No. 16-11062

In the United States Court of Appeals for the Fifth Circuit

CONSERVATION FORCE; DALLAS SAFARI CLUB; HOUSTON SAFARI CLUB; COREY KNOWLTON; CAMPFIRE ASSOCIATION; AND TANZANIA HUNTING OPERATORS,

Plaintiffs–Appellants,

v.

DELTA AIR LINES, INCORPORATED,

Defendant–Appellee.

On Appeal from the United States District Court
for the Northern District of Texas
No. 3:15-cv-3348

BRIEF FOR APPELLEE DELTA AIR LINES, INC.

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CERTIFICATE OF INTERESTED PERSONS
No. 16-11062

CONSERVATION FORCE; DALLAS SAFARI CLUB; HOUSTON SAFARI CLUB; COREY KNOWLTON; CAMPFIRE ASSOCIATION; AND TANZANIA HUNTING OPERATORS,

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The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendant–Appellee	**Counsel for Defendant–Appellee**
1. Defendant–Appellee, Delta Air Lines, Inc. Delta is a publicly traded company. There are no other persons, associations, or other entities associated with Delta who have a financial interest in the outcome of this case under Fed. R. App. P. 26.1(a).	Russell H. Falconer Christine Demana Cynthia Schmidt GIBSON, DUNN & CRUTCHER LLP 2100 McKinney Avenue Suite 1100 Dallas, TX 75201

Plaintiffs–Appellants	Counsel for Plaintiffs–Appellants
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Respectfully submitted,

/s/ *Russell H. Falconer*
Russell H. Falconer,
Attorney of Record for Delta Air Lines, Inc.

STATEMENT REGARDING ORAL ARGUMENT

The Court should affirm the decision below without holding argument. All of Plaintiffs' claims are foreclosed as a matter of law. The district court issued a thorough, well-reasoned memorandum opinion that provides a clear roadmap to decision for this Court. The record is very small, and the legal issues are straightforward. Oral argument is thus unnecessary. Nonetheless, Delta will be pleased to participate if the Court holds oral argument.

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INTRODUCTION

When Delta decided to stop accepting Big Five hunting trophies as cargo, it did exactly what Congress hoped airlines would do in a deregulated marketplace. Congress deregulated the airline business in 1978 with the intention that "competitive market forces" and "actual and potential competition" would "decide on the variety" of available "air transportation services." 49 U.S.C. § 40101(a).

In the summer of 2015, Delta made the business judgment that it would no longer accept for shipment as cargo any lions, leopards, elephants, rhinoceroses, or buffalo that had been hunted, killed, and taken as trophies. For a variety of reasons, Delta concluded that this change to the scope of its cargo services would enhance its competitive position in the marketplace.

Delta stands by its decision, but for purposes of this appeal, the wisdom of Delta's decision is beside the point. Congress enacted the Airline Deregulation Act of 1978 because it determined that market demand—not government stricture—should drive an airline's decisions about what kinds of transportation services it will offer for sale.

Congress took several steps to guard against the risk that regulation and litigation would take the place of competition in driving airlines' decisions about which services to provide. To prevent an expansion of the common law's regulatory reach, Congress instructed that a common-law claim would not be viable unless it had been clearly recognized before

1978. To prevent civil-suit plaintiffs from second-guessing the airlines, Congress declined to create a private right of action under the Federal Aviation Act. And to prevent the states from re-regulating the airlines, Congress enacted a preemption provision that bars state-law tort claims. To be sure: Congress did not abolish all regulatory oversight of the airlines. Various federal agencies exercise authority over safety, security, and consumer protection. But when it comes to an airline's decisions how about how to run its business, Congress's overriding concern was that "governmental commands" should not take the place of "competitive market forces" in determining what services an airline will provide. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 372 (2008) (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)).

As the district court recognized, Plaintiffs' claims in this case are incompatible with this carefully calibrated statutory scheme. Through each of their claims—one under federal common law, one under the Federal Aviation Act, and one under Texas tort law—Plaintiffs seek to second guess Delta's decision to narrow the scope of its cargo services. But as Chief Judge Lynn explained, even if "Delta's ban negatively affects [Plaintiffs], that impact does not mean Delta's decision is unlawful or actionable."[1] The district court was correct to dismiss Plaintiffs' claims with prejudice, and this Court should affirm.

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[1] ROA.261.

JURISDICTIONAL STATEMENT

The District Court had original jurisdiction under 28 U.S.C. §§ 1331, 1332, & 1367. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. The federal common law permits a common carrier to ban the shipment of specific items as cargo so long as that ban applies to all shippers. Delta has banned the shipment of so-called "Big Five" hunting trophies as cargo, and the ban applies to all shippers. Is Delta's Big Five trophy ban permissible under the federal common law?

2. A plaintiff has a private right of action under a federal statute only if Congress intended to create that right. This Court has never held that there is a private right of action under 49 U.S.C. § 41310(a), and the text and structure of the statute manifest no intention to create one. Do Plaintiffs have the right to bring suit under section 41310(a)?

3. The Airline Deregulation Act of 1978 ("ADA") preempts any state-law tort claim that is related to an airline's services. Plaintiffs' claim for tortious interference arises under Texas law and challenges both Delta's Big Five trophy ban (an aspect of Delta's cargo services) and Delta's public statement announcing that ban (an essential component of the ban itself). Does the ADA preempt Plaintiffs' tortious-interference claim?

4. The Due Process Clause does not guarantee a remedy for non-existent rights. It does not prohibit Congress from enacting statutes that modify the common law or preempt state law, and it does not require Congress to create a private right of action. Do any of Plaintiffs Due Process challenges have merit?

STATEMENT OF THE CASE

This appeal arises out of Plaintiffs' desire to compel Delta to carry Big Five hunting trophies as cargo. "Big Five" is a term coined in the nineteenth century that refers to the five species of African wild game that are reputed to be the most difficult and dangerous to hunt on foot: elephants, lions, leopards, rhinoceroses, and buffalo.[2]

Delta is an international air carrier that provides commercial air transportation of passengers and cargo to more than 900 destinations throughout the United States and the world.[3] In August 2015, Delta publicly announced its business decision to stop accepting for shipment as cargo hunting trophies from any Big Five species:

Effective immediately, Delta will officially ban shipment of all

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[2] South African tourism has an entire webpage devoted to the Big Five (available here), and the World Wildlife Federation has a similar post titled, "Ten Wild Facts about the 'Big Five.'" Marsea Nelson, *Ten Wild Facts About the "Big Five,"* WORLD WILDLIFE FUND TRAVEL BLOG (May 16, 2010), *available* here; *see also, e.g.*, WIKIPEDIA, "Big Five Game," *available* here (all sites last accessed Oct. 19, 2016).

[3] ROA.15 ¶ 19.

