U.S. Constitution's Contracts Clause.[99] Air Evac's suit specifically challenged the fee schedules and other regulations used to cap reimbursement rates covered by the PEIA and the OIC.[100] In response, West Virginia first argued that Air Evac lacked standing to challenge the OIC fee schedule.[101] The state also defended its scheme on the merits, arguing both that the challenged provisions were not preempted and that, if they were, the Airline Deregulation Act would violate the Tenth Amendment of the U.S. Constitution.[102]

On cross-motions for summary judgment, the district court ruled in favor of Air Evac, finding that the state's air ambulance regulations were preempted by the Airline Deregulation Act.[103] As such, the district court enjoined the state from enforcing the maximum reimbursement caps and fee schedules for both the PEIA and the OIC, as applied to air ambulance companies.[104] The court also enjoined the statute requiring air ambulance providers to accept annual subscription fees as full compensation for their services.[105] As the district judge explained, the West Virginia scheme both "establishe[d] the rate of reimbursement from the PEIA and the OIC" and "foreclose[d] Air Evac's ability to bill the patient for the full balance," in contravention of the Airline Deregulation Act's preemption clause.[106] (The district court did not enjoin the balance-billing prohibition, which had only been challenged in the alternative.)[107]

96. *Air Evac EMS, Inc.*, 910 F.3d at 758; W. VA. CODE § 5-16-8a(b).

97. *Air Evac EMS, Inc.*, 910 F.3d at 758.

98. *Id.* at 759.

99. *Id.*

100. *Id.* The separate prohibition on balance-billing was only challenged in the alternative if the PEIA and OIC regulations were upheld. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Air Evac EMS, Inc. v. Cheatham, 2017 WL 4765966, at *10 (S.D. W. Va. Oct. 20, 2017).

105. *Id.* at *10.

106. *Id.*

107. *Id.* at *7.

On appeal, the constitutional issues had fallen out of the case and the only questions left for the Fourth Circuit Court of Appeals to resolve, de novo, were: (1) whether Air Evac had constitutional standing to challenge the workers' compensation scheme; and (2) whether the state's regulations were preempted by the Airline Deregulation Act.[108]

After concluding that Air Evac had standing insofar as it could causally trace its alleged injury (i.e., the inability to seek full reimbursement for its services) to West Virginia's conduct (i.e., the state's role in administering the workers' compensation system),[109] the court directed the majority of its opinion to the issue of preemption. The court focused particularly on two arguments by West Virginia for why its air ambulance regulations were not preempted: (1) air ambulances, as an industry, are categorically outside the scope of the Airline Deregulation Act's preemption clause; and (2) that even if air ambulances were within the reach of the clause as a general matter, the state's particular policies did not run afoul of the Airline Deregulation Act.[110]

A threshold issue for the court in answering these questions was whether the air ambulance industry was within the scope of the preemption clause, a matter that turned on whether air ambulances were "air carrier[s] who may provide transportation under" the Airline Deregulation Act.[111] On the one hand, the court noted, air ambulance companies were regulated by federal authorities as air carriers, and like all other regulated air carriers, air ambulances were subject to FAA regulations related to safety.[112]

On the other hand, the economic authorization for air ambulances was more complex because air ambulance companies were "air taxi operators" and so subject to less extensive regulations than larger carriers, like major commercial airlines or cargo transportation.[113]

What is more, whereas larger air carriers were required to obtain a "certificate of public convenience and necessity," the Secretary of Transportation had waived this requirement for air ambulances.[114] And, air ambulance companies were exempt from some, but not all, of the economic regulations contained in the Airline Deregulation Act.[115] Nevertheless, the Fourth Circuit took notice that courts that had considered the question of whether an air ambulance operator was an air carrier under the Airline

108. *Id.*

109. *Air Evac EMS, Inc.*, 910 F.3d at 759–60.

110. *Id.* at 759.

111. *Id.* at 762; *see also* Med-Trans Corp. v. Benton, 581 F. Supp. 2d 721 (E.D.N.C. 2008).

112. *Air Evac EMS, Inc.*, 910 F.3d at 757; *see also* 49 U.S.C. § 44702 (2018); 14 C.F.R. § 135 (2019).

113. *Air Evac EMS, Inc.*, 910 F.3d at 757.

