

11-5464-cv
In re Air Cargo Shipping Servs. Antitrust Litig.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: April 19, 2012 Decided: October 11, 2012)

Docket No. 11-5464-cv

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**In re Air Cargo Shipping Services Antitrust
Litigation**

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Before: JACOBS, Chief Judge, KEARSE and HALL,
 Circuit Judges.

Plaintiffs (indirect purchasers of air freight shipping services) allege that numerous foreign airlines conspired to fix prices in violation of state antitrust, consumer protection, and unfair competition laws. The United States District Court for the Eastern District of New York (Gleeson, J.) accepted, in relevant part, the report and recommendation of Magistrate Judge Pohorelsky, dismissing those claims as expressly preempted by the Federal Aviation Act. 49 U.S.C. § 41713(b)(1). We agree that Plaintiffs' claims are expressly preempted.

Affirmed.

1 Christopher Lovell, Lovell Stewart
2 Halebian Jacobson LLP (Steven N.
3 Williams, Cotchett, Pitre &
4 McCarthy; W. Joseph Bruckner,
5 Lockridge Grindal Nauen P.L.L.P.;
6 Craig C. Corbitt, Zelle, Hofmann,
7 Voelbel, & Mason; Daniel E.
8 Gustafson, Gustafson Gluek PLLC, on
9 the brief), for Plaintiffs-
10 Appellants.

11
12 IAN SIMMONS (Jonathan D. Hacker,
13 Angela Thaler Wilks, Joshua Deahl,
14 Anton Metlitsky, on the brief),
15 O'Melveny & Myers LLP, for
16 Defendants-Appellees Asiana
17 Airlines, Inc.

18
19 Sanford M. Litvack, Eric J. Stock,
20 Hogan Lovells US LLP, for
21 Defendants-Appellees Air Canada and
22 AC Cargo.

23
24 George N. Tompkins Jr., Wilson Elser
25 Moskowitz Edelman & Dicker LLP, for
26 Defendants-Appellees Air China Ltd.
27 and Air China Cargo Co. Ltd.

28
29 Michael J. Holland, Roderick D.
30 Margo, Condon & Forsyth LLP, for
31 Defendants-Appellees Air New Zealand
32 Ltd.

33
34 Patrick J. Bonner, Freehill, Hogan &
35 Mahar, LLP and Charles J. Simpson,
36 Jr., James A. Calderwood, Jol A.
37 Silversmith, Zuckert, Scoutt &
38 Rasenberger, L.L.P., for Defendants-
39 Appellees All Nippon Airways Co.,
40 Ltd.

41
42 Harvey J. Wolkoff, Ropes & Gray LLP,
43 for Defendants-Appellees Atlas Air
44 Worldwide Holdings, Inc., Polar Air
45 Cargo, LLC, and Polar Air Cargo
46 Worldwide, Inc.

1 Daryl A. Libow, Sullivan & Cromwell
2 LLP, for Defendants-Appellees
3 British Airways Plc
4

5 Stephen Fishbein, Heather Kafele,
6 Shearman & Sterling LLP, for
7 Defendants-Appellees Cargolux
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10 David H. Bamberger, DLA Piper LLP
11 (US), for Defendants-Appellees
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14 John F. Savarese, David B. Anders,
15 Wachtell, Lipton, Rosen & Katz, for
16 Defendants-Appellees El Al Israel
17 Airlines Ltd.
18

19 Terry Calvani, Freshfields Bruckhaus
20 Deringer US LLP, for Defendants-
21 Appellees Emirates
22

23 Gary A. MacDonald, John M. Nannes,
24 Skadden, Arps, Slate, Meagher & Flom
25 LLP, for Defendants-Appellees
26 Koninklijke Luchtvaart Maatschappij
27 N.V. (KLM Royal Dutch Airlines)
28

29 Barry G. Sher, Paul Hastings LLP,
30 for Defendants-Appellees Korean Air
31 Lines Co., Ltd.
32

33 James V. Dick, Squire Sanders (US)
34 LLP, for Defendants-Appellees Lan
35 Airlines, S.A., Lan Cargo, S.A. and
36 Aerolinhas Brasileiras, S.A.
37