> lion, leopard, elephant, rhinoceros and buffalo trophies worldwide as freight. Prior to this ban, Delta's strict acceptance policy called for absolute compliance with all government regulations regarding protected species. Delta will also review acceptance policies of other hunting trophies with appropriate government agencies and other organizations supporting legal shipments.[4]

A few months later, Plaintiffs filed this lawsuit. Plaintiffs are one individual hunter, three organizations whose members are hunters, one organization whose members are Tanzanian tour operators, and one organization whose membership is less clear but purports to represent the interests of communities in Zimbabwe.[5]

With this lawsuit, Plaintiffs sought money damages and an injunction requiring Delta to repeal its cargo ban on Big Five trophies.[6] As relevant to this appeal, Plaintiffs' complaint alleged three claims—specifically, that Delta's decision to stop carrying Big Five trophies: (1) was a form of unreasonable discrimination in violation of the federal common law; (2) violated 49 U.S.C. § 41310(a), a statutory prohibition on unrea-

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4 ROA.21 ¶ 41.

5 ROA.11–15 ¶¶ 13–18.

6 ROA.31–32.

sonable discrimination; and (3) tortiously interfered with Plaintiffs' prospective business relations.[7]

Delta moved to dismiss the complaint.[8] In response, Plaintiffs did not file a motion for leave to amend their complaint; they chose to stand on the allegations in their original complaint.[9]

The district court granted Delta's motion and dismissed all of Plaintiffs' claims. The district court concluded that: (1) the federal common law leaves Delta "free to hold itself out as a carrier of some, but not all, hunting trophies;"[10] (2) Plaintiffs have no private right of action under 49 U.S.C. § 41310(a);[11] and (3) the ADA preempts Plaintiffs' tortious interference claim.[12]

The district court then entered final judgment in favor of Delta, dismissing Plaintiffs' complaint with prejudice.[13] Plaintiffs did not file a motion for reconsideration or a motion for leave to amend. Instead, they

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7 ROA.28–31. The complaint also alleged that Delta had violated federal statutes requiring Delta to hold an operating certificate and a certificate of public convenience and necessity. The district court dismissed both of these claims with prejudice, ROA.273–74, and Plaintiffs do not challenge those dismissals on appeal.

8 ROA.53–54.

9 ROA.183–84.

10 ROA.258–62.

11 ROA.267–73.

12 ROA.262–67.

13 ROA.276.

timely filed a notice of appeal.[14]

SUMMARY OF THE ARGUMENT

All three of Plaintiffs' claims fail as a matter of law. The district court was correct to dismiss them with prejudice.

I. Plaintiffs' common-law claim fails because the common law gives common carriers such as Delta the right to determine what kinds of cargo they will and won't carry. Plaintiffs are wrong to contend that Delta's Big Five trophy ban is an impermissibly narrow cargo exclusion. Never mind that Plaintiffs' complaint fails the test they propose in their brief. Put aside the fact that the rule Plaintiffs propose is completely unworkable. Nothing in the case law even remotely supports their position. From language in a few cases saying common carriers can exclude "classes," "kinds," or "types" of cargo, Plaintiffs would have this Court extrapolate an implied distinction between classes, kinds, or types of goods and specific items of cargo. Not one of the cases Plaintiffs cite even articulates that distinction, let alone applies it to hold that a carrier's cargo exclusion is impermissibly narrow.

Plaintiffs' contention that Delta's ban on the shipment of Big Five trophies discriminates among people, not cargo, also reflects a basic misunderstanding of a common carrier's common-law duties. The common law requires a common carrier to treat all shippers alike. It does not require the carrier to accept every type of cargo a shipper might tender

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[14] ROA.277–78.

for shipment. A carrier does not discriminate among shippers by refusing to carry a particular type of cargo.

II. Plaintiffs' statutory claim fails because Congress did not create a private right of action under 49 U.S.C. § 41310(a). The cases do not bear out Plaintiffs' claim that binding Fifth Circuit precedent has implied a private right of action under the statute. Plaintiffs do not have a private right of action under section 41310(a) unless they can satisfy the stringent standard laid out in the Supreme Court's seminal decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). This they cannot do (indeed, Plaintiffs' brief avoids any substantive discussion of *Sandoval*). *Sandoval* asks whether the statute in question creates an individual right and whether it reflects an intent to create a private remedy. Section 41310(a) fails both of those tests—badly.

III. Plaintiffs' tortious interference claim fails because it is preempted. The Airline Deregulation Act of 1978 preempts any state-law tort claim that challenges Delta's services or conduct related to Delta's services. Carriage of cargo is one of Delta's services, so Plaintiffs' challenge to Delta's refusal to carry Big Five trophies as cargo is preempted. Plaintiffs' claim is also preempted to the extent that it challenges Delta's public statement announcing its Big Five trophy ban, as the statement was an indispensable component of the ban.

Nor can Plaintiffs assign error to their own decision not to file an amended complaint on their tortious interference claim. By failing to

seek leave to amend, Plaintiffs waived their right to argue on appeal that they should have been allowed to do so. In any event, amendment would have been futile.

IV. Plaintiffs' various Due Process challenges to the district court's dismissal of their complaint are waived and frivolous.

STANDARD OF REVIEW

This Court reviews the district court's grant of a Rule 12(b)(6) motion *de novo*, accepting as true any well-pleaded facts in Plaintiffs' complaint. *E.g.*, *Shakeri v. ADT Sec. Servs., Inc.*, 816 F.3d 283, 290 (5th Cir. 2016). Dismissal is warranted if the complaint fails to plead a claim for relief that is factually plausible and legally viable. *E.g.*, *Raj v. La. State Univ.*, 714 F.3d 322, 330 (5th Cir. 2013).

ARGUMENT

I. Plaintiffs' common-law discrimination claim fails because the common law gives Delta the right to adopt and enforce specific cargo exclusions.

Plaintiffs repeatedly concede that "[a] common carrier need not carry every type of cargo."[15] By making this concession, Plaintiffs have given away the game. Their common-law claim is nothing more than a challenge to Delta's decision to stop carrying a specific type of cargo.

Like every common carrier, Delta has the legal right to determine

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[15] Blue Br. at 17; *see also id.* at 13 (same); *id.* at 7 ("a carrier may choose the classes or kinds of goods it carries"); *id.* at 12 (a carrier "may define its market"); *id.* at 17 ("a common carrier may choose whether to carry a class of cargo" (emphasis omitted)); *id.* at 13–14 (collecting cases in support of this proposition).

what kinds of cargo it will and won't carry. Common carriers routinely refuse to carry certain classes, types, or items of cargo. These policies are a standard, permissible exercise of the carriers' business judgment. While the common law does impose a duty on common carriers to treat all shippers equally, that duty does not obligate a carrier to carry every item of cargo a customer might wish to ship. So long as Delta applies its cargo exclusions equally to all shippers, it may define those exclusions as narrowly as it chooses.

Plaintiffs cannot state a viable claim unless they can show that they are entitled to relief under a common-law cause of action that was clearly established as of 1978. While the regulation of common carriers once was the exclusive domain of the common law, today the field has been almost entirely occupied by various federal statutes. In 1978, Congress amended the Federal Aviation Act of 1958—the primary statute regulating foreign and interstate air transportation—by enacting the ADA. The ADA's primary purpose was to "end federal economic regulation of commercial aviation." *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 805 (5th Cir. 2000). Nonetheless, the Act included a provision that saved all "remedies *now* existing at common law," *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928 (5th Cir. 1997) (emphasis added) (quoting 49 U.S.C.

