Hon. Jamal N. Whitehead

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

CINDY CODONI, MICHELLE GEER, HORACE CATHCART, AMY FRANCE, and TAMARA CHAKOS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PORT OF SEATTLE, ALASKA AIR GROUP, and DELTA AIR LINES, INC.,

Defendants.

Case No. 2:23-cv-00795

ALASKA AIR GROUP AND DELTA AIR LINES, INC.'S JOINT REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

NOTE ON MOTION CALENDAR: February 16, 2024 per Dkt. 54

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Plaintiffs concede that air travel is a "necessity," Dkt. 57 ("Opp.") at 2, and do not dispute that, to serve Sea-Tac, the Airlines ***must comply*** with federal law governing emissions, aircraft and engine design, and flight paths. Nonetheless, Plaintiffs seek to use state common law to penalize two commercial airlines that fly federally-approved aircraft, subject to federal emissions standards, along federally-mandated flight paths to and from Sea-Tac. Their claims are foreclosed by the plain text of not one, but two preemption statutes, along with decades of Supreme Court and Ninth Circuit precedent holding that federal law preempts state law claims in the field of aviation.

Plaintiffs attempt to avoid well-established principles of preemption and subject matter jurisdiction by arguing that their case "does not challenge or otherwise threaten federal regulation of commercial air travel," Opp. 2, because the primary relief sought is damages, rather than an injunction. The argument fails. A claim for damages is an attack on conduct, as Supreme Court and Ninth Circuit precedent make clear. If Plaintiffs prevail, the Airlines must either pay damages on an ongoing basis for complying with federal law or cease servicing Sea-Tac. Congress left no room for these state intrusions into the nation's airspace or the aircraft that operate within it. If Plaintiffs' suit is allowed to proceed, it would open the floodgates to a host of similar suits around the country—replacing uniform, nationwide rules on aircraft emissions, aircraft design, and flight paths with a patchwork of inconsistent state and local obligations that directly contradicts Congress's direction—leaving the airline industry in an untenable position. The action must be dismissed.

ARGUMENT

I. Plaintiffs' State-Law Claims Challenge The Airlines' Service To Sea-Tac, Conduct That Is Exclusively And Extensively Regulated By Federal Law.

The central tenet of Plaintiffs' opposition is that "this case does not challenge" any aspect of the Airlines' flights to and from Sea-Tac. Opp. 2. According to Plaintiffs, their claims have nothing to do with the design of the Airlines' aircraft and engines, Opp. 11, or the Airlines'

flight paths, Opp. 8-9, because they merely seek "compensation" for "pollution *after it has left the aircraft*," Opp. 10-11.

The complaint, however, belies their relabeling effort. Plaintiffs expressly base their claims on "dangerous pollutants that are the ***direct result*** of Defendants' flights in and out of Sea-Tac." SAC ¶ 50 (emphasis added). The complaint explicitly and repeatedly ties the alleged harm to the emissions released from the Airlines' aircraft and to the path and frequency of the Airlines' flights over their homes. *See, e.g.*, SAC ¶ 53 ("commercial jets of the type operated by Defendant Airlines … emit … dangerous pollutants … as they fly"); SAC ¶ 61 ("communities below aircraft flight paths … are exposed to significant … air pollution"); *see also* Dkt. 49 ("Mot.") 5, 8. Plaintiffs' damages request is thus a direct attack on the Airlines' service to Sea-Tac—conduct that, as Plaintiffs recognize, is extensively regulated by federal law. *See* Opp. 20-21.

Plaintiffs tacitly concede, as they must, that commercial aviation is extensively regulated by federal law. Opp. 11, 20-21, 29. In an effort to evade dismissal, Plaintiffs argue that because they are requesting damages, they do not seek to "require internal alterations of any aircraft or engine thereof," "to enforce any standard respecting emissions from the aircraft or engines themselves," Opp. 11, or to alter "aircraft traffic, patterns, or flight safety [requirements]," Opp. 18.