38 Daniel G. Swanson, D. Jarrett Arp,
39 Gibson, Dunn & Crutcher LLP, for
40 Defendants-Appellees Martinair
41 Holland N.V.
42

43 John R. Fornaciari, Baker &
44 Hostetler LLP, for Defendants-
45 Appellees Nippon Cargo Airlines Co.,
46 Ltd.
47

1 Peter J. Kadzik, Dickstein Shapiro
2 LLP, for Defendants-Appellees Saudi
3 Arabian Airlines Ltd.

4
5 George D. Ruttinger, Crowell &
6 Moring LLP, for Defendants-Appellees
7 Scandinavian Airlines System
8

9 Margaret M. Zwisler, William R.
10 Sherman, Ashley M. Bauer, Latham &
11 Watkins LLP, for Defendants-
12 Appellees Singapore Airlines Cargo
13 PTE LTD and Singapore Airlines Ltd.
14

15 James R. Warnot Jr., Linklaters LLP,
16 for Defendants-Appellees Société Air
17 France
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19 Sara E. Kropf, John M. Taladay,
20 Steve Weissman, Andreas Stargard,
21 Kimberly A. Murphy, Baker Botts LLP,
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23 African Airways Ltd.
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26 Moore LLP, for Defendants-Appellees
27 Thai Airways International Public
28 Co. Ltd.
29

30 W. Todd Miller, Baker & Miller PLLC,
31 for Defendants-Appellees Qantas
32 Airways Ltd.

1 DENNIS JACOBS, Chief Judge:

2 Plaintiffs (indirect purchasers of air freight shipping
3 services) brought suit against numerous foreign airlines
4 ("Defendants"), alleging a conspiracy to fix prices in
5 violation of state antitrust, consumer protection, and
6 unfair competition laws. The United States District Court
7 for the Eastern District of New York (Gleeson, J.) dismissed
8 those claims as expressly preempted by federal law. The
9 Federal Aviation Act preempts state-law claims "related to a
10 price, route, or service of an air carrier." 49 U.S.C.
11 § 41713(b)(1). The question is whether "air carrier" in
12 that provision applies to foreign air carriers. We conclude
13 that it does, and affirm.

14
15 **BACKGROUND**

16 At least 22 foreign air carriers have been subject to
17 federal criminal charges in the United States in connection
18 with a global price-fixing conspiracy. Some have settled,
19 agreeing to pay fines and penalties totaling almost \$2
20 billion.

21 Plaintiffs bring this civil suit alleging that they
22 paid excessive prices when Defendants entered into that

1 conspiracy, beginning in 2000, and began levying a number of
2 surcharges, including a fuel surcharge, a war-risk-insurance
3 surcharge, a security surcharge, and a United States customs
4 surcharge. Plaintiffs, as indirect purchasers of air
5 freight shipping, dealt with the defendant airlines through
6 intermediaries, such as freight forwarders. They bring
7 their claims under state law because indirect purchasers are
8 unable to obtain money damages under federal antitrust law.
9 See Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977).

10 Additional claims were brought by other plaintiffs who were
11 direct purchasers. The claims of those direct-purchaser
12 plaintiffs remain in district court and are not before us.

13 Below, the district court accepted, in relevant part,
14 Magistrate Judge Pohorelsky's recommendation to dismiss
15 Plaintiffs' state claims on the ground that it was expressly
16 preempted by federal law. The district court then entered
17 partial final judgment under Rule 54(b) of the Federal Rules
18 of Civil Procedure, so Plaintiffs could immediately appeal
19 the dismissal decision. This appeal followed.

20 21 **DISCUSSION**

22 We review de novo a dismissal for failure to state a
23 claim upon which relief can be granted. Harris v. Mills,

1 572 F.3d 66, 71 (2d Cir. 2009). We also review de novo
2 questions of statutory interpretation, Bodansky v. Fifth on
3 the Park Condo, LLC, 635 F.3d 75, 82 (2d Cir. 2011), and
4 questions of preemption, New York SMSA Ltd. Partnership v.
5 Town of Clarkstown, 612 F.3d 97, 103 (2d Cir. 2010).