114. *Id.*

115. *Id.*

Deregulation Act had uniformly ruled that the Airline Deregulation Act preemption clause applied to the air ambulance market.[116]

The Fourth Circuit joined this growing consensus, rejecting West Virginia's argument to depart from a national trend recognizing air ambulance operators as "air carrier[s] who may provide transportation" under the Airline Deregulation Act.[117] "We have no difficulty concluding as well that air ambulance companies are common carriers," the court stated, because

> Air ambulance companies fall squarely within the definition of common carriers. They respond whenever called by emergency medical providers. Patients need not be subscribers or have a preexisting contract to receive services. There is no individual bartering between the air ambulance company and the medical provider over whether to provide life-saving services.[118]

Having resolved that air ambulance companies were air carriers within the meaning of the Airline Deregulation Act, the court next considered whether they were the sort of air carriers the preemption clause was intended to reach.[119]

Again aligning itself with other courts and federal agencies that had considered the same question and reached the same result,[120] the Fourth Circuit concluded that air ambulances fell within the ambit of the preemption

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116. *See* EagleMed, LLC, v. Cox, 868 F.3d 893, 904 (10th Cir. 2017) ("Neither Amicus nor Defendants have presented a single textual reason to support the argument that the broad language of the Airline Deregulation Act's express preemption provision should not include air-ambulance services."); Air Evac EMS, Inc. v. Sullivan, 331 F. Supp. 3d 650, 662 (W.D. Tex. 2018) ("Air Evac is an air carrier under Subpart II."); Valley Med Flight, Inc. v. Dwelle, 171 F. Supp. 3d 930, 933–34 (D.N.D. 2016) (finding the plaintiff air ambulance company "is an 'air carrier' for purposes of the Airline Deregulation Act"); *see also* Bailey v. Rocky Mountain Holdings, LLC, 889 F.3d 1259, 1266 n.13 (11th Cir. 2018) ("The parties do not dispute [the air ambulance companies'] status as an air carrier.").

117. The court further explained:

> West Virginia makes much of the fact that Air Evac, like other air ambulance companies, relies on referrals from medical providers to dispatch its aircraft, rather than responding to calls directly from the public. The state, however, has offered no reason to think that the law turns on any such matter, especially when interpreting a general term like "common carrier." A train does not cease to be a common carrier simply because its tickets are exclusively sold through a third-party vendor. Air Evac, just like its industry competitors, serves the public indiscriminately and on equal terms, and that is what counts here.

Air Evac EMS, Inc., 910 F.3d at 764.

118. *Id.* at 764.

119. *Id.*

120. *E.g.*, Hughes Air Corp. v. Pub. Util. Comm'n, 644 F.2d 1334, 1338–39 (9th Cir. 1981); *Sullivan*, 331 F. Supp. 3d at 660–62; Dep't of Transp., Letter from D.J. Gribbin, Gen. Counsel, to Hon. Greg Abbott, Texas Att'y Gen. 8 (Nov. 3, 2008).

clause of the Airline Deregulation Act.[121] In reaching this conclusion, the court began with the text of the preemption clause itself, noting that it did not sweep in all forms of air transportation, but only those air carriers "who may provide air transportation *under this subpart*" where "subpart" referred to subpart II of the amended Federal Aviation Act entitled "economic regulations" and administered by the Department of Transportation.[122] Hence, only if air ambulances companies "provide[d] air transportation under [subpart II]," could or would they be protected by the preemption clause.[123]

Within this analytical framework, the parties took different views. Air Evac argued that an air carrier provided transportation "under" the subpart when it was merely subject to the subpart's regulations.[124] On this view, air ambulance companies operated "under" subpart II because they held a registration from the Secretary, granted pursuant to the Secretary's authority to administer subpart II, and were required to comply with some of the subpart's regulations.[125]

West Virginia, on the other hand, argued that certification under subpart II was dispositive.[126] Air ambulances were not certified under subpart II like many other carriers, and in fact, had been exempted from the requirement to obtain a "certificate of public convenience and necessity" by the Secretary of Transportation pursuant to 14 C.F.R. § 298.1.[127] Under West Virginia's view, then, if an air carrier was exempt from the certification requirement, it did not "provide air transportation under" subpart II.[128]

As Judge Wilkinson wrote, however, the plain text of the law, the overall structure of the federal aviation laws, and the subsequent acts of Congress all pointed in the same direction: air ambulances were within the scope of the Airline Deregulation Act.[129] The court's reasoning rested on two provisions in the law that ostensibly demonstrated Congress' ability to express its intent expressly:[130]