§ 1506)).[16] This savings clause preserves the small, discrete set of federal common-law causes of action that had been "clearly established" by 1978. *See Sam L. Majors Jewelers*, 117 F.3d at 928.[17]

If a cause of action had not been established by 1978, the federal courts may not establish it now, since doing so would be inconsistent with Congress's decision not to create a private right of action under the various federal statutes that regulate air carriers. *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1249–52 (6th Cir. 1996). Under this standard, Plaintiffs cannot prevail on either of their challenges to Delta's Big Five trophy ban.

A. The common law imposes no duty on common carriers to carry every item within a class or type of cargo.

Plaintiffs cannot use the common law to force Delta to carry cargo that Delta does not wish to carry and has notified the public it will no longer carry. A common carrier's "obligation to carry is coextensive with and limited by its public profession as to the kinds of goods it is carrying." 13 AM. JUR. 2D *Carriers* § 289 (2016). The case law refers to this public profession as a "holding out." *E.g.*, *Woolsey v. N.T.S.B.*, 993 F.2d 516, 522 (5th Cir. 1993). "This 'holding out'" principle was "one of the earmarks of

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[16] In 1994, 49 U.S.C. § 1506—the ADA's original savings clause—"was re-enacted without substantive change as 49 U.S.C. § 40120(c)." *Sam L. Majors Jewelers*, 117 F.3d at 928 n.13.

[17] By contrast, most causes of action under *state* common law are *not* saved because the ADA contains a broad-sweeping preemption provision that preempts any state law—including business-tort claims—that seeks to challenge an airline's prices, routes, or services. *See infra* section III.

common carriers at common law." *Akron, Canton & Youngstown R.R. Co. v. I.C.C.,* 611 F.2d 1162, 1168 (6th Cir. 1979). It imposes a duty on a common carrier to "accept and transport all commodities that are tendered to it for carriage which it holds itself out to the world as engaged in carrying." *Harp v. Choctaw, Okla. & Gulf R.R. Co.*, 125 F. 445, 449 (8th Cir. 1903). And it gives a common carrier the corresponding right to limit the scope of its duty to carry by limiting the terms on which it holds itself out to the public. *See id.* at 449–50 (a common carrier "is not bound by the rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting.").

This "holding out" principle allows a common carrier to carve out specific exclusions from its offer to carry cargo. For at least 150 years, the common law has recognized that a common carrier is not "obliged to accept every package;" rather, the decision about what cargo to accept "is a business decision" that the carrier is "entitled to" make. *Treiber & Straub, Inc. v. United Parcel Serv., Inc.*, 474 F.3d 379, 386 (7th Cir. 2007). "[B]y the principles of the common law and common sense, it must be the company" that determines "what [it] will transport." *Harp v. Choctaw, Okla. & Gulf Ry. Co.*, 118 F. 169, 174 (C.C.W.D. Ark. 1902), *aff'd*, 125 F. 445 (8th Cir. 1903).

The authorities stating this rule are legion,[18] and examples of its application abound. For instance, a common carrier may refuse to carry:

- any cargo the actual value of which exceeds $50,000, *Treiber & Straub*, 474 F.3d at 386;
- "[m]oney, currency, bonds, bills of exchange, deeds, promissory notes, negotiable securities, or stock certificates," *Kan. State Bank & Tr. Co. v. Emery Air Freight Corp.*, 656 F. Supp. 200, 205

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[18] *York Co. v. Cent. R.R.*, 70 U.S. (3 Wall.) 107, 112 (1865) (A common carrier "may limit his services to the carriage of particular kinds of goods" and is only required to carry goods if they are "within the course of his employment."); *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 345 (D.C. Cir. 2013) ("[A]t common law carriers could pick and choose the goods which they would transport in common carriage . . . ." (quoting *Akron, Canton & Youngstown R.R.,* 611 F.2d at 1166)); *B.J. Alan Co. v. I.C.C.*, 897 F.2d 561, 563 (D.C. Cir. 1990) (Ginsburg, R.B., J.) ("[A] common carrier is free to carve out as large or as small a niche as it feels appropriate. An unlimited duty of carriage was never the rule." (internal citation omitted)); *Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 543 F.2d 247, 259 (D.C. Cir. 1976) (Common law gives common carriers the right to "delineate what they will carry."); *Nat'l Ass'n of Reg. Util. Comm'rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("[B]usiness may be turned away [] because it is not of the type normally accepted."); *Harp*, 125 F. at 449–50 ([A] common carrier "is entitled in the first instance to determine what class of commodities it will engage in carrying."); *Adkins v. Slater*, 298 S.E.2d 236, 240 (W. Va. 1982) ("[A] common carrier need not agree to carry all kinds of property[.] At common law a man might become a common carrier of just such kinds of property as he chose." (citation omitted)); *Ala. Great S. R.R. Co. v. Herring*, 174 So. 502, 503 (Ala. 1937) ("A common carrier may hold itself out to the public as being a carrier of certain sorts of goods only, and it is under no obligation to receive for carriage other articles."); *Kan. Pac. Ry. Co. v. Nichols, Kennedy & Co.*, 9 Kan. 235, 253 (1872) ("At common law [a] person . . . was a common carrier of just such articles as he chose to be, and no others."); *see also* 13 AM. JUR. 2D *Carriers* § 289 (a "common carrier of goods is not obliged to receive and transport all kinds of goods that may be offered for carriage" and "may refuse to receive and transport goods which are not of the kind it undertakes or is accustomed to carry"); SAUL SORKIN, 1 GOODS IN TRANSIT § 1.01[1][b] (Lexis updated through 2015) ("[A] regulated common carrier does not have an unlimited duty to carry goods.").

(D. Kan. 1987); or

- "common fireworks," *B.J. Alan*, 897 F.2d at 562.

As noted above, Plaintiffs do not deny that the common law gives common carriers the right to limit the types, classes, or kinds of cargo they will accept for shipment. Instead, they incorrectly contend that this right does not allow common carriers to draw "razor-thin distinctions" that "pinpoint the specific items" the carrier wishes to exclude."[19] There are at least four fatal flaws with this position.

First, Plaintiffs have not cited even a single case that articulates (much less applies) the rule that a common carrier cannot define its cargo exclusions too precisely. This failure defeats Plaintiffs' claim. The ADA's savings clause does not authorize the federal courts to break new ground by recognizing novel common-law causes of action. *See Sam L. Majors Jewelers*, 117 F.3d at 928; *Musson*, 89 F.3d at 1249–52.

Second, the case law affirmatively refutes Plaintiffs' theory. The common law always allowed a common carrier to define the scope of its cargo services with whatever level of precision the carrier deems appropriate. Cargo exclusions may be drawn as narrowly as the carrier wishes, all the way down to an individual article or item. For example, a common carrier may choose to carry:

- some kinds of food ("confectionary and spices") but not others

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[19] Blue Br. at 16 (first quote) & 7 (second quote); *see also id.* at 12 (carriers "may not use such laser-like precision" as "to pick and choose down to the item").