6 The relevant provision of the Federal Aviation Act is
7 as follows:

8 Except as provided in this subsection, a State,
9 political subdivision of a State, or political
10 authority of at least 2 States may not enact or enforce
11 a law, regulation, or other provision having the force
12 and effect of law related to a price, route, or service
13 of an air carrier that may provide air transportation
14 under this subpart.

15 49 U.S.C. § 41713(b)(1). Plaintiffs' claims undoubtedly
16 arise under state law and are related to "price." Id. The
17 dispositive question, then, is whether foreign air carriers
18 (such as Defendants) are "air carrier[s]" under
19 § 41713(b)(1) (the "preemption provision").
20

21 I

22 We begin "'with the language employed by Congress and
23 the assumption that the ordinary meaning of that language

1 accurately expresses the legislative purpose.'" United
2 States v. Aleynikov, 676 F.3d 71, 76 (2d Cir. 2012) (quoting
3 United States v. Albertini, 472 U.S. 675, 680 (1985)). The
4 ordinary, everyday meaning of "air carrier" includes both
5 domestic and foreign air carriers.

6 That would usually end the analysis, but "[w]hen a
7 statute includes an explicit definition," we generally
8 follow that definition, "even if it varies from that term's
9 ordinary meaning." Stenberg v. Carhart, 530 U.S. 914, 942
10 (2000). "'Statutory definitions control the meaning of
11 statutory words, of course, in the usual case.'" Nw. Austin
12 Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 206 (2009)
13 (quoting Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198,
14 201 (1949)). The Federal Aviation Act defines an "air
15 carrier" as "a citizen of the United States undertaking by
16 any means, directly or indirectly, to provide air
17 transportation." 49 U.S.C. § 40102(a)(2). A "foreign air
18 carrier" is separately defined as "a person, not a citizen
19 of the United States, undertaking by any means, directly or
20 indirectly, to provide foreign air transportation." Id.
21 § 40102(a)(21).

22 Plaintiffs contend that this is the "usual case" where
23 the statutory definitions should control. The statutory

1 definitions are consistent with this Court's authority that
2 the terms "air carrier" and "foreign air carrier" are
3 "mutually exclusive" because an entity cannot be both a
4 citizen and not a citizen of the United States. United
5 States v. Keuylian, 602 F.2d 1033, 1040 (2d Cir. 1979).

6 That observation is sound as far as it goes; but there are
7 occasions when statutory definitions yield to context and
8 the development of the statutory wording over time. In any
9 event, while an entity cannot be both an air carrier and a
10 foreign air carrier (i.e., the terms are mutually
11 exclusive), nothing in the statutory definitions prevents
12 the statutory preemption provision from applying to both
13 domestic air carriers and foreign air carriers, which is the
14 matter at issue here.

15 To demonstrate that Congress has been careful to
16 distinguish between the two terms, Plaintiffs cite 51 places
17 in the Federal Aviation Act where Congress distinguished
18 between an "air carrier" and a "foreign air carrier" by
19 using both terms. At the same time, Plaintiffs concede that
20 there are numerous provisions in the Federal Aviation Act
21 where Congress was not so careful and used the term "air
22 carrier" generically to reference air carriers, both

1 domestic and foreign.¹ See In re Korean Air Lines Co. Ltd.,

¹ For example, 49 U.S.C. § 44901(i) applies to "an air carrier providing air transportation under a certificate issued under section 41102 of this title *or a permit issued under section 41302.*" 49 U.S.C. § 44901(i) (emphasis added). Because only foreign air carriers may obtain "a permit under section 41302 of this title," "air carrier" in Section 44901 must include foreign air carriers.