> We agree with Air Evac that the phrase "under this subpart" includes all air carriers regulated by the Secretary of Transportation under subpart II, rather than those specifically certified under the subpart. By its plain meaning, the word "under" does not suggest it is limited

121. *Air Evac EMS, Inc.*, 910 F.3d at 764.
122. *Id.*
123. *Id.*
124. *Id.* at 765.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

> to certain regulations or certain certificates. If Congress wished the preemption clause to only apply to certain certificate-holders, it knew how to do so. For instance, a separate provision of the statute explicitly defines "major air carrier[s]" as those air carriers "holding a Chapter 411 certificate" under 49 U.S.C. § 41720(a)(2). The preemption clause, however, does not borrow this language.
>
> The [Airline Deregulation Act's] preemption provision further demonstrates that Congress was fully capable of tying preemption to certification if it so desired. Immediately following the preemption clause at issue, for example, the next sentence of the ADA reads, "[the preemption clause] do[es] not apply to air transportation provided entirely in Alaska unless the transportation is air transportation . . . provided under a certification issued under Section 41102 of this title." Put simply, this language clarifies that, in Alaska only, preemption does not apply to air carriers that do not hold Chapter 411 certificates. Despite the fact that Congress chose to tether preemption to certification in this one discrete context, West Virginia asks us to adopt a certification-based reading of the preemption clause across the board. We see no need to adopt such a cumbersome interpretation of the statute's text when a more natural one is available.[131]

While the plain text sufficed to support its decision that air ambulances fell within the scope of the Airline Deregulation Act, the Fourth Circuit Court of Appeals also concluded that the overall structure and operation of the federal aviation laws supported a reading of the preemption clause that encompassed the air ambulance industry.[132] The court began by noting the discretionary nature of the Secretary of Transportation's exemption granting power for air ambulance companies from the certification requirements of Chapter 411.[133] Given this, the court rejected West Virginia's unequivocal argument that "an exemption from certification is also an exemption from preemption," noting that such a view, if adopted, would empower the Secretary of Transportation "to unwind the preemptive effect of the [Airline Deregulation Act] for air carriers as he sees fit."[134] No basis existed to infer such a vast authority, the court reasoned, particularly "when that authority was

131. *Id.* (citations omitted).
132. *Id.*
133. *Id.*
134. *Id.* at 765–66.

never expressly provided and could be used to subvert one of the [Airline Deregulation Act's] principal deregulatory goals."[135]

Additionally, the court opined that even if the text of the Airline Deregulation Act was not clear, West Virginia's "limited reading" of the preemption clause would reach well beyond the air ambulance sector and cut against the core legislative aim of placing the aviation industry under a single regulator.[136] For example, small commuter air carriers are eligible for the same exemption as air ambulance companies and small Canadian air taxi operators that frequently travel to the United States are exempt from the permitting requirement for other foreign air carriers under subpart II.[137] If these exemptions from certification were also exemptions from preemption, states would be free to regulate these carriers.[138]

Enactment of the FAA Reauthorization Act of 2018, which took steps to respond to steep air ambulance prices and provide other consumer protections for customers of air ambulance operators, further reinforced the court's view that the Airline Deregulation Act's preemption clause extended to the air ambulance industry.[139] Critically, the court noted, the law retained regulatory authority firmly in the hands of the federal government, and "Congress's decision to leave the preemption clause intact in the FAA Reauthorization Act, notwithstanding other amendments to subpart II," mitigated against importing West Virginia's "strained and unnatural reading into the words of the [Airline Deregulation Act]."[140] The court thus characterized its decision in terms of judicial restraint:

> Taking together the text and structure of the statute, we conclude that the preemption clause reaches air ambulance companies like Air Evac. Whether Congress has acted wisely as a matter of policy is not our business. It has spoken clearly, and it is our obligation to respect its judgment. Appellant invites us to begin to unravel the federal government's regulatory framework for interstate air travel, a result Congress expressly sought to avoid with the [Airline Deregulation Act]. The recourse the appellant seeks rests with Congress, which alone has authority to amend the statute in a manner the state desires.[141]

135. *Id.* at 766.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

Finally, having determined that the Airline Deregulation Act's preemption clause applied to the air ambulance operator, the court focused on whether West Virginia's legislative actions also were within the scope of the clause. The court specifically examined whether the challenged West Virginia laws and regulations both "relate to a price, route or service" and had "the force and effect of law."[142]