Supreme Court and Ninth Circuit precedent prohibit Plaintiffs' attempt to separate damages from the conduct that allegedly gives rise to liability. Damages result from liability and are a means to govern conduct. As the Supreme Court has explained, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method for governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 247 (1959). Plaintiffs cite no authority holding that damages escape the preemptive effect of federal law. On the contrary, the very "purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state," and a defendant held liable "is expected to modify" its behavior "to reduce the risk of injury" going

forward. *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *see also Mutual Parm. Co. v. Bartlett*, 570 U.S. 472, 492 (2013) ("[T]he duty to ensure that one's products are not 'unreasonably dangerous' … involves a duty to make one of several changes.") (citation omitted). Accordingly, state-law-based "compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Garmon*, 359 U.S. at 247. That Plaintiffs do not seek an injunction mandating changes in aircraft design or flight operations is irrelevant.

Whatever labels Plaintiffs attach to their claims, the case seeks to impose liability and damages for alleged "dangerous pollutants that are the ***direct result*** of Defendants' flights in and out of Sea-Tac." SAC ¶ 50 (emphasis added). That is a direct and impermissible challenge to the Airlines' federally regulated conduct. *Garmon*, 359 U.S. at 247; *Law*, 114 F.3d at 910.

II. Federal Law Preempts Plaintiffs' Claims.

A fundamental principle underlying the "three different types of preemption" is that federal law gives private actors "a federal right to engage in certain ***conduct*** subject only to certain (federal) constraints." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 477-79 (2018) (emphasis added). Because Plaintiffs' state-law claims attack the Airlines' service to Sea-Tac, and because federal law extensively and exclusively regulates that conduct, the Airlines have the "right" to service Sea-Tac "subject only" to federal law. *Id.* Plaintiffs' claims are preempted.

Plaintiffs proceed from the mistaken premise that a presumption against preemption applies. Opp. 5-7. There is no presumption when a "statute 'contains an express pre-emption clause'"—as both the Airline Deregulation Act ("ADA") and Clean Air Act ("CAA") do. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (citation omitted); *see* Mot. 14. Moreover, as explained further below, there is no presumption because "[i]n matters of air transportation, the federal presence is both longstanding and pervasive; that field is simply not one traditionally reserved to the states." *Brown v. United Airlines, Inc.*, 720 F.3d 60, 68 (1st Cir. 2013).

A. Federal Law Expressly Preempts Plaintiffs' Claims.

1. The Airline Deregulation Act

The ADA preempts Plaintiffs' claims, because they are "related to" the Airlines' routes and services. 49 U.S.C. § 41713(b)(1); *see* Mot. 15-17. Plaintiffs' counterarguments fail.

First, *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 281 (2014), forecloses Plaintiffs' argument that "the ADA does not preempt" claims based on "state common law." Opp. 8. *Northwest* held that "state common-law rules fall comfortably within the language of the ADA pre-emption provision." 572 U.S. at 281; *see id.* at 279 (rejecting the Ninth Circuit's more stringent test limiting preemption to state laws that directly compel a change in routes, rates, or services). In so doing, the Supreme Court reaffirmed that the ADA has a "broad pre-emptive purpose" that displaces state-law claims of any variety "related to" "airline 'rates, routes, or services.'" *Id.* at 280-81 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992)). As the Supreme Court explained in *Morales*, any argument that "the ADA imposes no constraints on laws of general applicability" would create "an utterly irrational loophole" to the plain "sweep of the 'relating to' language." 504 U.S. at 386.

Second, Plaintiffs misstate the test for ADA preemption. The ADA preempts any state standard "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Plaintiffs incorrectly assert that ADA preemption occurs "*only where*" state law "acts immediately and exclusively upon price, route or service or where the existence of a price, route or service is essential to the law's operation." Opp. 8 (quoting *Air Transp. Ass'n of Am. v. City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001)). As *Air Transportation* itself confirms, the statutory phrase "related to" covers standards that (1) bear "reference to" ***or*** (2) have a "connection with" an airline's price, route, or service. 266 F.3d at 1071 (citation omitted). The language Plaintiffs cherry-pick concerns the "reference to" prong, but it does not address the "connection with" prong. *Id.* To determine whether a state law has "a prohibited connection with" a "price, route, or service," *Air Transportation* evaluated whether "the law binds the air carrier to a particular price, route or service and thereby interferes with competitive

market forces within the air carrier industry." *Id.* at 1072. Ultimately, any state laws that have a "'significant impact'" on an airline's price, route, or service interfere with "Congress' deregulatory … objectives" and are preempted. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (quoting *Morales*, 504 U.S. at 390).