("bacon, lard, and molasses"), *State ex rel. Bd. of R.R. Comm'rs v. Rosenstein*, 252 N.W. 251, 254 (Iowa 1934) (quoting *Kan. Pac. Ry.*, 9 Kan. at 253);

- all goods except molasses, *Tunnel v. Pettijohn*, 2 Harr. 48, 48-49 (Del. Super. 1836);
- all livestock except dogs, *Honeyman v. Or. & C.R. Co.*, 13 Or. 352, 356 (Or. 1886); or
- all agricultural commodities except cotton seed, *Cent. of Ga. Ry. Co. v. Augusta Brokerage Co.*, 50 S.E. 473, 474–75 (Ga. 1905).[20]

It thus comes as no surprise that Plaintiffs are unable to cite any authority to support their claim that "while a carrier may hold itself out as a carrier of fabrics or silk, courts do not go as far as to allow it to specify silk from worms versus spiders, or Irish lace versus Battenberg lace."[21] The common law does not prohibit "discrimination between different commodities belonging to a general class of freight." *Cent. of Ga. Ry.*, 50 S.E. at 475). If a carrier wishes exclude a specific item of cargo from the cargo services it holds out to the public, the common law allows it to do

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[20] *Central of Georgia* addressed a common carrier's duties under a rule promulgated by the Georgia Railroad Commission, but the Commission's rule (which required carriers to "afford to all persons equal facilities in the transportation and delivery of freight," 50 S.E. at 473) was substantively very similar to the requirements of the common law, so its reasoning is persuasive here.

[21] Blue Br. at 15; *see also id.* at 12 (suggesting—without citation to authority—that a carrier may not carry "only green apples but not red").

so. *Ocean S. S. Co. of Savannah v. Savannah Locomotive Works & Supply Co.*, 63 S.E. 577, 580 (Ga. 1909) (a common carrier "may discontinue to carry any particular commodity it desires").[22]

Third, Plaintiffs propose a test that their own claim fails. Plaintiffs say common carriers should be able to exclude "classes or types of cargo."[23] Big Five trophies are a recognized class or type of hunting trophy.[24] Plaintiffs' complaint affirmatively pleads as much: "Delta has unlawfully refused to transport *a specific class* of legally acquired trophies."[25] The complaint even characterizes the Big Five as being an

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[22] Plaintiffs suggest in a footnote that there is a fact issue as to whether Delta has stopped holding itself out as willing to carry Big Five trophies, Blue Br. at 19 n.7, but elsewhere they concede that "Delta restricts its 'holding out,'" *id.* at 12–13. A "holding out" is a public indication of willingness to carry that can be accomplished by conduct or by some kind of public statement or announcement. *Arrow Aviation, Inc. v. Moore*, 266 F.2d 488, 490 (8th Cir. 1959); *Harp*, 125 F. at 449–50; *Jackson v. Stancil*, 116 S.E.2d 817, 825 (N.C. 1960); *Rosenstein*, 252 N.W. at 253–54; *Schloss v. Wood*, 17 P. 910, 911–12 (Colo. 1888). As the district court correctly concluded, Delta's public announcement of its Big Five trophy ban unambiguously excluded Big Five trophies from the offer to provide cargo services that Delta holds out to the public. ROA.261–62. In any event, by raising this issue only in footnote, Plaintiffs have waived it. *See*, *e.g.*, *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 479 n.2 (5th Cir. 2016); *Justiss Oil Co. v. Kerr-McGee Ref. Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996).

[23] Blue Br. at 13 (emphasis omitted).

[24] For an explanation of the genesis of the term "Big Five," see *supra* note 2, references cited therein, and accompanying text.

[25] ROA.29 ¶ 64 (emphasis added); *see also* ROA.189 (Plaintiffs' response to the motion to dismiss) (contending that Delta "violates its duty of equal treatment by refusing to ship *one type* of trophy") (emphasis added).

especially "prized" type of trophy.[26] By Plaintiffs' own admission, then, Delta's decision to stop carrying elephant, lion, leopard, rhinoceros, and buffalo trophies is a permissible exclusion of a type or class of cargo.

Finally, the rule Plaintiffs propose is illogical, unwise, unnecessary, and unadministrable. Logically, a ban on a "class" or "type" of items is nothing more than a ban that uses shorthand to describe some number of individual items. Thus, under Plaintiffs' rule Delta's ban would pass muster if it used the phrase "all Big Five trophies" instead of listing the five included species.[27] This is pure semantics.

As a policy matter, Plaintiffs' test would create a strong incentive for carriers to enact overbroad bans on baggage or cargo. For example, if a carrier wanted to prohibit passengers from bringing dangerous animals into the cabin, the safest course would be to ban *all* animals.[28] To ban venomous snakes or honey badgers, a carrier also would have to ban pets, service dogs, and emotional support animals. Plaintiffs would have the common law incentivize airlines to carve out the widest possible cargo exclusions. This case is a perfect example: it appears that Delta would satisfy the standard Plaintiffs propose by extending its Big Five trophy

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26 ROA.8 ¶ 6; *see also* ROA.19 ¶ 31 ("the Big Five are the highest priced" animals to hunt in Southern and Eastern Africa); ROA.25 ¶ 54; ROA.29 ¶ 65 (similar).

27 *Compare* ROA.21 ¶ 41 (*supra* note 4 and accompanying text).

28 *See* Blue Br. at 16 (a "cape buffalo skin and horns is a trophy just like an antelope skin and horns").

ban to apply to *all* hunting trophies as a class. This cannot be the result Plaintiffs want (and for the record, they took exactly the opposite position before the district court[29]).

The rule Plaintiffs propose is also unnecessary. Plaintiffs predict a parade of horrible bans on specific items of cargo unless the Court adopts their rule.[30] But when a common carrier stops transporting a particular item of cargo, the common law has always counted on "the commercial necessities [to] regulate [any] deficiency in transportation service." *Ocean S. S.*, 63 S.E. at 579. The market—not the law—will step in to ensure that adequate cargo services are available to the public. And that is as it should be, especially since Congress has directed that "competitive market forces" and "actual and potential competition" should "decide on the variety" of available "air transportation services." 49 U.S.C. § 40101(a).

Most fundamentally, Plaintiffs' proposed rule is hopelessly unadministrable. It would create an insolvable line-drawing problem and leave no way for Delta and other common carriers to know whether their cargo policies comply with the law. No matter what type, class, or item of cargo a carrier excluded, disgruntled would-be shippers could always find a larger type or class into which their excluded items fit and claim

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29 ROA.188 n.10 ("Delta certainly cannot save its claims by just refusing to carry all trophies.").

30 *Id.* (hypothesizing bans on contraceptives and police bulletproof vests).

(as Plaintiffs do) that the carrier made too fine a distinction.

Consider an example. Could a carrier refuse to accept as cargo jerseys from any of the four football teams in the NFL's NFC East Division? Is that a permissible class-wide ban, or is that an impermissible ban on a subset of specific items from within a broader category?[31] What about jerseys from all 16 teams in the NFC? From all 32 teams in the NFL? From all American professional football leagues (AFL, IFL, etc.)? From all professional football teams worldwide (CFL, NFL Europe, etc.)? From all American football teams (college, high school, etc.)? From all professional sports? If a carrier excluded jerseys, would it have to exclude all sports memorabilia? What about other kinds of lifestyle and entertainment memorabilia?

The target would never stop moving under Plaintiffs' proposed rule. There is no line a carrier could draw that a plaintiff could not second-guess in litigation. "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). Plaintiffs' version of the common law fails this basic test. For that reason—and many others—the Court should reject it.

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[31] *See* Blue Br. at 17 ("[O]nce [a common carrier] holds itself out to carry that class, it cannot favor a sub-set" of the class.).