First, the court focused on the term "price" in evaluating whether West Virginia's laws, taken together as a comprehensive scheme, "relate to a price, route, or service" of Air Evac.[143] The court accepted the definition of "price" under the Airline Deregulation Act as encompassing any "rate, fare, or charge."[144] The court also opined that a state regulation having "a connection with, or reference to, airline prices, routes, or services"[145] satisfied this broad definition. Additionally, the court recognized that "price" related to more than just a state's attempt to regulate the price of a ticket, and consistent with *Morales*, was implicated if a state law had a "forbidden significant effect" on prices, even without referencing them directly.[146]

A fortiori, several other courts had found that state regulations structuring reimbursements to air ambulance companies, including those that limited patient billing and capped payments using a fee schedule, "relate to" price.[147] Those courts also concluded that even a state law incentivizing separate agreements between air ambulance companies and private insurers met this requirement because of the "clear and significant" effect of the law on air ambulance compensation.[148] Ultimately, then, the Fourth Circuit concluded that "[t]he challenged West Virginia laws clearly had a connection to air ambulance prices" in contravention of the Airline Deregulation Act:[149]

> The statutes and regulations for both the OIC and the PEIA directly reference air ambulance payments. These laws establish the maximum amounts that the state will pay directly to air ambulance providers, . . . and limit the ability of those providers to seek recovery from anyone else . . . .
>
> The regulatory scheme only exists because West Virginia was attempting to lower payments for air ambulance services. It set up the entire framework to achieve this result by, for example, requiring

142. *Id.* at 767–68.
143. *Id.* at 768.
144. *Id.* at 767.
145. *Id.* (quoting Northwest, Inc. v. Ginsberg, 572 U.S. 273, 284 (2014)).
146. *Id.* (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388 (1992)).
147. *Id.*
148. *Id.*
149. *Id.*

> these companies to accept subscription fees as total reimbursement for state employees. There was nothing subtle or indirect about this approach; it was directly targeted at payments for air ambulance services. If such actions involving an air carrier are not "related to price," it is unclear what meaning the phrase would have left.[150]

The last question evaluated by the court was whether the challenged provisions had "the force and effect of law."[151] West Virginia argued they did not, and instead reflected nothing more than the state's participation in the health insurance market—actions taken to address air ambulance prices that were no different from those of a private insurer bargaining to obtain the best price.[152] The Fourth Circuit disagreed, however, concluding that West Virginia did not act like a private insurer in its regulation of the air ambulance market but rather "used the coercive power that only sovereigns possess to achieve its goals." That is,

> Through this combination of low reimbursement rates, refusals to pay for certain services, and prohibitions on directly billing patients, West Virginia [had avoided] the problems faced by private insurers in the marketplace . . . [and] simply dictated a relatively low reimbursement rate and prohibited any additional recovery. Under these regulations, the state face[d] no pressure to bargain up front, and no threat of patients being directly billed on the back end, thereby lowering total reimbursement costs.[153]

Accordingly, the court held that West Virginia's actions had the force and effect of law.[154]

In explaining its holding, the court elaborated upon an important consideration in the federal-state relationship, including preemption, namely whether the state was acting as a regulator—arraying its police power to coerce private conduct—or was instead acting as a market participant—using its bargaining power to achieve a desirable policy.[155] As the court noted:

> Once the line between the two is drawn, the application is straightforward: when the state acts as a market participant, it is treated like a private party in the same market; when the state acts as

150. *Id.* at 767–68 (citations omitted).
151. *Id.* at 768.
152. *Id.*
153. *Id.* at 758.
154. *Id.* at 768.
155. *Id.*

> a regulator, it is subject to the unique limits placed on states by our federal system.
>
> The market participant distinction is relevant here because a state's use of its buying power in the marketplace does not have "the force and effect of law." [In *Am. Trucking Ass'n v. City of Los Angeles*,] the Supreme Court explained that this "phrasing [the force and effect of law] targets the State acting as a State, not as any market actor—or otherwise said, the State acting in a regulatory rather than proprietary mode."[156]