Section 44940(a)(2)(B)(ii) provides that "[t]he amount of fees collected under this paragraph from an air carrier described in subparagraph (A) for each of fiscal years 2002, 2003, and 2004 may not exceed the amount paid in calendar year 2000 by that carrier for screening passengers and property." 49 U.S.C. § 44940(a)(2)(B)(ii). Defining "air carrier" in this statute to mean only domestic air carriers contradicts the Department of Transportation's regulation enforcing the provision. See Aviation Security Infrastructure Fees, 67 Fed. Reg. 7926-01, 7927 (Feb. 20, 2002) ("For fiscal years 2002 through 2004, the fee imposed on each air carrier *and foreign air carrier* is limited to the amount that carrier paid for screening passengers and property in calendar year 2000, as determined by the Under Secretary." (emphasis added)).

Section 44925(a) requires the Secretary of Homeland Security to deploy explosives screening to "detect . . . weapons and explosives that terrorists would likely try to smuggle aboard an air carrier aircraft." 49 U.S.C. § 44925(a). Congress did not intend to require explosives screening only for domestic air carriers but not foreign air carriers. Subsection (d) of that same statute requires the Assistant Secretary for Homeland Security, on an interim basis, to provide screening of particular individuals on "aircraft operated by an air carrier or foreign air carrier" Id. § 44925(d).

The original wording of 49 U.S.C. § 40118(d) governed the payment for air travel by an officer or employee of the State Department "between two places both of which are outside the United States . . . aboard air carriers which do not hold certificates under Section 1371 of this title." 49 U.S.C. § 1518 (1982). But the legislative history made clear that the term "air carriers which do not hold certificates" meant "foreign air carriers." See H.R. Rep. No. 95-1535, at 45 (1978) (Conf. Rep.). Congress later corrected the language through an amendment not intended to

1 Anti-Trust Litig., 642 F.3d 685, 692 (9th Cir. 2011); Port
 2 Auth. of N.Y. & N.J. v. Dep't of Transp., 479 F.3d 21, 32
 3 (D.C. Cir. 2007).

4 Since the Federal Aviation Act used the statutory
 5 definition in some places, and in other places used the
 6 normal, everyday meaning, this is the "unusual case" in
 7 which the statutory definitions do not have compulsory
 8 application. Nw. Austin Mun. Util. Dist. No. One, 557 U.S.
 9 at 206-07 (internal quotation marks omitted). Because it
 10 has been "'established that a statutorily defined term has
 11 different meanings in different sections, the term standing
 12 alone is necessarily ambiguous and each section must be
 13 analyzed to determine whether the context gives the term a
 14 further meaning that would resolve the issue in dispute.'" Korean Air Lines, 642 F.3d at 692-93 (brackets omitted)
 15 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 343-44
 16 (1997)). To dispel this ambiguity, we look to "other
 17 sources, including the legislative history, to discern
 18 Congress's meaning." Slayton v. Am. Express Co., 604 F.3d
 19 758, 771 (2d Cir. 2010); accord Nw. Austin Mun. Util. Dist.
 20 No. One, 557 U.S. at 206-07; Robinson, 519 U.S. at 343-44;
 21

make a substantive change. In re Korean Air Lines Co. Ltd.,
Anti-Trust Litig., 642 F.3d 685, 693 n.5 (9th Cir. 2011).

1 Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755,
2 764 (1949); Lawson, 336 U.S. at 201; see also Philko
3 Aviation, Inc. v. Shacket, 462 U.S. 406, 411 (1983)
4 (refusing to use statutory definition of “conveyance” in the
5 Federal Aviation Act because it would “defeat the primary
6 congressional purpose for” enacting the provision).

