IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ALEX KISLOV, NIKO HEARN and MARLENI CURIEL FREGOSO, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., a Delaware corporation,

Defendant.

No. 17 CH 15328

Honorable Neil H. Cohen

AMERICAN AIRLINES, INC.'S MOTION TO DISMISS

Defendant, American Airlines, Inc. ("Defendant"), by and through its attorneys, requests that this Court dismiss with prejudice Plaintiffs' Fourth Amended Complaint pursuant to 735 ILCS 5/2–615.

Facts, arguments and authority in support of Defendant's Motion are set forth in its Memorandum in Support of Its Motion to Dismiss, which is being filed simultaneously with this Motion, and is incorporated herein by reference.

Dated: March 18, 2022

AMERICAN AIRLINES, INC.

By: */s/Lavanga V. Wijekoon*
Lavanga V. Wijekoon
One of the Attorneys for Defendant

Paul E. Bateman
Lavanga V. Wijekoon
LITTLER MENDELSON, P.C.
321 North Clark Street, Suite 1100
Chicago, IL 60654
312.372.5520

pbateman@littler.com
lwijekoon@littler.com
Firm Id. 34950

Mark W. Robertson – Attorney Id. 99675
Charles J. Mahoney – Attorney Id. 99677
O'Melveny & Myers LLP
7 Times Square
New York, NY 1006
212.326.2111
mrobertson@omm.com
cmahoney@omm.com

CERTIFICATE OF SERVICE

Lavanga V. Wijekoon hereby certifies that on March 18, 2022 a copy of the foregoing was electronically filed with the Clerk of the Court, and served via email upon the counsel listed below:

Evan M. Meyers – emeyers@mcgpc.com
Timothy P. Kingsbury – tkingsbury@mcgpc.com
Steven R. Beckham – sbeckham@mcgpc.com

/s/Lavanga V. Wijekoon
Lavanga V. Wijekoon

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AMERICAN AIRLINES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiffs—two consumers and one former employee—allege that American violated the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*, by failing to post a public policy regarding retention and destruction of biometrics. Their sole cause of action is brought under § 15(a) of BIPA, which requires an entity in possession of an individual's biometrics to destroy them within certain time periods pursuant to a publicly-posted data-destruction policy. Plaintiffs' claims fail for two threshold reasons.

First, Plaintiffs have not been "aggrieved" by American's alleged failure to post a data-destruction policy as required to give rise to a claim under BIPA. In *Rosenbach v. Six Flags Entertainment Corp.*, 129 N.E.3d 1197 (Ill. 2019), the Illinois Supreme Court held that a putative plaintiff is "aggrieved" within the meaning of BIPA when their *personal* rights are violated; that is, when their biometric data "is subject to [a] breach" of one of BIPA's requirements, *id.* at 1206. For example, under § 15(a), a potential claim could arise if an individual's biometric data is not destroyed pursuant to a data-destruction policy within the time imposed by BIPA. But Plaintiffs have expressly and repeatedly disavowed that they are making such a claim. And Plaintiffs do not have a *personal* right to a publicly-available data destruction policy, nor is *their* biometric data even allegedly subject to such a breach. As Plaintiffs themselves have conceded, the duty they assert here is "owed to the public generally, rather than to any particular person." They thus fail to state a claim.

Plaintiffs' theory that § 15(a) can be subdivided into component pieces that each give rise to an independent cause of action also fails because it violates fundamental principles of statutory construction. Statutes must be construed as a whole—a single sentence cannot be extracted and read in isolation. Moreover, the Legislature's express intent in enacting § 15 was to "regulat[e]

the collection, use, safeguarding, handling, storage, retention, and destruction of" biometrics. 740 ILCS 14/5(g). A standalone claim for failure to post a public policy does not satisfy any of those purposes. But when § 15(a) is read as a whole, it fits neatly with those purposes because it regulates data retention and destruction by requiring entities to destroy biometrics pursuant to conditions set by the Act.