B. Delta treats all shippers equally by refusing to carry Big Five trophies for anyone.

Plaintiffs' second common-law theory fares even worse than their first. Plaintiffs contend that Delta's Big Five trophy ban discriminates against Big Five hunters as a class of shippers. This contention reflects a basic misunderstanding of a common carrier's duty of equal treatment.

The common law requires common carriers "to treat all shippers alike." *Mo. Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612, 620 (1909). A carrier may not refuse "to do for one [shipper] that which it was doing for others," *Mo. Pac.*, 211 U.S. at 619 (1909). What a carrier "does for one it must do for all under like circumstances." *Harp*, 118 F. at 175. Thus, if a common carrier holds itself out as willing to carry a particular type of cargo, the carrier cannot refuse to carry that type of cargo for one shipper while accepting it from others. *See Mo. Pac.*, 211 U.S. at 619 (A railroad "engaged in the business of transferring cars" between rail lines could not refuse to transfer cars on behalf of a mill company when "it continued to do so for all parties except the mill company.").[32] Similarly,

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[32] Plaintiffs speculate that the outcome of *Missouri Pacific* might have been different if the facts of *Missouri Pacific* had been different (specifically, if the railroad's ban on accepting cars from the mill company had been written as pretextual, hyper-specific ban on a type of cargo that only the mill company wanted to ship). *See* Blue Br. at 19–20. Even if Plaintiffs were correct on the law, the complaint does not (and could not) allege that Delta's Big Five trophy ban is a pretext intended to allow discrimination against a single shipper. But Plaintiffs are wrong on the law. The fact that a single shipper "may have been the only . . . [shipper] affected by [the carrier's] policy cannot alter the case. As a shipper, it was not discriminated against, though one of the commodities it handled was." *Cent. of Ga. Ry.*, 50 S.E. at 474–75.

if a common carrier holds itself out as willing to carry several different types of cargo, the carrier cannot give preferential treatment to some customers over others based on what kind of cargo they are shipping. *See, e.g.*, *Ocean S.S.*, 63 S.E. 578 (common carrier that held itself out as carrying both lumber and cotton could not refuse to carry cotton tendered by plaintiff).

But nothing in the common law requires a common carrier to carry every type of cargo. A common carrier's duty of equal treatment is conditional: "*if* a [common carrier] offers [a particular] service to the public," "it must make that service available to any person without discrimination." *Am. Trucking Ass'ns v. Atchison, Topeka & Sante Fe Ry. Co.*, 387 U.S. 397, 406 (1967) (emphasis added). But the carrier is under no obligation to offer the service in the first place. In other words, if the carrier provides the service to anyone, it must provide the service to everyone—but it is always free to provide the service to no one.

Delta's Big Five trophy ban complies with Delta's duty to treat all shippers alike. Delta does not carry Big Five trophies as cargo for any of its customers. The complaint affirmatively pleads this fact,[33] and Plaintiffs' brief concedes it.[34] Delta accepts Big Five trophies from no one (just as it accepts non-Big Five trophies from anyone). No shipper is treated

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[33] *See, e.g.*, ROA.8 ¶ 6 (Delta is "refusing to transport . . . trophies of the prized Big Five"); *see also* ROA.19–20 ¶ 32; ROA.21 ¶ 41; ROA.23 ¶ 49; ROA.27 ¶ 59.

[34] Blue Br. at 3.

differently than any other.

Plaintiffs' claim—a discrimination claim based on the notion that a carrier's categorical refusal to carry a particular type of cargo "targets" or "disfavors" the persons who wish to ship that cargo[35]—was unknown to the common law. If Plaintiffs were correct that a cargo ban's disproportionate impact on a handful of shippers were an actionable form of discrimination, the case law cited above allowing carriers to enforce specific cargo exclusions would be meaningless.[36] No cargo exclusion would ever be legal, because it could always be recast as a form of discrimination against the shippers who wanted to ship the excluded item. That is not the law. As the district court explained, "a common carrier may discriminate in *what* it chooses to carry" provided it does "not discriminate as to the *persons* for whom it carries."[37]

Plaintiffs take umbrage with what they believe to be the reasons behind Delta's ban,[38] but this disagreement does not give rise to a legally cognizable claim. If a common carrier no longer wants to ship a particular type of cargo, it "undoubtedly" has the right to stop shipping that type

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35 *Id.* at 19.

36 *See supra* note 18 and cases cited therein.

37 ROA.259 (emphasis added).

38 Blue Br. at 19.

of cargo, as long the change to its cargo policy applies "in behalf of shippers generally." *See Mo. Pac.*, 211 U.S. at 620. And the carrier can exercise that right for any reason it believes will advance its "business interests." *Cent. of Ga. Ry.*, 50 S.E. at 474.[39] "[T]o hold that" common carriers could not "curtail the class or kinds of articles they would carry" would be "to take from the carrier the conduct of its own business." *Harp*, 118 F. at 175. The common law rightfully does not do so.

II. Plaintiffs' statutory discrimination claim fails because Congress did not create a private right of action under 49 U.S.C. § 41310(a).

The district court was correct to conclude that "Congress did not intend . . . to create a private right of action" under 49 U.S.C. § 41310(a), which prohibits air carriers from engaging in unreasonable discrimination in foreign air transportation.[40] A private plaintiff has the right to bring suit under a federal statute only if Congress created that right. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). Congress can create a private right of action expressly or by implication. *E.g.*, *Sam L.*

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[39] The cases Plaintiffs cite in which courts examined a carrier's justification for its cargo exclusion arose under federal statutes and regulations that imposed additional requirements over and above those of the common law. *See Akron, Canton, & Youngstown R.R.*, 611 F.2d at 1166 (explaining this distinction); *see also, e.g.*, *Riffin*, 733 F.3d at 343 (Surface Transportation Board order under applicable railway statute); *B.J. Alan*, 897 F.2d at 563 (Interstate Commerce Commission decision under Interstate Commerce Act).

[40] ROA.273.

Majors Jewelers, 117 F.3d at 925. Plaintiffs concede that there is no express private right of action under section 41310(a).[41] And Plaintiffs have failed to show that Congress created a private right by implication.

A. This Court has never held that there is a private right of action under either 49 U.S.C. § 41310(a) or its statutory predecessor.

In an attempt to short-circuit the rigorous inquiry required under the Supreme Court's seminal decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), Plaintiffs contend that three prior decisions from this Court already have recognized an implied right of action under the statutory predecessor to section 41310(a), commonly referred to as section 404(b).[42] But none of the cases Plaintiffs cite—all of which were decided long before *Sandoval*—decided the question this case presents.

Smith v. Piedmont Aviation, 567 F.2d 290 (5th Cir. 1978), did not recognize a private right of action under section 404(b). *Smith* reviewed an award of damages under the statute without breathing a word on the question of whether the statute was privately enforceable. *See id.* at 292. This Court later acknowledged that *Smith* had skipped an important step by reviewing the damages award without first "discussing the existence of a private right of action." *Diefenthal v. Civ. Aeronautics Bd.*, 681 F.2d 1039, 1050 (5th Cir. 1982).

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41 *See* Blue Br. at 21

42 Section 404(b) of the Federal Aviation Act of 1958 was codified at 49 U.S.C. § 1374(b). It was, as Plaintiffs correctly note, re-codified in 1994 without substantive change as section 41310(a).