7 Resort to context and legislative history is
8 particularly appropriate in this instance. When the Federal
9 Aviation Act was originally enacted, it “defined ‘air
10 carrier’ as being a U.S. citizen ‘*unless the context*
11 *otherwise require[d].’” Korean Air Lines, 642 F.3d at 693
12 n.5 (emphasis added) (quoting Pub.L. No. 85-726, 72 Stat.
13 731 (1958)). The proviso was removed in 1994 in an
14 amendment that was intended to make “‘no substantive change
15 in the law.’” Id. (quoting S. Rep. No. 103-265, at 5
16 (1994)); see also Act of July 5, 1994, Pub. L. No. 103-272,
17 § 1, 108 Stat. 745. We therefore consult context and
18 legislative history to ascertain the meaning of “air
19 carrier” in the preemption provision.*

21 II

22 A review of the Federal Aviation Act, the various
23 amendments to it, and the legislative history and purpose of

1 the preemption provision confirms that the preemption
2 provision should be read to preempt state-law antitrust
3 suits against foreign as well as domestic air carriers.
4 Korean Air Lines, 642 F.3d at 693-95. We start with the
5 preemption provision.

6
7
8 **A**

9 The preemption provision was part of the Airline
10 Deregulation Act,² which amended the Federal Aviation Act to
11 “encourage, develop, and attain an air transportation system
12 which relies on competitive market forces to determine the
13 quality, variety, and price of air services,” Pub. L. No.
14 95-504, (Preamble) 92 Stat. 1705 (1978), while still
15 preserving the significant regulatory authority of the
16 federal Civil Aeronautics Board (“CAB”), see Morales v.
17 Trans World Airlines, Inc., 504 U.S. 374, 379 (1992); see
18 also 49 U.S.C. §§ 1374(b), 1381 (1982) (providing authority
19 for CAB to, inter alia, bar anti-competitive conduct).
20 Previously, the Federal Aviation Act provided that
21 “[n]othing . . . in this chapter shall in any way abridge or

² 49 U.S.C. § 1305(a)(1) (1978) (preemption provision before it was relocated and renumbered during the re-enactment of Title 49 in 1994).

1 alter the remedies now existing at common law or by statute,
2 but the provisions of this chapter are in addition to such
3 remedies." 49 U.S.C. § 1506 (1978).

4 The preemption provision was included in the Airline
5 Deregulation Act "[t]o ensure that the [s]tates would not
6 undo federal deregulation with regulation of their own."
7 Morales, 504 U.S. at 378; Korean Air Lines, 642 F.3d at 694
8 ("In addition to protecting consumers, federal regulation
9 insures a uniform system of regulation and preempts
10 regulation by the states' in a field where state-based
11 variations 'would be confusing and burdensome to airline
12 passengers, as well as to the airlines.'") (quoting H.R.
13 Rep. No. 98-793, at 4 (1984), reprinted in 1984 U.S.C.C.A.N.
14 2857, 2860). This also resolved "uncertainties and
15 conflicts" in the law created by conflicting or overlapping
16 regulations issued by the federal and state governments.
17 H.R. Rep. No. 95-1211 at 16 (1978), reprinted in 1978
18 U.S.C.C.A.N. 3737, 3751. Accordingly, the preemption
19 provision conferred on the federal government exclusive
20 authority to regulate a carrier's routes, rates, and
21 services. Id. at 16 (explaining that the Airline
22 Deregulation Act "will prevent conflicts and inconsistent
23 regulations by providing that when a carrier operates under

1 authority granted pursuant to . . . the Federal Aviation
2 Act, no state may regulate that carrier's routes, rates or
3 services").

4 The Airline Deregulation Act achieved domestic
5 deregulation, and the original preemption provision applied
6 only to "air carrier[s] having authority . . . to provide
7 *interstate* air transportation." 49 U.S.C. § 1305(a)(1)
8 (1978) (emphasis added). Interstate air transportation is
9 transportation between two states (or the District of
10 Columbia) within the United States. 49 U.S.C. § 1301(24)(a)
11 (1978). Because only domestic air carriers were authorized
12 to engage in "interstate air transportation," 49 U.S.C.
13 § 1301(22) (1978); Korean Air Lines, 642 F.3d at 694, the
14 preemption provision, as originally drafted, was aimed at
15 preemption of state laws and regulations aimed at *domestic*
16 air carriers, only.

17
18 **B**

19 The International Air Transportation Competition Act of
20 1979 ("IATCA"), Pub. L. No. 96-192, 94 Stat. 35 (1980),
21 extended deregulation and the market-oriented regulatory
22 approach of the Airline Deregulation Act to foreign air
23 transportation. Korean Air Lines, 642 F.3d at 694.