Plaintiffs' claims are preempted under these standards. Mot. 15-17. Their claims bear "reference to" the Airlines' routes and services, because they are factually "premised upon" the Airlines' flights in and out of Sea-Tac, including flight paths. *Air Transp.*, 266 F.3d at 1071 (discussing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 135, 139 (1990)); *see also* SAC ¶¶ 27, 58-61, 78; Mot. 16-17. Plaintiffs would have no claim apart from the Airlines' routes and services to Sea-Tac, which are "essential" to Plaintiffs' case. *Air Transp.*, 266 F.3d at 1073.

Plaintiffs' claims also have a forbidden "connection with" the Airlines' routes and services. Mot. 16-17. Plaintiffs' contention that they "do not challenge the Defendant Airlines' routes or services, even indirectly," Opp. 8, is belied by their own allegations, which plead violations of state law caused by the Airlines' aircraft flying over their homes, *see supra* pp. 2-3. Plaintiffs assert that they are "not asking Defendants to change their daily flight operations in any way." Opp. 8-9. But the practical effect of liability and damages would be to "bin[d]"—*i.e.*, limit—the Airlines to "particular" routes or services, *Air Transp.*, 266 F.3d at 1072, forcing the Airlines to change routes (which they cannot do without federal approval) or stop service to Sea-Tac entirely, if they want to avoid future liability. In any event, the Ninth Circuit has cautioned against applying its "binds to" test too literally in the context of common-law claims, because the "the scope of … preemption is broader than this language suggests." *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1025 (9th Cir. 2020); *see also id.* at 1024 (finding *Northwest* "instructive"). That is this case.

The Supreme Court's decision in *Rowe* definitively debunks Plaintiffs' attempt to avoid preemption. *Rowe* held that a Maine law requiring tobacco "shippers" to use only delivery services that provide recipient verification impermissibly impacted "carriers" like UPS and FedEx in violation of the substantively-identical Federal Aviation Administration

Authorization Act, which applies the ADA's preemption language to the trucking industry. 552 U.S. at 368, 372. Although Maine vigorously argued that "federal law does not preempt a State's efforts to protect its citizens' public health," *id.* at 374—much like Plaintiffs argue that the ADA does not preempt state tort laws—the Supreme Court rejected a "'public health' exception" to preemption, *id.* at 375. *Rowe* confirmed that regardless of their form, state laws may be preempted where the "effect" of those laws results in "services that differ significantly from those that, in the absence of the [state] regulation, the market might dictate." *Id.* at 372; *see also Morales*, 504 U.S. at 386 (state law may be preempted "even if" its "effect is only indirect" (citation omitted)). Allowing Maine to regulate carrier services would "permit other States to do the same," undermining the congressional scheme. *Rowe*, 552 U.S. at 375.

Plaintiffs' suit under Washington's tort laws is barred for the same reason. Plaintiffs' theory would allow every state and locality to impose its own standards and extract damages for the ordinary operation of aircraft under federally-approved conditions. That is the opposite of Congress' design of having a uniform, nationwide approach to airline regulation with "'maximum reliance on competitive market forces'" to "further 'efficiency, innovation, and low prices.'" *Morales*, 504 U.S. at 378 (citation omitted).

Under *Northwest* and *Rowe*, where, as here, a tort claim would effectively "'*regulate certain prices, routes or services,*'" it is preempted. *Miller*, 976 F.3d at 1025 (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014)). Unlike the cases cited by Plaintiffs where application of state wage and hour laws would have a "remote" and "tenuous" effect on carriers, *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1185 (9th Cir. 1998), imposing state tort liability and damages for the Airlines' use of FAA-mandated routes in and out of Sea-Tac would have an obvious and significant effect on the Airlines' services. It is thus barred by the ADA.

2. The Clean Air Act

Independent of the ADA, the CAA expressly—and broadly—prohibits states from "enforc[ing] any standard respecting emissions of any air pollutant from any aircraft or engine"

if that standard differs from federal law. 42 U.S.C. § 7573; *see* Mot. 17-20. Plaintiffs argue that Section 233 does not apply because their damages claims are based on "pollution *after it has left the aircraft*." Opp. 10. This argument defies common sense and fails under the statute's text and Ninth Circuit precedent.