Against this backdrop the court stated that "[w]hat matters is that the state respect the line between regulatory power and market power, such that the terms of the deal reflect 'agreements freely made, based on needs perceived by the contracting parties at the time.'"[157] West Virginia's program crossed this line according to the Fourth Circuit. The state's laws both limited reimbursement rates paid by the state and prevented air ambulance companies from seeking additional recovery from any third party.[158] If a company objected, it faced the prospect of enforcement actions.[159] Such a scheme, "government dictates backed by civil and criminal sanctions, the court wrote, "counts as action 'having the force and effect of law' if anything does."[160] As such, like other courts that had adjudicated similar efforts to limit third party payments for air ambulance services, the Fourth Circuit had no trouble concluding that the state was acting in its regulatory, not proprietary, capacity.[161]

Finally, the court reasoned that the market participant distinction was in line with the Airline Deregulation Act's preemption clause, which "protects air carriers from 'state-imposed obligations' related to their prices, routes, or services, not from their 'own, self-imposed undertakings'" as detailed in *Wolens*.[162] Given the purpose of the Airline Deregulation Act to promote open market competition, moreover, the market participant distinction made "perfect sense" to the Fourth Circuit, particularly in light of *Wolens* in which the Supreme Court recognized that the Airline Deregulation Act "was designed to promote maximum reliance on competitive market forces [and]

156. *Id.* (quoting Am. Trucking Ass'n v. City of Los Angeles, 569 U.S. 641, 650 (2013)).
157. *Id.* at 769 (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 230 (1995)).
158. *Id.*
159. *Id.*
160. *Id.* (quoting *Am. Trucking Ass'n*, 569 U.S. at 651).
161. *Id.*
162. *Id.* at 768 (quoting *Wolens*, 513 U.S. at 229).

[m]arket efficiency requires effective means to enforce private agreements."[163]

That said, the Fourth Circuit opined that while the Airline Deregulation Act certainly limited the options available to states, it did not envision that states like West Virginia played no role, and in fact, states retained the power to influence the prices of air ambulance providers, albeit not by legislation:

> This is not to say that West Virginia cannot, moving forward, bargain for lower payments to air ambulance companies. It would be permissible for the state to use its considerable purchasing power as the insurer of state employees to negotiate better rates up front or limit reimbursements for air ambulance services after the fact.
>
> As the program for state employees, the PEIA is a large part of the healthcare market in West Virginia and nothing in the preemption provision prevents that market power from playing a role at the negotiating table. The ADA does not require a state to pay whatever an air carrier may demand. In obtaining favorable terms, however, it must be the state's market power, and not its unique coercive authority, that is driving the negotiation.[164]

IV. CONCLUSION

In the final analysis, the Fourth Circuit Court of Appeal's jurisprudence under the Airline Deregulation Act reflects both a judicial conservatism and a faith in federalism and the legislative process. After all, as the court has noted, the Airline Deregulation Act itself expressed a commitment to work with state governments in developing uniform national policy.[165] As such, the court's "decision[s are] not one[s] of policy, but of law. That must be in the end what matters."[166] Be that as it may (or must), no plaintiff has prevailed in a case at the level of the Fourth Circuit Court of Appeals arising under the Airline

163. *Id.* (quoting *Wolens*, 513 U.S. at 230).

164. *Id.* at 769. The district court enjoined the statutes and regulations related to both the PEIA and OIC fee schedules and reimbursement caps. It dismissed Air Evac's alternative claim that the balance-billing provisions were preempted. Neither party on appeal sought review of that dismissal. Thus, the question of whether the fee schedule could be maintained without either the reimbursement caps or balance-billing provisions was not before the court, and the court did not consider whether the fee schedule, standing alone, had the force and effect of law. *Id.* at 769 n.3 (citations omitted). That said, the court stated: "Nothing in our analysis forecloses the possibility that West Virginia, acting as a market participant, could use a uniform fee schedule to structure its own payments for air ambulance services in the absence of both the caps and the balance-billing prohibitions." *Id.* at 769.

165. *Id.*

166. *Id.*

Deregulation Act. The *Air Evac EMS, Inc.* case may be the most noteworthy in this respect.