Because *Smith* did not address the existence of a private right of action, *Smith* is not precedent on that question. It is black-letter law that a judicial decision does not "constitute a binding precedent" on an "issue [that] was neither raised by the parties nor addressed by the Court." *Kershaw v. Shalala*, 9 F.3d 11, 13 n.3 (5th Cir. 1993); *accord De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015) (quoting *United States v. Mitchell,* 271 U.S. 9, 14 (1926)). This Court has specifically recognized that when an earlier decision affirms a damages award without considering a potential challenge to the propriety of the award, the earlier decision is not binding in a later case raising that challenge. *Thomas v. Tex. Dep't of Crim. Just.*, 297 F.3d 361, 370 n.11 (5th Cir. 2002).

Diefenthal—the second case on which Plaintiffs rely—actually undercuts Plaintiffs' argument that *Smith* is binding precedent on the private-right-of-action question. *Diefenthal* acknowledged that *Smith* "implicitly recognized a private right of action under" section 404(b), 681 F.2d at 1050, but *Diefenthal* did not treat *Smith* as controlling on that question. Instead, the *Diefenthal* court concluded that the plaintiffs could not prevail on the merits of their claim "*even if* an implied right of action exists under section [404(b)]." *Id.* (emphasis added). If the *Diefenthal* court had thought that *Smith* had decided the private-right-of-action question, there would have been no need to include that "even if" clause.

Nor did *Diefenthal* itself find a private right of action under section 404(b). Rather, *Diefenthal* assumed without deciding that a private right

of action existed. *Id.* at 1050–51. It is well settled that when a court "decide[s] [a] particular legal issue[] while assuming without deciding the validity of [an] antecedent proposition[]," that assumption is "not binding in future cases that directly raise the question[.]" *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478–79 (2006) (quoting *United States v. Verdugo–Urquidez,* 494 U.S. 259, 272 (1990)). Because *Diefenthal* concluded that the plaintiffs did not have a viable claim under section 404(b), it was not required to—and did not—decide the antecedent question of whether there was a private right of action under section 404(b). Any statement in *Diefenthal* about that question is dicta, which this Court is "free to disregard" if the Court "find[s] it unpersuasive." *United States v. Segura*, 747 F.3d 323, 328–29 (5th Cir. 2014) (citation omitted); *accord Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004).

The third and final Fifth Circuit case on which Plaintiffs rely—*Shinault v. Am. Airlines, Inc.*, 936 F.2d 796 (5th Cir. 1991)—is equally inapplicable. In *Shinault*, this Court recognized an implied private right of action to enforce the Air Carrier Access Act, 49 U.S.C. § 41705(a), which prohibits airlines from discriminating against travelers on the basis of disability. The present case does not arise under section 41705(a), so *Shinault* does not control here. A decision construing one section of a statute is not binding precedent in a case arising under a different section of the same statute. *See, e.g.*, *Heaven v. Gonzales*, 473 F.3d 167, 173 (5th Cir. 2006). Plaintiffs acknowledge as much when they argue that cases

analyzing "a private right of action under . . . [§] 47105" are irrelevant to the analysis under section 41310(a).[43]

Plaintiffs point to a statement in *Shinault* that references a private right of action under section 404(b),[44] but since the claim in *Shinault* arose under section 41705(a), that reference is non-binding dicta. *See, e.g.*, *Curr-Spec Partners, L.P. v. Comm'r of Internal Revenue*, 579 F.3d 391, 400 (5th Cir. 2009) (an earlier decision's characterization of a statute "was dicta" where the statute "was not at issue" in the earlier case).

In sum, neither *Smith* nor *Diefenthal* nor *Shinault* held that there was a private right of action under section 404(b). Mistaken assumptions, questions not decided, and offhand statements do not create binding Circuit precedent.

It follows that Plaintiffs' argument based on the 1994 reenactment

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[43] Blue Br. at 23 n.11. Plaintiffs are correct to concede that *Shinault* is neither binding nor persuasive here. *Shinault* was decided ten years before the Supreme Court's seminal decision in *Sandoval* and uses a method of analysis—focusing on legislative history to the exclusion of statutory text and structure, *see* 936 F.2d at 800—that *Sandoval* expressly disavowed, *see Sandoval*, 532 U.S. at 288 & n.7; *Gill v. JetBlue Airways Corp.*, 836 F. Supp. 2d 33, 47–48 & n.6 (D. Mass. 2011); *Shqeirat v. U.S. Airways, Inc.*, 515 F. Supp. 2d 984, 1000–02 (D. Minn. 2007). All three Circuits that have considered the question since *Sandoval* have concluded that there is no private right of action under section 47105(a). *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596–98 (2d Cir. 2011); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1271 (10th Cir. 2004); *Love v. Delta Air Lines*, 310 F.3d 1347, 1353 (11th Cir. 2002).

[44] Blue Br. at 22 & n.10.

of section 404(b) as section 41310(a) does nothing more than beg the question. Plaintiffs correctly observe that when Congress reenacts a statute without substantive change, it is generally presumed that Congress adopts existing judicial interpretations of the statute.[45] But at the time that Congress re-codified the Federal Aviation Act in 1994, this Court had not held that section 404(b) created an implied right of action. A bill that "makes no substantive change in the law"[46] cannot transform out-of-Circuit case law into binding Circuit precedent. Congress left the law as they found it. Since none of this Court's "decisions establishes . . . the private right of action at issue here," "incorporating" cases into the statute "would thus not help" Plaintiffs. *See Sandoval*, 532 U.S. at 291–92.

B. Under controlling Supreme Court precedent, there is no private right of action under section 41310(a).

With no outdated case law to hide behind, Plaintiffs' argument for an implied right of action crumbles. Plaintiffs cannot prevail under the modern framework for analyzing implied private rights of action. Indeed, in the proceedings below Plaintiffs did not even attempt to defend their position under that framework. Nor did they do so in their opening brief before this Court.

Beginning with *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court

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[45] *Id.* at 23–25.

[46] Blue Br. at 25 n.13 (quoting S. Rep. No. 103-265 (1994)).

has created a restrictive test under which "[t]he central inquiry" in determining whether a statute includes "a private cause of action" is whether "Congress intended to create" one. *Touche Ross*, 442 U.S. at 575. Four factors guide this inquiry:

1. "[D]oes the statute create a federal right in favor of the plaintiff?"
2. "[I]s there any indication of legislative intent, explicit or implicit, [] to create" a "private remedy"?
3. "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy"?
4. "[I]s the cause of action one traditionally relegated to state law"?

Cort, 422 U.S. at 78. The third and fourth *Cort* factors are relevant only if both of the first two factors weigh in favor of a private right of action. If either of the first two factors is missing (if there is no individual right, or if there is no intent to create a private remedy), there is no implied right of action. *California v. Sierra Club*, 451 U.S. 287, 298 (1981); *La. Landmarks Soc'y, Inc. v. City of New Orleans,* 85 F.3d 1119, 1125 (5th Cir. 1996).