First, Section 233 bars states from regulating "any ***air*** pollutant ***from*** any aircraft or engine." 42 U.S.C. § 7573 (emphases added). Thus, the plain text forecloses Plaintiffs' attempt to evade Section 233 preemption because the statutory text covers pollutants in the "air" that originated "from" aircraft. This plain text is buttressed by the CAA's purpose and structure, which regulates sources to protect air quality. *See* 42 U.S.C. § 7571.

Moreover, Section 233 covers "any standard ***respecting*** emissions." 42 U.S.C. § 7573 (emphasis added). Plaintiffs ignore the word "respecting," which "has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717 (2018); *see* Mot. 18. This precedent sinks Plaintiffs' argument. It makes no sense to say that state standards that govern aircraft emissions the split-second they leave the engine have no relation, "direct" or "indirect," 584 U.S. at 718 (citations omitted), to the "emissions of any air pollutant from any aircraft or engine thereof," 42 U.S.C. § 7573. And nothing else in the CAA indicates any congressional intent to limit the scope of Section 233 to emissions and pollution onboard aircraft.

Second, Plaintiffs misread *California v. Department of Navy*, 624 F.2d 885 (9th Cir. 1980). Opp. 10-11. In *Navy*, the Ninth Circuit held that Section 233 preempts state law that would "affect[t] the design, structure, operation, or performance of the [aircraft or] aircraft engine." 624 F.2d at 888. As an initial matter, *Navy* involved ***stationary-source*** pollution: "detached jet engines" being tested "in immobile concrete housing structures." *Id.* at 886-87. In that context, the Ninth Circuit held that Section 233 did not apply because the state regulation governed emissions leaving the concrete housing structures, ***not*** the jet engines. *Id.* at 889. Here, by contrast, Plaintiffs are invoking state law to target emissions directly from aircraft and

engines in flight. SAC ¶¶ 54-59. Unlike in *Navy*, where the pollution could "be abated" by altering the concrete "test cell," 624 F.2d at 889, the only way the Airlines can abate the alleged emissions is to change the design of their aircraft or engines.

Plaintiffs argue (Opp. 11-12) that payment of damages will not affect the Airlines' conduct, including the design, structure, operation, or performance of the aircraft or engine. The pertinent question under *Navy*, however, is whether the state law "can be met without affecting the engine," 624 F.2d at 889, not whether a ***remedy*** can be provided without affecting the engine. As the Airlines explained (Mot. 19), there simply is no way to comply with the supposed state-law standards without modifying their routes, aircraft, or aircraft engines. Plaintiffs theorize that discovery could "make plain" a "host of mitigation efforts," making it improper to decide preemption now. Opp. 13. But mitigation, like damages, is merely a "remedy" for the alleged "harm," SAC ¶¶ 97, 134, and preemption is analyzed by looking at the scope of state-law liability, *see supra* p. 2-3.

B. Plaintiffs' Claims Are Foreclosed By Field Preemption.

1. The Relevant Field Is Flight Operations, Not Property Rights And Personal Injury.

Plaintiffs' argument against field preemption is based on the flawed premise that the relevant "fields" are "property rights and personal injury" because they bring state-law tort claims. Opp. 18. That is not how field preemption works. A state-law cause of action is foreclosed by field preemption when it attempts to "regulat[e] ***conduct*** in a field that Congress … has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (emphasis added). Accordingly, in defining "the pertinent regulatory field," courts focus on the conduct that is the target of the ***federal*** regulations. *Knox v. Brnovich*, 907 F.3d 1167, 1177 (9th Cir. 2018) (citations omitted). It is therefore immaterial that Plaintiffs' claims are packaged as "property rights and personal injury"; what matters is that Plaintiffs seek to impose state-law liability for federally-regulated conduct—the operation of

aircraft in the federal government's sovereign airspace. *See Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 734 (9th Cir. 2016).