1 Although more limited than domestic deregulation, the IATCA
 2 was also intended to increase market competition in order to
 3 reduce pricing in foreign air transportation. Id. (citing
 4 IATCA, § 102(a)(4)).³

6 C

7 The Civil Aeronautics Board Sunset Act of 1984 ("Sunset
 8 Act"), Pub. L. No. 98-443, 98 Stat. 1703 (1984), included an
 9 amendment to the preemption provision that deleted the term
 10 "interstate"; so the provision preempted state laws relating
 11 to price, route, or service of "'any air carrier having
 12 authority . . . to provide air transportation.'" See Korean
 13 Air Lines, 642 F.3d at 694 (alteration in original) (quoting
 14 49 U.S.C. § 1305(a)(1) (1984)). The Sunset Act conferred
 15 upon the United States Department of Transportation the
 16 authority to "'preserve the competitive direction adopted in

³ Plaintiffs argue that we should disregard Defendants' reliance on the IATCA because those arguments were not raised below. There is no new argument; the IATCA is additional support for Defendants' position. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Yee v. City of Escondido, 503 U.S. 519, 534 (1992). In any event, the Ninth Circuit's intervening decision in Korean Air Lines relied on the IATCA's amendments to the Federal Aviation Act. Defendants are certainly privileged to cite that case and to urge its persuasiveness.

1 the [Airline Deregulation Act] and the IATCA,'" which makes
2 "clear that the ramifications of the IATCA were in the minds
3 of the Sunset Act's drafters" when they deleted "interstate"
4 from the preemption provision. Korean Air Lines, 642 F.3d
5 at 695 (quoting H.R. Rep. No. 98-793 at 8, reprinted in 1984
6 U.S.C.C.A.N. at 2864). This legislative history leads to
7 the "conclu[sion] that Congress intended to expand the
8 [Airline Deregulation Act's] preemptive scope to cover state
9 regulation of 'foreign air carriers.'" Id. (internal
10 brackets omitted).

11 The legislative history of the Sunset Act justifies
12 preemption. Although the following text concerns domestic
13 deregulation, the point that is made is just as applicable
14 to foreign air carriers. The House's report explained:

15 Federal regulation insures a uniform system of
16 regulation and preempts regulation by the states. If
17 there was no federal regulation, the states might begin
18 to regulate these areas, and the regulations could vary
19 from state to state. This would be confusing and
20 burdensome to airline passengers, as well as to the
21 airlines.

22 H.R. Rep. No. 98-793 at 4, reprinted in 1984 U.S.C.C.A.N. at
23 2860. By the same token, the "purpose [of deregulation]

1 would be undermined if states could regulate foreign air
2 carriers." Korean Air Lines, 642 F.3d at 694. Reading the
3 statutory scheme to permit "regulation of foreign air
4 carriers would create a confusing patchwork of regulations
5 for airline passengers to navigate Such a result
6 would not be consonant with Congress's express purpose in
7 enacting the statute." Id.

8
9 **D**

10 Plaintiffs argue that the removal of a single word from
11 the preemption provision--"interstate"--cannot support
12 expansion of the preemption provision to cover foreign air
13 carriers. We disagree. It had been beyond dispute that the
14 preemption provision only applied to domestic air carriers.
15 The Sunset Act, however, was enacted on the heels of the
16 IATCA, which expanded deregulation of the domestic airline
17 industry to foreign air carriers. In light of the clear
18 signals from Congress that deregulation was to continue
19 unabated--and not be frustrated by re-regulation by the
20 states--Congress's removal of "interstate" was intended to
21 expand the preemption bar to state regulation of foreign air
22 carriers.