Second, even if there were such a claim, Plaintiffs lack standing to assert it. Plaintiffs themselves concede they lack standing to proceed in federal court because they have not suffered an injury in fact—indeed, that was the sole basis of their motion to remand. But they also lack standing to proceed in this Court because the alleged injury is shared in common with all members of the public, making it a classic generalized grievance. Quoting Plaintiffs, the duty they assert is "owed to the public generally, rather than to any particular person," and thus the injury they allege is shared by the public generally too.

While these two threshold flaws dispose of all three Plaintiffs' claims, the consumer plaintiffs' claims fail for the additional reason that they are preempted by the Airline Deregulation Act (ADA). The ADA preempts the application of any state law that relates to the services of an air carrier. Because the consumer plaintiffs' claim would regulate how American services its customers, it is squarely preempted by the ADA. Courts across the country have correctly held that similar state privacy laws are preempted on this basis. This case is no different.

BACKGROUND

A. Plaintiffs' Allegations in the Fourth Amended Complaint

While American treats Plaintiffs' allegations as true for purposes of this motion, many are demonstrably false, including the claim that American's customer service hotline collects customers' biometrics. Plaintiffs allege as follows.

The customer plaintiffs. American operates a "24-hour customer service hotline to assist

its customers and respond to customer questions, issues, and complaints." Plaintiffs' Fourth Amended Class Action Complaint ("4AC") ¶ 19. American has "integrated 'Integrated Voice Response' ('IVR') software into its general support line" "in an effort to better achieve service goals." *Id.* ¶ 20. This software collects and analyzes customers' voiceprints "to understand the caller's request and automatically respond with a personalized response," and allows American to track interactions with specific customers, understand and predict their requests, "personalize the experience, and shorten hold times"—i.e., to provide better customer service. *Id.* ¶¶ 20-21, 25-27. Hearn, for example, claims that he interacted with IVR during calls "to resolve several issues pertaining to flights departing from Illinois." *Id.* ¶ 30. Both Kislov and Hearn allege American's software "captured and stored the unique biometric signatures of [their] voice[s]." *Id.* ¶¶ 30-31.

The employee plaintiff. American "requires workers in Illinois to provide their biometric identifiers, in the form of their fingerprints," for timekeeping purposes. *Id.* ¶¶ 33, 25. American "came into possession of [Fregoso's]" biometrics when she clocked in and out of work. *Id.* ¶ 36.

B. Statutory and Procedural Background

Through BIPA, the "General Assembly has codified that individuals possess a right to privacy in and control over their biometric[s]." *Rosenbach*, 129 N.E.3d at 1206. BIPA thus regulates "how private entities collect, retain, disclose and destroy biometric[s]." *Id.* at 1199. To that end, § 15 sets out the substantive standards for "[r]etention; collection; disclosure; [and] destruction of biometric[s]." 740 ILCS 14/15.

Section 15(a)—the only section Plaintiffs claim American has violated in this litigation—provides in full:

> A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's

> last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

Plaintiffs have expressly and repeatedly disavowed that American unlawfully retained or failed to destroy their biometrics. *See, e.g., Kislov v. Am. Airlines, Inc.*, No. 1-17-cv-09080, Dkt. 98 at 4-5 (N.D. Ill.) ("Remand Motion") ("Plaintiffs do not allege that Defendant has unlawfully retained their biometrics."); *Id.* Dkt. No. 103 at 5 ("Remand Reply") (Plaintiffs "allegations under Section 15(a) say nothing about unlawful retention."). And the Northern District of Illinois accepted that argument in remanding Plaintiffs' § 15(a) claim to this Court for lack of standing. *See Kislov v. Am. Airlines, Inc.*, 2021 WL 4711741, at *4 (N.D. Ill. Oct. 8, 2021) ("Plaintiffs here have not alleged that American failed to comply with any such [data retention and destruction] policies. Nor have Plaintiffs alleged that American unlawfully retained their biometrics.").