City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973), demonstrates this point. In *Burbank*, the city sought to exercise its historic police power to regulate property rights by imposing takeoff-and-landing restrictions to limit noise pollution. The Supreme Court held that the city's ordinance was barred by field preemption—not because the "field" of property rights is preempted, but because the claims concerned "airspace management," and "the pervasive control vested in EPA and in FAA" bars "local" regulation. 411 U.S. at 627, 633, 638. Similarly, in *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), the Ninth Circuit defined the field by examining federal law (the Federal Aviation Act), even though the plaintiffs had brought "common law personal injury" claims for failure to warn. *Id.* at 469-71. And, in *National Federation of the Blind*, the Ninth Circuit defined the field (accessibility of airport kiosks) by consulting federal law (14 C.F.R. § 382.57) rather than the plaintiffs' state-law basis for filing suit (discrimination). 813 F.3d at 723, 734.

These binding precedents demonstrate that the pertinent "field" is dictated by federal law, not state-law interests.[1] Here, there is no question that federal law regulates flight operations. *See* Mot. 2-8.

Plaintiffs cannot avoid field preemption through the bald assertion that they "bring no challenge to aircraft traffic, patterns, or flight safety." Opp. 18. As discussed, Plaintiffs necessarily seek to impose liability based on the Airlines' flight paths and aircraft design—both of which are directly connected to flight safety. *See supra* pp. 2-3; Mot. 24. Similarly,

[1] Plaintiffs' non-binding California cases (Opp. 18) are not to the contrary. *Bethman v. City of Ukiah*, 265 Cal. Rptr. 539 (Ct. App. 1989), rejected a state-law claim for negligent maintenance of an airport's navigation facilities because the facilities "were adequate under FAA standards" and plaintiffs' damages claim would "impose upon [the city] the duty to establish additional standards and requirements," which "would be inconsistent with the FAA's exclusive authority to make these determinations." *Id.* at 540, 547. In *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.*, 32 Cal. 3d 762, 778 (1982), the federal agency "disclaim[ed] any authority" over the issues being litigated. And *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 603 P.2d 1329 (Cal. 1979), failed to delineate the pertinent regulatory field, an analytical step that "precedent requires," *Knox*, 907 F.3d at 1177.

Plaintiffs' theory that they "only challenge" pollution that has already "left Defendant Airlines' aircraft," Opp. 18-19, is entirely disingenuous for the reasons explained, *see* supra pp. 6-8. Just as in *Burbank*, "to exclude the aircraft [pollution] … is to exclude the aircraft." 411 U.S. at 628 (citation omitted).

2. Plaintiffs' Claims Impermissibly Intrude Into The Field Of Flight Operations.

As to the properly defined field—flight operations, including flight paths, emissions, and aircraft and engine design—Plaintiffs argue that state-law tort claims are still allowed. Opp. 19. Their arguments fail.

First, Plaintiffs distort *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013), contending that "the Ninth Circuit has recognized 'congressional intent *not* to preempt state-law tort suits against airlines.'" Opp. 19 (citation omitted). *Gilstrap* merely held that common-law actions for damages are not preempted where the "common-law duties" are "parallel [to] federal requirements." 709 F.3d at 1006 (citation omitted). In other words, plaintiffs can seek a state-based remedy ***only if*** the suit is based on violation of a federal standard of care. *Id.* Plaintiffs do not allege that the Airlines violated any federal requirement.

Second, Plaintiffs concede "that federal law may well preempt state regulations that seek to control flight paths or flight frequency." Opp. 20. Plaintiffs then hedge, arguing that "there is no pervasive … federal regulatory scheme that controls the amount of pollution that may accumulate on a family's front lawn." *Id.* But Plaintiffs elsewhere admit that the pollutants that allegedly "fall upon Plaintiffs and their property," Opp. 13, "are the direct result of Defendants' flights in and out of Sea-Tac Airport," SAC ¶ 50. And the complaint expressly ties the "accumulated pollution" "in local communities" to the Airlines' flight paths, including their specific altitude ("below 3,000 feet") and location ("within a five-mile radius of Sea-Tac"), SAC ¶¶ 14, 31, 57, which are pervasively regulated by federal law, Mot. 4-5.