Indeed, the Fourth Circuit's (principled) decision to include air ambulances and state laws aimed at mitigating their fees and costs within the scope of the Airline Deregulation Act is troubling at a practical level, as evidenced by the increasing amount of attention, commentary, and litigation on the topic.[167] Even the Fourth Circuit Court of Appeals has expressed surprise that states like West Virginia have not pushed back on the deregulatory purpose of the Airline Deregulation Act; states instead seem to aruge that the federal law leaves them powerless to address local problems particularly with high costs for air ambulances services, an industry that has grown substantially since the federal government deregulated airlines in the late 1970s.[168]

As such, consumer protection advocates will detest the *Air Evac EMS, Inc.* case, as it reflects a technical application of the law that may leave uninsured or underinsured patients stuck with thousands of dollars in medical costs. Could Congress really have imagined or intended that result when it prohibited states from enacting or enforcing any law related to airline prices, routes, or services, as part of a broader policy reset designed to unshackle the airline industry from the regulatory and economic burdens imposed by the

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167. *See generally* GOV'T ACCOUNTABILITY OFFICE, GAO-19-292, AIR AMBULANCE: AVAILABLE DATA SHOW PRIVATELY-INSURED PATIENTS ARE AT FINANCIAL RISK 19 (Mar. 2019) (stating some states have attempted to limit potential air ambulance billing through public attention); Andrew J. Upton, *Air Ambulance Reform—Why Congress Should Exempt Air Ambulances from "Carrier" Classification and Preemption under the Airline Deregulation Act*, 82 J. AIR L. & COMM. 431, 443 (2017) (noting that several states in attempting to regulate the industry are met with resistance by the courts); Karan Chhabra et al., *Are Air Ambulances Truly Flying Out of Reach? Surprise-Billing Policy and the Airline Deregulation Act*, HEALTH AFF. (Oct. 17, 2019), https://www.healthaffairs.org/do/10.1377/hblog20191016.235396/full/ [https://perma.cc/GV75-DSNM]; Tanner Holton, *Air Ambulance Service Providers: A Lifesaving Industry and a Financial Catastrophe*, 92 N.D. L. REV. 473 (2017) (noting states have tried to take action regulating air ambulances). Lower court cases expanding the act to include air ambulances have emerged recently after the industry's aggressive legal strategy. *See generally* Med. Mut. of Ohio v. Air Evac EMS, Inc., 2019 WL 4573700 (N.D. Ohio, Sept. 20, 2019); Scarlett v. Air Methods Corp., 922 F.3d 1053 (10th Cir. 2019); Guardian Flight, LLC v. Godfread, 359 F. Supp. 744 (D.N.D. 2019); PHI Air Med., LLC v. N.M. Office of Superintendent of Ins., 2018 WL 6478626 (D.N.M., Dec. 10, 2018); Chanze v. Air Evac EMS, Inc., 2018 WL 5723947 (N.D. W. Va., Nov. 1, 2018); Med. Mut. of Ohio v. Air Evac EMS, Inc., 341 F. Supp. 771 (N.D. Ohio 2018); Schnerberger v. Air Evac EMS, Inc., 749 F. App'x 670 (10th Cir. 2018); Ferrell v. Air Evac EMS, Inc., 900 F.3d 602 (8th Cir. 2018); Air Evac EMS, Inc. v. Sullivan, 331 F. Supp. 3d 650 (W.D. Tex. 2018); Pratt v. Air Evac Lifeteam, 329 F. Supp. 3d 722 (W.D. Mo. 2018); Bailey v. Rocky Mountain Holdings, LLC, 889 F.3d 1259 (11th Cir. 2018); Stout v. Med-Trans Corp., 313 F. Supp. 3d 1289 (N.D. Fla. 2018); EagleMed LLC v. Cox, 868 F.3d 893 (10th Cir. 2017); Valley Med Flight, Inc. v. Dwelle, 171 F. Supp. 3d 930 (D.N.D. 2016).

168. *Air Evac EMS, Inc.*, 910 F.3d at 769–70.

CAB? Surely Congress could have said so more explicitly and in a manner that would have saved courts and litigants the time and money involved in wrangling over technical phrases like "under this subpart," "related to," and "prices, routes, and services."[169]

Going forward, an open question exists as to what the *Air Evac EMS, Inc.* case portends in terms of federalism, preemption, and state rights in the context of emerging and yet-imagined aerial technologies and services such as advanced air mobility and drone delivery. Time will tell. For now, the *Air Evac EMS, Inc.*, together with the *Smith*, *Wagman*, and *Weber* decisions discussed above, reflect judicial decisions that strike an appropriate understanding of the court's role as a decisionmaker and not a lawmaker. [170] As the Fourth Circuit Court of Appeals has said: "The balance of state and federal responsibility created by the [Airline Deregulation Act] is a complex balance in an exhaustively debated field that Congress has struck. As to that, we take no sides."[171]

169. *Id.* at 756.
170. *Id.* at 770.
171. *Id.*

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