Instead, Plaintiffs purport to allege *only* a violation of § 15(a)'s first sentence—namely, that American "failed to make publicly availably any written policy addressing its biometric retention and destruction practices." 4AC ¶ 50. For this purported violation, Plaintiffs seek $5,000 in penalties for each member of a class of "thousands." *Id.* ¶¶ 40, Prayer for Relief.

ARGUMENT

American moves to dismiss under 735 ILCS 5/2–615, because Plaintiffs have failed to state a claim upon which relief can be granted. The "critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient" to state a claim. *Bonhomme v. St. James*, 970 N.E.2d 1, 10 (Ill. 2012). Here, they are not.

I. PLAINTIFFS HAVE NOT BEEN "AGGRIEVED" UNDER BIPA.

Plaintiffs do not assert that American violated § 15(a) as a whole; rather, they allege

American violated only § 15(a)'s first sentence, which requires those in possession of biometrics to "ma[k]e available to the public" a data-destruction policy with certain features. 740 ILCS 14/15(a). Plaintiffs' attempt to read § 15(a)'s first sentence in isolation, and cleave § 15(a) into two causes of action—one for the failure to post a policy and another for the failure to comply—fails. Section 15(a) creates a single cause of action that can be brought when a company fails to destroy biometric information pursuant to the policy that § 15(a)'s first sentence mandates. Until that point, a putative plaintiff has not been "aggrieved" by any alleged § 15(a) violation because their personal rights have not been violated.

A. BIPA's Text And Structure Require Rejecting Plaintiffs' Claim.

"The fundamental rule of statutory interpretation is to ascertain and give effect to the intent of the legislature." *Hendricks v. Bd. of Trs. of Police Pension Fund of City of Galesburg*, 38 N.E.3d 969, 974 (Ill. Ct. App. 2015). "That intent is best determined from the plain and ordinary meaning of the language used in the statute." *Rosenbach*, 129 N.E.3d at 1204. "In determining the plain meaning of statutory language, a court will consider the statute in its entirety, the subject the statute addresses, and the apparent intent of the legislature in enacting the statute." *Hendricks*, 38 N.E.3d at 974.

BIPA § 15 regulates the "[r]etention," "collection," "disclosure," and "destruction" of biometric identifiers and biometric information. 740 ILCS 14/15. Section 15(a) is BIPA's data-retention and destruction provision. It contains *two* interrelated sentences. Section 15(a)'s first sentence requires companies in possession of biometric data to "develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first." *Id.* § 14/15(a). Section 15(a)'s second

sentence requires a company to "comply with its established retention schedule and destruction guidelines." Together, § 15(a)'s two sentences require companies to adopt and comply with data-retention and destruction policies with certain features.

As the Illinois Supreme Court has explained, the Legislature did not intend everyone in the State of Illinois would be able to sue for an alleged violation of Section 15. It granted a cause of action only to individuals "aggrieved by a violation." 740 ILCS 14/20. In *Rosenbach*, the Illinois Supreme Court held that the Legislature intended the term "aggrieved" to have its "popularly understood," "settled legal meaning." 129 N.E.3d at 1205. Although a person need not suffer an actual injury, or sustain actual damages, a person is only "aggrieved" when their *personal* legal rights are invaded. *Id.* ("[A]ggrieved simply means having a substantial grievance; a denial of some personal or property right" (quotations omitted)). Put differently, an individual can state a claim under BIPA when their personal biometrics are "subject to the breach" of one of § 15's requirements. *Id.* at 1206.