In its landmark decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court further curtailed the federal courts' authority to recognize implied rights of action. As in *Cort*, the central inquiry after *Sandoval* remains whether Congress intended to create a private right of action. *Id.* at 286. But *Sandoval* articulated important new restrictions on how that intent is to be ascertained. Under *Sandoval*, the second *Cort*

factor is not satisfied unless there is independent evidence that Congress intended to create a private remedy. *See id.* at 289–91. And that evidence must be found in "the text and structure of the statute." *Id.* at 288 n.7. Legislative history is relevant "if—and only if—statutory text and structure have not resolved whether a private right of action should be implied." *Love*, 310 F.3d at 1353.

Under this framework—which requires consideration of the first two *Cort* factors as narrowed by *Sandoval*—two features of the Federal Aviation Act foreclose Plaintiffs' argument for an implied right of action under 49 U.S.C. § 41310(a). First, section 41310(a) does not create an individual right under the first *Cort* factor. Second, the Act's remedial scheme reveals that Congress did not intend to create a private remedy under the second *Cort* factor.

1. Section 41310(a) does not create an individual right.

Because section 41310(a) does not use "rights-creating language" that focuses on "the individuals who will ultimately benefit from" the statute, it does not reflect Congressional intent to create a federal right in favor of Plaintiffs. *See Sandoval*, 532 U.S. at 288–89. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Id.* at 289 (quoting *California*, 451 U.S. at 294).

As the district court correctly recognized, section 41310(a) is framed

in terms of the obligations imposed on the regulated party.[47] It provides that an "*air carrier or foreign air carrier* may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination." 49 U.S.C. § 41310(a) (emphasis added). Customers of the air carrier (such as Plaintiffs) are "referenced only as an object of [the regulated entity's] obligation." *See Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1171 (9th Cir. 2013) (concluding that a similarly worded statute did not create a federal right). Statutes such as section 41310(a) that are "written [] simply as a ban on discriminatory conduct" by the regulated entity do not create a federal right. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 691–92 (1979).

2. Congress did not intend to create a private remedy under section 41310(a).

The second *Cort* factor also weighs against an implied right of action. Nothing in the Federal Aviation Act suggests that Congress intended to create a private remedy under section 41310(a). Congress created other remedies for alleged violations of section 41310(a), and it created an express right of action under a different section of the Act. Both of those features confirm that Congress did not intend to authorize private suits under section 41310(a).

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[47] ROA.271–72.

a. Congress provided other remedies under section 41310(a).

"[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979). For this reason, where a statute contains "elaborate enforcement provisions[,] it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens." *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981).

The Federal Aviation Act contains an elaborate and comprehensive scheme of administrative and judicial remedies. Specifically, the Act creates an enforcement scheme that allows section 41310(a) to be enforced in any of four ways, none of which involves a private plaintiff filing suit in federal court.

First, the Act allows private plaintiffs to seek redress for a violation by filing "a complaint in writing" with the Department of Transportation ("DOT") about any alleged violation of section 41310(a). *See* 49 U.S.C. § 46101(a)(1). The DOT is required to "investigate the complaint if a reasonable ground appears . . . for the investigation." *Id.*[48] Indeed,

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[48] The DOT actively and effectively exercises its authority to enforce 49 U.S.C. § 41310(a). *See, e.g.*, DOT Order 2016-1-3 (Jan. 7, 2016) (imposing $2 million in

Plaintiffs recently availed themselves of this enforcement procedure by filing an administrative complaint with the DOT.[49] Even Plaintiffs agree that where a statute "include[s] administrative enforcement procedures," it "suggest[s] Congress did not intend a private right."[50]

Second, the DOT and the FAA may enforce the Act's provisions by commencing an administrative proceeding on their own initiative. *Id.* § 46101(a)(2). The DOT and the FAA can impose significant penalties in these administrative enforcement proceedings. *See* 49 U.S.C. §§ 46101(a)(4), 46301(a)(1)(A); *see also* 14 C.F.R. §§ 383.2, 13.301. And the DOT and the FAA's enforcement authority is backstopped by 49 U.S.C. § 46110(a), which allows any "person disclosing a substantial interest in an order issued by" the agency to seek judicial review of that order in either the D.C. Circuit or the appropriate regional circuit.

Third, the Act provides two mechanisms by which its provisions may be enforced via a civil action in federal district court. The DOT "may bring a civil action against a person in a district court of the United States

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civil penalties on United Airlines); DOT Order 2013-11-4 (Nov. 4, 2013) (imposing $1.2 million in civil penalties on US Airways).

49 *See* Appellee Delta Air Lines, Inc.'s Updated Notice of Related Proceeding (filed Nov. 7, 2016). In their brief, Plaintiffs complain that they filed an administrative complaint with the FAA that the FAA did not act on, *see* Blue Br. at 26–27, but complaints under section 41310(a) are properly lodged with the DOT, *see* 14 C.F.R. § 302.404(a).

50 Blue Br. at 23 n.11. The fact that the procedure for administrative enforcement of section 41310(a) is set out in section 46101(a) instead of in section 41310 itself is immaterial to the private-right-of-action analysis. *Contra id.* Either way, Congress has provided an alternative means for enforcing the statute.

to enforce" 41310(a). 49 U.S.C. § 46106. And upon request from the DOT, "the Attorney General may bring a civil action in an appropriate court." *Id.* § 46107(b)(1)(A).

Finally, violations of § 41310(a) are also punishable by criminal fine. *Id.* § 46316.

The Supreme Court held in *Sandoval* that "[t]he express provision of *one* method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290 (emphasis added). Here, Congress expressly provided not one but *four* methods of enforcing section 41310(a). Two of those methods give "private litigants" the "right to review of administrative action in the courts of appeals," which "powerfully suggests that Congress did not intend to provide other rights of action." *Love*, 310 F.3d at 1357. A third allows "for judicial enforcement through a civil action by" either the DOT or the Attorney General, "suggesting Congress intended to place enforcement in the hands of [government officials], rather than private parties." *See Freeman v. Fahey*, 374 F.3d 663, 665 (8th Cir. 2004). And Congress's stated intent for "the statute to be enforced through the imposition of criminal fines" is also inconsistent with an intent to authorize private civil suits. *Hall v. Valeska*, 509 F. App'x 834, 837 (11th Cir. 2012) (per curiam). Congress's enactment of this "carefully integrated" enforcement scheme creates an all-but-irrebuttable presumption that "Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *See Mass.*

Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985).

b. Congress expressly created a private right of action under a different section of the Federal Aviation Act.

Finally, where, as here, "Congress has established a detailed enforcement scheme, which expressly provides a private right of action for violations of specific provisions, that is a strong indication that Congress did not intend to provide private litigants with a means of redressing violations of other sections of the Act." *Casas v. Am. Airlines, Inc.,* 304 F.3d 517, 523 (5th Cir. 2002) (quoting *Diefenthal*, 681 F.2d at 1049)). The Federal Aviation Act creates an express private right of action under a single provision of the Act. Specifically, 49 U.S.C. § 46108 gives private plaintiffs an express cause of action to enforce 49 U.S.C. § 41101(a)(1). Section 46108 does not authorize private suits under section 41310(a).

Section 46108 establishes that "when Congress wished to provide a private [] remedy, it knew how to do so and did so expressly." *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152, 160 (5th Cir. Unit A Aug. 1981) (quoting *Touche Ross*, 442 U.S. at 572). And the fact that Congress remembered to create an express private right of action to enforce section 41101(a)(1) makes it "highly improbable that Congress absentmindedly forgot to mention an intended private action" to enforce other sections of the Act. *See TAMA*, 444 U.S. at 20 (citation omitted)).