Third, Plaintiffs argue that federal law does not extensively and exclusively regulate the design of aircraft and engines because the FAA is tasked with prescribing "minimum

standards." Opp. 20-21 (quoting 49 U.S.C. § 44701(a)(1)). Plaintiffs ignore the ***thousands*** of FAA design standards issued under this statute, hundreds of which focus specifically on aircraft engines and fuel systems. *See* 14 C.F.R. Parts 25-26, 33-34; *see also* Mot. 6-7. The fact that the federal government has issued "such pervasive regulations" demonstrates "a preemptive intent to displace ***all*** state law" in that area. *Montalvo*, 508 F.3d at 472 (emphasis added). Plaintiffs also argue that the "CAA allows for and recognizes both state *and* federal regulation of aircraft emissions." Opp. 21. That reading is implausible. *Supra* pp. 6-8.

Finally, although Plaintiffs recognize that "the field of aviation safety" may be preempted, Opp. 19, they erroneously argue that the field of aviation safety only preempts state standards that relate to in-air safety. *See* Opp. 19-20. All the federal standards noted above—flight paths, emissions, and aircraft and engine design—reflect in-air safety concerns. *See* Mot. 2, 5-6, 21-22, 24-25. Moreover, because the alleged harm to Plaintiffs "on the ground" cannot be divorced from conduct allegedly giving rise to that harm—conduct in the air—Plaintiffs are wrong to argue that their claims are "entirely unrelated to 'in-air safety.'" Opp. 20. In *Burbank*, the Supreme Court concluded that the "delicate balance between safety and efficacy, ***and*** the protection of persons on the ground" "requires a uniform and exclusive system of federal regulation" that "leave[s] no room" for "local controls." 411 U.S. at 638-39 (emphasis added) (citation omitted). *Burbank* is dispositive. If local governments are barred from regulating aircraft for the benefit of people on the ground, the same is necessarily true of local citizens.

C. Plaintiffs' Claims Are Barred By Conflict Preemption.

1. Impossibility Preemption

In an effort to escape impossibility preemption, Plaintiffs argue that the Airlines can "comply with federal regulations without incurring liability under state law," Opp. 12, but the premise of their complaint is that the Airlines are liable under state tort law for flying federally-compliant aircraft along federally-directed routes, Mot. 26. Plaintiffs also argue that "entry" onto their properties is not "demanded by federal requirements," Opp. 13, ignoring that federal

law dictates the precise paths the Airlines must take, Mot. 3-6. The only ways for the Airlines to avoid the liability Plaintiffs seek to impose would be to (1) alter their flight paths (which they cannot do because routes are mandated by the FAA) or (2) exit the market altogether. Neither option is compatible with congressional design and the Supreme Court's preemption caselaw. *See PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623-24 (2011) (state duties are preempted where they would require "the Federal Government's special permission"); *Bartlett*, 570 U.S. at 488 (rejecting "'stop-selling' rationale as incompatible with … pre-emption jurisprudence"). Plaintiffs' proposal—that the Airlines continue to fly but simply pay the cost of "clean-up" on the ground, Opp. 13 & n.4—is precisely backwards: paying for clean-up is the result of liability, not a means to avoid it. *See Bartlett*, 570 U.S. at 487 n.3 (rejecting argument that defendant could avoid preemption by simply "pa[ying] the state penalty" for violating a state-law duty).

2. Obstacle Preemption

Plaintiffs' claims stand as an obstacle to federal emissions laws, because allowing a jury to decide whether the Airlines improperly emitted pollutants under state law would undermine the federal government's careful balancing of overlapping statutory goals when regulating aircraft emissions. *See* Mot. 27-28. Plaintiffs argue (Opp. 16-17) that because the CAA targets emissions, state standards that also target emissions *advance* (not obstruct) Congress's objectives in enacting the CAA. Plaintiffs misunderstand how obstacle preemption works.

"When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives." *Cohen v. Apple Inc.*, 46 F.4th 1012, 1029 (9th Cir. 2022) (citation omitted). And when states "impose a different standard," they necessarily balance the competing objectives differently, thus standing as an obstacle to the federal regime. *Id.* (citation omitted).

The Airlines framed their obstacle preemption argument around this binding precedent, specifically emphasizing how Congress instructed the EPA and FAA to balance several

overlapping and potentially competing policies when regulating aircraft emissions, including the United States' international treaty obligations. *See* Mot. 28. Plaintiffs have no response to this "careful balancing" argument, and thus have forfeited the issue. Regardless, Plaintiffs' efforts to impose "higher" or different standards for aircraft pollution, Opp. 15-17, would necessarily interfere with the EPA's careful balancing and decision to "harmoniz[e]" "U.S. domestic standards" with "international" requirements, 87 Fed. Reg. 72,312, 72,314 (Nov. 23, 2022).

III. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Collateral Attacks On FAA And EPA Orders.

The extensive federal rulemaking in the field of takeoffs and landings at Sea-Tac (which preempt Plaintiffs' claims for all the reasons discussed) also deprives this Court of subject matter jurisdiction over Plaintiffs' claims against the Airlines. Those claims are "inescapably intertwined with," and thus "an impermissible collateral challenge to," agency orders, regulations, and standards, *Tur v. FAA*, 104 F.3d 290, 291-92 (9th Cir. 1997). Only the courts of appeals have jurisdiction to review such attacks. Mot. 9-13. Plaintiffs try to avoid dismissal by contending that (1) they do not seek to "revisit, reverse, attack, or evade any" federal order and (2) their request for damages means this doctrine does not apply. Opp. 25-29. Neither contention succeeds.

First, Plaintiffs never acknowledge the "inescapably intertwined with" test, *Tur*, 104 F.3d at 292, and cannot avoid its application by arguing that they do not directly attack a specific federal order. Plaintiffs themselves recognize (Opp. 28) that a key question is "'whether the administrative agency had the authority to decide the ***issue***' raised by the claim." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 188 n.9, 189 (2d Cir. 2001) (Sotomayor, J.) (emphasis added) (citation omitted). There can be no question that the FAA and EPA have the authority to manage airspace, mandate flight paths, impose aircraft design requirements, and set aircraft emissions standards—*i.e.*, to decide the very issues in the complaint. Mot. 4-9. Plaintiffs'

claims are thus "inescapably intertwined with" the orders and regulations that authorize this service to Sea-Tac.

Plaintiffs try to evade the collateral attack doctrine by arguing that the Airlines "cite a panoply of inapposite cases" brought against federal agencies or officers. Opp. 26. But they ignore the many cases where courts applied the collateral attack doctrine to claims against private parties because the claims, as here, "*effectively*" challenged agency action. *Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 506 (9th Cir. 2015); *see also McKay v. City & Cnty. of San Francisco*, 2016 WL 7425927 (N.D. Cal. Dec. 23, 2016); *Krauss v. FAA*, 2016 WL 1162028 (N.D. Cal. Mar. 24, 2016); *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006); *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981); *Oling v. Air Line Pilots Ass'n*, 346 F.2d 270, 278 (7th Cir. 1965); Mot. 10-13.

Second, there is no "damages only" exception to the collateral-attack doctrine. Where applicable, the collateral-attack doctrine deprives district courts of jurisdiction over suits seeking damages the same as claims seeking injunctive relief. *See* Mot. 10; *see, e.g.*, *Tur*, 104 F.3d at 293; *Green v. Brantley*, 981 F.2d 514, 521 (11th Cir. 1993); *Gaunce v. deVincentis*, 708 F.2d 1290, 1291 (7th Cir. 1983).

Finally, Plaintiffs argue that if this Court dismisses under the collateral attack doctrine, they would be unfairly left without a remedy because they cannot now challenge existing FAA and EPA orders in a court of appeals. Opp. 30-31. But there are multiple other avenues for Plaintiffs—including petitioning the EPA and FAA for a new rulemaking or submitting comments in ongoing proceedings involving these issues. Mot. 13 n.11.

CONCLUSION

Despite Plaintiffs' attempt to reframe their allegations, the gravamen of this case is clear: Plaintiffs seek to impose liability for conduct exclusively regulated and fully authorized by federal law. Plaintiffs' approach is impermissible both because the relevant state law is barred by all three forms of preemption and because the Court lacks subject matter jurisdiction

to address collateral attacks on the agency orders authorizing Airlines' conduct. The Court should dismiss the complaint with prejudice.

DATED: February 16, 2024

By: s/Malaika M. Eaton

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CERTIFICATION OF COMPLIANCE WITH THE WORD LIMIT

As required by Local Rule 7(e)(6), I certify that this Motion contains 4,999 words, excepting captions, tables of contents, tables of authorities, signature blocks, and certificates of service, in compliance with the Order of this Court of October 25, 2023, Dkt. 47.

DATED: February 16, 2024

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