1 Since the removal of "interstate" must be given some
2 effect, Plaintiffs propose a congressional intent to expand
3 the preemption provision to domestic air carriers that only
4 had authority to provide overseas air transportation⁴ and
5 thus were not protected by the wording of the original
6 enactment ("air carrier[s] having authority . . . to provide
7 interstate air transportation," 49 U.S.C. § 1305(a)(1)
8 (1978)). However, by 1984, that category of domestic air
9 carrier no longer existed. Before 1982, if an air carrier
10 provided overseas--but not interstate--transportation, the
11 CAB would issue an authorizing certificate limited to air
12 transportation overseas. The CAB's authority to issue such
13 certificates expired on December 31, 1981, Airline
14 Deregulation Act of 1978, Publ L. No. 95-504, § 40, 92 stat
15 1705, 1744-47; starting January 1, 1982, the CAB issued
16 certificates for domestic air carriers that authorized
17 "interstate *and* overseas air transportation . . . between
18 all points in the United States, its territories and
19 possessions (without regard to point listings)." In re
20 Certificate Formats in 1982, CAB Order No. 81-11-23, at 2

⁴ Overseas air transportation is air transportation between a state (or the District of Columbia) and a territory or possession of the United States or between two territories or possessions of the United States. 49 U.S.C. § 1301(24)(b) (1982).

1 (Nov. 3, 1981); see also Proposals to Provide Essential Air
2 Service at Natchez, Mississippi, CAB Order No. 81-12-132, at
3 1 (Dec. 22, 1981) (making final the proposed orders and
4 findings set out in the November 3, 1981, Order).

5 Plaintiffs also argue that deregulation was a domestic
6 initiative; so an expansion of the preemption provision to
7 protect foreign air carriers does not flow from
8 deregulation. However, the IATCA was aimed at foreign air
9 carriers, and the Sunset Act was intended to preserve the
10 pro-competition policy approach of the IATCA as well as the
11 Airline Deregulation Act. See Korean Air Lines, 642 F.3d at
12 695 (citing H.R. Rep. No. 98-793 at 8, reprinted in 1984
13 U.S.C.C.A.N. at 2864).

14 Plaintiffs argue that the IATCA has no bearing on the
15 question before us because it mainly redistributed the
16 administration of federal regulatory authority among federal
17 agencies, and therefore was not deregulatory. This is
18 incorrect. The IATCA (and, later, the Sunset Act) continued
19 the deregulation of the airline industry and expanded
20 deregulation to foreign air carriers. Some regulatory
21 authority that was deemed critical was preserved and
22 transferred from the CAB to the Department of
23 Transportation, Korean Air Lines, 642 F.3d at 694-95 (citing

1 H.R. Rep. No. 98-793, at 2, 8, 13, reprinted in 1984
2 U.S.C.C.A.N. at 2857, 2858, 2864, 2869), but deregulation is
3 an incremental process, not an annihilation. Maintaining
4 some federal regulatory authority had the not-incidental
5 effect of filling holes for which state regulation was to be
6 excluded. See Korean Air Lines, 642 F.3d at 694.

7 Finally, Plaintiffs point out that Congress chose to
8 omit from the IATCA any preemption provision specifically
9 for foreign air carriers. That does not matter because we
10 conclude above that Congress achieved that result by other
11 means.⁵

13 III

14 The legislative history of the preemption provision and
15 the amendments to it confirm that Congress intended the term
16 "air carrier" in the preemption provision to mean domestic

⁵ Plaintiffs point to a proposed (but rejected) amendment to the preemption provision from 1981 that would have expanded protection for any air carrier providing interstate air transportation by removing the phrase, "having authority under subchapter IV of this chapter to." Plaintiffs argue that this amendment is significant because it would not have protected foreign air carriers. That Congress considered (and rejected) an amendment entirely unrelated to foreign air carriers is of no moment. In any event, this amendment (even if enacted) would not advance Plaintiffs' position because it preceded the Sunset Act, which removed "interstate" from the preemption provision and expanded the provision's protection to foreign air carriers.

1 and foreign air carriers alike. A contrary result would
2 undermine Congress's purpose in enacting the preemption
3 provision and the various deregulation statutes. See Philko
4 Aviation, 462 U.S. at 411; accord Lawson, 336 U.S. at 201
5 (rejecting mechanical use of a statutory definition that
6 would "destroy one of the major purposes of" enacting the
7 provision).