Plaintiffs cannot state a standalone claim under § 15(a)'s first sentence because they do not have a personal right to a publicly-available data-destruction policy. That right is shared in common by everyone. *See, e.g.*, *Stauffer v. Innovative Heights Fairview Heights, LLC*, 480 F. Supp. 3d 888, 898 (S.D. Ill. 2020) (The first sentence of § 15(a) "does not outline an entity's duty to an *individual*; rather, this section outlines a duty to the *public* generally."); *Cothron v. White Castle Sys., Inc.*, 467 F. Supp. 3d 604, 612 (N.D. Ill. 2020) (similar). As the Seventh Circuit explained, "the duty to disclose under section 15(a) is owed to the public generally, not to particular persons whose biometric information the entity collects." *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 626 (7th Cir. 2020). Plaintiffs have repeatedly conceded this: "[a] defendant's publication duty under Section 15(a) is owed to the public generally, not to [particular] persons."

Remand Reply at 1; *see also* Remand Motion at 1-2 (duties "are owed to the public generally, rather than to any particular person, and are not part of BIPA's 'informed consent' regime"). Nor has Plaintiffs' biometrics been "subject to [a] breach." *Rosenbach*, 129 N.E.3d at 1206. American's alleged breach was merely the failure to make available a policy—Plaintiffs' personal biometric information is irrelevant to that alleged violation. Under *Rosenbach*, Plaintiffs are not "aggrieved."[1]

Rosenbach's discussion of § 15 further compels this result. *Rosenbach* explained that to assert a claim under BIPA, a plaintiff must show a "violation of *his or her* rights under the Act"—i.e., rights personal to the plaintiff, consistent with the definition of "aggrieved." 129 N.E.3d at 1207 (emphasis added). And *Rosenbach* explained what those rights under § 15 are: "individuals possess a right to privacy in and control over their biometric identifiers and biometric information," and the "duties imposed" by § 15 "regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right." *Id.* at 1206. But Plaintiffs' purported claims fall outside the contours of that statutory right. The duty at issue here does not concern collection, retention, disclosure, or destruction of biometric data. Rather, the alleged duty is to make information available to the public, and that duty is owed equally to everyone; in *Rosenbach*'s terminology, that is not a right that "individuals possess." *Id.* at 1206. Under *Rosenbach*, Plaintiffs cannot show that they are "aggrieved" because they cannot show "a violation of [their] rights under the Act." *Id.* at 1207.

This does not mean that individuals cannot assert a claim under § 15(a). Properly construed, an individual can sue under § 15(a) when an entity fails to destroy her biometric

[1] Plaintiffs' § 15(b) and 15(d) claims pending in federal court do allege Plaintiffs were aggrieved because they claim American collected and disclosed Plaintiffs' own biometrics without complying with BIPA.

information pursuant to a policy compliant with § 15(a)'s first sentence. That individual would be "aggrieved" because § 15(a) creates a personal right to have data destroyed pursuant to a valid policy. If an individual's biometrics were retained past the point they should have been deleted, that individual's biometrics would have been "subject to [a] breach." *Rosenbach*, 129 N.E.3d at 1206. But § 15(a) does not give rise to *two* claims as Plaintiffs assert—one for failure to publish and another for the failure to comply. The statute, as construed in *Rosenbach*, precludes that result.

Plaintiffs' theory also conflicts with settled principles of statutory construction. It is a "fundamental principle that statues must be read as a whole and not as isolated provisions." *In re Jarquan B.*, 102 N.E.3d 182, 187 (Ill. 2017). Yet that is exactly what Plaintiffs ask this Court to do—divorce § 15(a)'s first sentence from its second, and ignore that second sentence when interpreting the first. Courts "do not read individual sentences of statutes in isolation." *People v. O'Laughlin*, 979 N.E.2d 1023, 1028-29 (Ill. Ct. App. 2012). Section 15(a)'s two sentences are not independent of one another; they are interrelated on their face. The first sentence requires entities to adopt and publish a data-destruction policy, and the second sentence requires entities to comply with that policy. Read together and in context, § 15(a) creates one cause of action that does not ripen until a company unlawfully retains biometric information that it should have destroyed pursuant to the policy that § 15(a)'s first sentence requires.

B. Plaintiffs' Interpretation Is Inconsistent With BIPA's Purpose.

The Legislature's express purpose in enacting BIPA was to "regulat[e] the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). That purpose is reflected in the title of § 15, BIPA's core substantive provision. *Id.* § 15 ("Retention; collection; disclosure; destruction."); *see also, e.g.*, *Brunton v. Kruger*, 32 N.E.3d 567, 575 (Ill. 2015) (statute's title "can provide guidance in resolving statutory ambiguity[ies]"). Thus, in *Rosenbach*, the Supreme Court explained that the

requirements imposed by § 15 concern "the collection, retention, disclosure, and destruction of biometric identifiers and biometric information." 129 N.E.3d at 1203; *see id.* at 1200. Plaintiffs' claim under the first sentence of § 15(a) does not fit with *Rosenbach*'s description of the statute, the section's title (or text, *supra* at 5-8), or the Legislature's express purposes: a standalone cause of action for failing to publicly disclose a policy does not "regulat[e] the collection, use, safeguarding, handling, storage, retention, [or] destruction of biometric[s]." 740 ILCS 14/5(g). By contrast, reading § 15(a) as a cohesive whole is consistent with *Rosenbach* and the Legislature's intent: by requiring companies to destroy biometric data pursuant to a valid policy, § 15(a) regulates data retention and destruction.

Plaintiffs' interpretation would also create anomalous results. For example, it would have subjected anyone in possession of biometric data to immediate and strict liability when BIPA was first enacted. BIPA took "effect upon becoming law," 740 ILCS 14/99, and § 15(a) applies to any "entity *in possession* of biometric identifiers or biometric information," 740 ILCS 14/15(a) (emphasis added). Thus, under Plaintiffs' interpretation, a company "in possession" of biometric data that had not yet posted a policy when BIPA was enacted would have been liable without any chance to bring their conduct into compliance. That is absurd and likely unconstitutional. *See, e.g.*, *Adams v. N. Ill. Gas Co.*, 809 N.E.2d 1248, 1268 (Ill. 2004) ("[A] court must presume that the legislature, in enacting a statute, did not intend absurdity or injustice."); *People v. Orth*, 530 N.E.2d 210, 213 (Ill. 1988) ("[A] statute ... where possible will be interpreted so as to avoid an unconstitutional construction."). That is avoided if § 15(a) is correctly read as a cohesive whole.[2]

[2] No Illinois court has considered whether a plaintiff can state a claim under § 15(a)'s first sentence or has standing in Illinois for such a claim, although federal courts have held such plaintiffs lack standing in federal court, *infra* at 11-12. If such a claim exists, Illinois law suggests it would not ripen until that individual's

Plaintiffs' interpretation would also create limitless liability simply for not posting publicly a data-destruction policy. Because "the duty to disclose under section 15(a) is owed to the public generally," *Bryant*, 958 F.3d at 626, any member of the public—or all of them—could sue under § 15(a)'s first sentence on Plaintiffs' theory. Nothing in § 15(a)'s text would limit the cause of action to individuals whose data was collected, because § 15(a)'s first sentence is indifferent to data collection—it simply states that a company in possession of biometric data must "ma[k]e" a policy "available to the public." 740 ILCS 14/15(a). Thus, on Plaintiffs' reading, a customer could sue for a company's failure to publicly post a policy governing employee data. Or vice-versa. There is no indication that the Legislature intended such outrageous—and likely unconstitutional—results. *See Adams*, 809 N.E.2d at 1268.