8 The intent of Congress in deregulating the industry and
9 in enacting the preemption provision was "[t]o ensure that
10 the [s]tates would not undo federal deregulation with
11 regulation of their own." Morales, 504 U.S. at 378. The
12 preemption provision protects air carriers against state
13 regulation relating to prices, routes, and services, 49
14 U.S.C. § 41713(b)(1); so re-regulation could comprehensively
15 defeat the federal effort to reduce regulation.

16 Plaintiffs' reading of the preemption provision, which
17 would preempt only state regulation of domestic air
18 carriers, would allow states to regulate the routes, prices,
19 and services of foreign air carriers that operate all over
20 the world. That would risk subjecting foreign air carriers
21 and their customers to "a confusing patchwork" of state-by-
22 state regulation, such as different rules for purchase of
23 otherwise identical international flights if one ticket is

1 from an American air carrier and the other from a foreign
2 carrier. See Korean Air Lines, 642 F.3d at 694 (explaining
3 that, in the context of domestic deregulation, state-by-
4 state re-regulation would subject air carriers and their
5 customers to "state-based variations [which] 'would be
6 confusing and burdensome to airline passengers, as well as
7 to the airlines.'" (quoting H.R. Rep. No. 98-793 at 4,
8 reprinted in 1984 U.S.C.C.A.N. at 2860)).

9 Allowing the states to regulate only foreign air
10 carriers would be particularly peculiar since "[f]oreign
11 commerce is pre-eminently a matter of national concern."
12 Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448-49
13 (1979). Apart from that oddity, a preemption provision that
14 favors domestic air carriers by subjecting only foreign air
15 carriers to state regulation would likely be viewed as
16 "discriminat[ion] against foreign air carriers" in violation
17 of the United States' treaty obligations. Korean Air Lines,
18 642 F.3d at 696.⁶ Interpreting the preemption provision in

⁶ See, e.g., Convention on International Civil Aviation, art. 11, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (providing for application of laws and regulation "without distinction as to nationality" of airlines of signatory states); Air Transport Agreement, U.S.-S. Kor., art. 11, June 9, 1998, State Dept. No. 98-111, 1998 WL 468488, at *7 ("Each Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in providing the international air transportation

1 such a manner "offend[s] the longstanding principle that
 2 statutes should be construed in accordance with
 3 international law." Id. (citing Murray v. Schooner Charming
 4 Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).⁷

7 * * *

8 In sum, the ambiguity of Congress's use of the term
 9 "air carrier" in the preemption provision necessitates
 10 review of the legislative history of the preemption
 11 provision and the various statutes deregulating the airline
 12 industry. That legislative history (confirmed by additional
 13 canons of statutory construction) leads us to conclude that
 14 "air carrier" in the preemption provision means both

governed by this Agreement."); Treaty of Friendship,
 Commerce and Navigation, U.S.-S. Kor. art. I, Nov. 28, 1956,
 8 U.S.T. 2217 ("Each Party shall at all times accord
 equitable treatment to the persons, property, enterprises
 and other interests of nationals and companies of the other
 Party.").

⁷ Plaintiffs contend that none of the treaties cited,
supra note 6, is violated by a regulatory system that
 discriminates between domestic and foreign air carriers.
 This argument was rejected in Korean Air Lines, 642 F.3d at
 696. In any event, even without an outright violation, the
 treaties demonstrate a commitment by the United States to
 regulating domestic and foreign air carriers in a similar
 fashion. Subjecting only foreign air carriers to suits under
 an overlapping patchwork of state laws does not comport with
 that principle.

1 domestic and foreign air carriers. Plaintiffs' state law
2 claims are therefore expressly preempted, and the district
3 court correctly granted Defendants' motion to dismiss.

4 Because Plaintiffs' claims are expressly preempted, we
5 need not consider whether they are impliedly preempted.
6

7 **CONCLUSION**

8 For the foregoing reasons, the judgment of the district
9 court is affirmed.