Nor will interpreting § 15(a) as a whole frustrate any of the Legislature's goals in enacting that provision. Section 15(a)'s requirement that companies post data-destruction policies means the public will have access to such policies before deciding whether to consent to the collection of their information. But § 15(b)—"the heart of BIPA," *Bryant*, 958 F.3d at 626—already ensures that members have everything they need to give (or decline) informed consent. Section 15(b) requires private entities to provide written notice to anyone whose information may be collected. 740 ILCS 14/15(b)(2). Whereas § 15(a)'s first sentence does not ensure that individuals know what the policy is or consent to the collection of their information, § 15(b) requires companies to provide *direct* notice to individuals that their biometric data is being collected and secure a written release, and subjects companies to penalties for non-compliance. *Id.* §§ 15(b)(2)-(3). Thus,

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information should have been deleted, largely consistent with American's interpretation. *See Watson v. Legacy Healthcare Fin. Servs., LLC*, 2021 WL 5917935, at *6 (Ill. Ct. App. Dec. 15, 2021). This would mean that the customer plaintiffs' claims are not ripe and should be dismissed.

reading § 15(a) as a whole will not impair in any way the Legislature's goals. But reading § 15(a)'s sentences in isolation will create results the Legislature could not have intended.

II. PLAINTIFFS LACK STANDING.

Standing requires "some injury in fact to a legally cognizable interest," that must be "(1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Greer v. Illinois Hous. Dev. Auth.*, 524 N.E.2d 561, 492-93, 574-75 (Ill. 1988). The Illinois Supreme Court has long held these fundamental principles of standing preclude a plaintiff from bringing suit based on a "generalized grievance common to all members of the public." *Id.* at 494; *see Garner v. Du Page Cnty.*, 133 N.E.2d 303, 304 (Ill. 1956) (taxpayer challenging zoning ordinance "has the burden of proving that he has suffered a special damage by reason of such use which differs from that suffered by the general public"); *see also Clark Oil & Ref. Corp. v. City of Evanston*, 177 N.E.2d 191, 192 (Ill. 1961) (plaintiff challenging ordinance must show "some direct injury as the result of its enforcement") (collecting cases). Where conduct implicates a right owed to the public generally, "a prospective party cannot gain standing merely through a self-proclaimed concern about an issue." *Landmarks Pres. Council of Illinois v. City of Chicago*, 531 N.E.2d 9, 13 (Ill. 1988); *see also, e.g., Glisson v. City of Marion*, 720 N.E.2d 1034, 1036 (Ill. 1999). A claim that the law "has not been followed"—as Plaintiffs bring here—is "precisely the kind of undifferentiated, generalized grievance" insufficient for standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

Plaintiffs have repeatedly argued that they are bringing a generalized grievance. They even successfully convinced a federal court to remand their § 15(a) claims for lack of standing for this reason. In Plaintiffs' own words, their claims in this lawsuit allege only that American breached a duty "owed to the public generally, rather [than] to any particular person." Remand Motion at 1; *see also* Remand Reply at 1. As such, "the failure to make available a written retention and

destruction policy was a harm to the public, not a harm particular to [Plaintiffs]." *Cothron*, 467 F. Supp. 3d at 612. That is the very definition of a generalized grievance. *See Greer*, 524 N.E.2d at 494 (generalized grievance asserts an injury "common to all members of the public"). Accordingly, Plaintiffs lack standing to proceed.

III. THE CUSTOMER PLAINTIFFS' CLAIMS ARE PREEMPTED BY THE ADA.

Congress enacted the ADA because it concluded that "maximum reliance on competitive market forces" would best promote efficient and affordable national transportation services. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (quotations omitted). "To ensure that the States would not undo federal deregulation with regulation of their own," *id.*, Congress included in the ADA an express preemption provision that preempts any state law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The Supreme Court has always emphasized this provision's "broad scope" and "expansive sweep." *Morales*, 504 U.S. at 384; *see also Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428-30 (2014); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 238-39 (1995); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370-71 (2008).[3] A state law "relates to" services if it has a significant impact on them, even if that impact is indirect. *Morales*, 504 U.S. at 386, 388-90. An airline's provision of customer service is a covered "service" under the ADA. *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 94 (1st Cir. 2013); *Weber v. USAirways, Inc.*, 11 F. App'x 56, 58 (4th Cir. 2001); *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1343 (11th Cir. 2005).

The Supreme Court has also held the Act preempts generally applicable laws (like BIPA)—

[3] *Rowe* involved the Federal Aviation Administration Authorization Act, but courts apply "the shared language of the two statutes identically." *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1051 (7th Cir. 2016).

not just laws targeted specifically toward airlines—when applying those laws to airlines would impermissibly impact their services. In *Morales*, the Supreme Court expressly rejected the argument that "the ADA imposes no constraints on laws of general applicability," explaining that such a rule would "creat[e] an utterly irrational loophole," and would "ignore[] the sweep of the 'relating to' language." 504 U.S. at 386. The Supreme Court also held in *Wolens* that a claim under Illinois's Consumer Fraud and Abuse Act was preempted to the extent it related to an airlines' services, "highlight[ing] the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation." 513 U.S. at 226-28. And in *Ginsberg*, the Court found a common-law claim that sought reinstatement of a single passenger into a carrier's frequent flier program preempted under the Act. 134 S. Ct. at 1430-31.

As these cases demonstrate, "[l]aws that affect the way a carrier interacts with its customers fall squarely within the scope of [ADA] preemption." *Costello*, 810 F.3d at 1054. Courts consistently hold state privacy claims that would in effect regulate how airlines interact with customers are preempted by the ADA. *See, e.g.*, *Pena v. British Airways, PLC (UK)*, 2020 WL 3989055, at *5 (E.D.N.Y. Mar. 30, 2020); *McGarry v. Delta Airlines, Inc.*, 2019 WL 2558199, at *2 (C.D. Cal. June 18, 2019); *Pica v. Delta Air Lines, Inc.*, 2019 WL 1598761, at *9 (C.D. Cal. Feb. 14, 2019); *In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 315 (E.D.N.Y. 2005) ("*Jetblue*"); *In re Am. Airlines, Inc., Privacy Litig.*, 370 F. Supp. 2d 552, 555, 563 (N.D. Tex. 2005) ("*American*"); *Copeland v. Nw. Airlines Corp.*, 2005 WL 2365255, at *1 (W.D. Tenn. Feb. 28, 2005); *In re Nw. Airlines Privacy Litig.*, 2004 WL 1278459, at *3 (D. Minn. June 6, 2004); *People ex rel. Harris v. Delta Air Lines, Inc.*, 247 Cal. App. 4th 884, 901 (2016).

That is because "an attempt to regulate the representations and commitments that [an airline] makes in connection with reservations and ticket sales directly affect the airline's provision

of those services." *Jetblue*, 379 F. Supp. 2d at 316. After all, "Congress surely intended to immunize airlines from a host of potentially-varying state laws and state-law causes of action that could effectively dictate how they manage personal information collected from customers to facilitate the ticketing and reservation functions that are integral to the operation of a commercial airline." *American*, 370 F.3d at 564.

In the directly on-point case of *Harris*, the California Attorney General asserted that Delta violated of California's Online Privacy Protection Act (OPPA) because it did not post a privacy policy on its FlyDelta mobile application. 247 Cal. App. 4th at 888-92. The Attorney General argued the law was not preempted because "the OPPA [wa]s merely a 'disclosure regime,' in that '*other than some baseline requirements*,' ... any policy will do." *Id.* at 902. The California Court of Appeals had no difficulty rejecting the argument. "The law ... requires operators of online services to draft a privacy policy describing their collection of certain categories of 'personally identifiable information,' and to provide for a reasonably accessible means of making the privacy policy available for consumers of the online service." *Id.* at 903 (quotations omitted). Thus, "similar to the NAAG guidelines in *Morales* and the Illinois Consumer Fraud Act in *Wolens*; the OPPA 'is prescriptive; it controls the primary conduct of those falling within its governance,'" "serves as a means to guide and police the marketing practices of the airline," and would "not simply give effect to bargains offered by the airlines and accepted by airline customers." *Id.* at 903 (quoting *Wolens*, 513 U.S. at 227-28 (alterations omitted)). The Attorney General's claim, the court held, would have a significant impact on Delta's ability to market flights and give rise to the patchwork of state-law requirements the ADA was enacted to prevent. *Id.*

The same is true here. Plaintiffs' claim is "an attempt to regulate the representations and commitments that [American] makes in connection with reservations and ticket sales" and thus

"directly affects the airline's provision of those services." *Jetblue*, 379 F. Supp. 2d at 316. As in *Harris*, Plaintiffs' claim would require American to create and publish a privacy policy under which it made specific (mandatory) promises to its customers. *See* 740 ILCS 14/15(a). Plaintiffs' claim clearly "serve[s] as a means to guide and police [American]'s marketing practices," "does not simply give effect to bargains offered by the airline," *Harris*, 247 Cal. App. 4th at 409-10 (quotations omitted), and would require American create a privacy policy "that the market does not now provide (and which the carrier[] would prefer not to offer)," *Rowe*, 552 U.S. at 372.

Indeed, the inescapable conclusion from the full text of § 15(a) is that American would be required to *comply* with that policy as well, *see* 740 ILCS 14/15(a) (company "must comply with its established ... guidelines"), deleting its customer's information not when "competitive market forces" dictate, *Morales*, 504 U.S. at 378 (quotations omitted), but when the State of Illinois says so. That regime is unquestionably preempted, as all of the cases discussed above illustrate: states cannot regulate the manner in which airlines' manage their customers' information in connection with customer services. *Supra* at 13. To hold otherwise would not only allow states to interfere impermissibly with the airline-customer relationship but it would allow *every* state and locality to do so, subjecting airlines to the very patchwork of varying state laws that Congress meant to preempt. *See Rowe*, 552 U.S. at 373 ("[S]tate regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federal unregulated, to the competitive marketplace."); *Harris*, 247 Cal. App. 4th at 903 ("If each State were to require Delta to comply with its own version of the [privacy law], it would force Delta to design different mobile applications to meet the requirements of each state.").

CONCLUSION

For these reasons, Plaintiffs fail to state a claim and their complaint should be dismissed.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ALEX KISLOV, NIKO HEARN and MARLENI CURIEL FREGOSO, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., a Delaware corporation,

Defendant.

No. 17 CH 15328

Honorable Neil H. Cohen

NOTICE OF MOTION

To: See below Certificate of Service

PLEASE TAKE NOTICE that on **Friday, April 8, 2022 at 9:30 a.m. – during the previously scheduled status hearing**, the undersigned counsel shall appear remotely via Zoom (Meeting ID Number: 940 2402 4757 / Password: 739301) before the Honorable Judge Neil H. Cohen, Circuit Court of Cook County, Illinois, Room 2308, Daley Center, 50 West Washington Street, Chicago, Illinois 60602, and shall then and there present Defendant's Motion to Dismiss and Memorandum in Support.

Dated: March 18, 2022

AMERICAN AIRLINES, INC.

By: */s/Lavanga V. Wijekoon*
Lavanga V. Wijekoon
One of the Attorneys for Defendant

Mark W. Robertson – Attorney Id. 99675
Charles J. Mahoney – Attorney Id. 99677
O'Melveny & Myers LLP
7 Times Square
New York, NY 1006
212.326.2111
mrobertson@omm.com
cmahoney@omm.com

Paul E. Bateman
Lavanga V. Wijekoon
LITTLER MENDELSON, P.C.
321 North Clark Street, Suite 1100
Chicago, IL 60654
312.372.5520
pbateman@littler.com
lwijekoon@littler.com
Firm Id. 34950

CERTIFICATE OF SERVICE

Lavanga V. Wijekoon hereby certifies that on March 18, 2022 a copy of the foregoing was electronically filed with the Clerk of the Court, and served via email upon the counsel listed below:

Evan M. Meyers – emeyers@mcgpc.com
Timothy P. Kingsbury – tkingsbury@mcgpc.com
Steven R. Beckham – sbeckham@mcgpc.com

/s/Lavanga V. Wijekoon
Lavanga V. Wijekoon