* * *

In the face of the proper analysis under *Sandoval*, Plaintiffs' reliance on out-of-Circuit case law falls flat. All but two of Plaintiffs' cases were decided before *Sandoval*, and the two cases that post-date *Sandoval* do not even cite to it.[51] This outdated case law has no persuasive value. As the First and Eleventh Circuits have explained, "the Supreme Court's decision in *Sandoval* changed the legal landscape" so significantly as to "render[] unpersuasive the reasoning employed in previous cases in which private rights had been implied" under the Federal Aviation Act. *Bonano v. E. Caribbean Airline Corp.*, 365 F.3d 81, 86 n.4 (1st Cir. 2004) (citing *Love*, 310 F.3d at 358–59).

Congress did not intend to create an implied private right of action under section 41310(a). The Court should affirm the district court's dismissal of Plaintiffs' statutory discrimination claim.

III. The Airline Deregulation Act preempts Plaintiffs' claim for tortious interference with business relations.

A. Plaintiffs' claim is related to Delta's cargo service.

This Court has held that a tortious "interference with business relations claim is plainly preempted" if "it involves" a carrier's "services to customers." *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002). Carriage of cargo is one of Delta's services to its customers, and Delta's Big Five trophy ban limits the scope of that service. Accordingly, Plaintiffs' challenge to Delta's ban is preempted. Plaintiffs try

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[51] *See* Blue Br. at 22. The same is true of the secondary sources Plaintiffs cite.

to avoid this conclusion by recasting their tortious interference claim as a defamation claim that challenges Delta's *announcement* of its Big Five trophy ban, not the ban itself. But as the district court aptly put it: "Any claim challenging the statement [announcing the ban] is also a challenge to the refusal of service, because the way that an airline or any common carrier limits its services is by informing potential customers of that decision."[52]

Until 1978, the airline industry was heavily regulated, essentially functioning as a cost-plus regulated oligopoly. Under the Federal Aviation Act of 1958, airlines were required to file tariffs with the Civil Aeronautics Board listing their routes, prices, services, and terms and conditions of service, and they were prohibited "from charging or collecting rates or providing services which varied from their tariffs." *Sam L. Majors Jewelers*, 117 F.3d at 927.

In 1978, Congress enacted the Airline Deregulation Act with the goal of "end[ing] federal economic regulation of commercial aviation" and "promot[ing] competition within the airline industry." *Am. Airlines*, 202 F.3d at 805. The ADA reflects Congress's judgment that "efficiency, innovation, low prices, variety, and quality" in the airline industry are better "promoted by reliance on competitive market forces rather than pervasive federal regulation." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (en banc).

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[52] ROA.266

"To ensure that the States would not undo federal deregulation with regulation of their own," Congress included a preemption provision in the ADA. *Morales*, 504 U.S. at 378. The ADA's preemption provision prohibits the states from enacting any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The "Supreme Court has interpreted the preemptive effect of the ADA broadly." *Onoh v. NW. Airlines, Inc.*, 613 F.3d 596, 599 (5th Cir. 2010).

Determining whether the ADA preempts Plaintiffs' tortious-interference claim requires a two-step inquiry:

> 1) What is the conduct by Delta that gives rise to Plaintiffs' tortious-interference claim?
>
> 2) Is that conduct one of Delta's services, or is it related to one of Delta's services?

If the answer to the second question is "yes," Plaintiffs' claim is preempted. *See, e.g.*, *Lyn-Lea Travel*, 283 F.3d at 286.

Plaintiffs' complaint repeatedly identifies Delta's enactment and enforcement of its Big Five trophy ban as the conduct giving rise to their tortious interference claim.[53] Plaintiffs do not dispute that an airline's

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53 *See, e.g.*, ROA.30 (alleging that Delta's "imposition of the unlawful embargo proximately caused the injuries of the Plaintiffs"); *see also* ROA.8–9 ¶ 6 ("Delta's embargo jeopardizes the benefits of tourist hunting."); ROA.9 ¶ 9 ("Delta's embargo deters U.S. hunters from going to Africa"); ROA.24–25 ¶¶ 52–57 ("Delta's unlawful embargo has injured [Plaintiffs]."); ROA.27 ¶ 59 ("These injuries arise because Delta is wrongly embargoing legal, fully regulated trade.").

carriage of cargo (or refusal to carry cargo) is a "service" within the meaning of the ADA's preemption provision. *See, e.g.*, *Hodges*, 44 F.3d at 336–37 ("the point-to-point transportation of . . . cargo" is a "service" under § 41713(b)(1)). Thus, to the extent that Delta's refusal to carry Big Five hunting trophies as cargo is the conduct that gives rise to Plaintiffs' tortious-interference claim, that claim is preempted.

To avoid this open-and-shut case, Plaintiffs contend that their claim does not challenge Delta's Big Five trophy ban, but rather Delta's public statement announcing the ban.[54] In other words, Plaintiffs attempt to recast their tortious interference claim as a claim for defamation. This recasting is equal parts implausible (would Plaintiffs really not have brought suit if Delta had banned shipment of Big Five trophies but used different words to announce the ban?) and ineffectual (this new, unpleaded defamation claim is also preempted).

The ADA preempts not just claims involving an air carrier's services, but any claim that is "related to" a carrier's services. 49 U.S.C. § 41713(b)(1). The ADA's preemptive effect thus extends to any claim that has "a connection with, or reference to," an airline's services. *Nw., Inc. v. Ginsberg*, __ U.S. __, 134 S. Ct. 1422, 1430 (2014) (quoting *Morales*, 504 U.S. at 384).

An airline's public statement about its own services is "related to"

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[54] Blue Br. at 9, 27, 31–34.

those services under section 41713(b)(1). For example, in *Onoh v. Northwest Airlines,* after an airline refused to allow a passenger to board a plane, the passenger sued the airline for intentional infliction of emotional distress arising out of the gate agent's statements to the plaintiff explaining why she could not travel. 613 F.3d at 598–99. The *Onoh* plaintiff argued—just as Plaintiffs argue here—that her claim was not preempted because it was based not on the refusal of service but on the airline's explanatory statement. This Court rejected that argument and held that an airline's "decision to deny [service to customer] cannot be divorced from its stated reasons for denying [the service]." *Id.* at 600.

Delta's public statement announcing its Big Five trophy ban is even more closely related to its services than the gate agent's statement in *Onoh*. Delta's public announcement of its Big Five trophy ban communicated and defined the scope of the cargo services that Delta offers to the public. As discussed above, a common carrier has a duty to carry any cargo that it holds itself out to the public as being willing to carry.[55] A common carrier cannot stop carrying a certain kind of cargo unless it also stops holding itself out as willing to carry that cargo.

Thus—and as the district court recognized[56]—Delta could not have enacted its Big Five trophy ban without making some kind of public statement putting the traveling public on notice that Delta is no longer

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[55] *Supra* section I(A).

[56] ROA.266

willing to carry Big Five trophies as cargo. Delta's public announcement of its Big Five trophy ban is not merely "related to a . . . service of an air carrier" under section 41713(b)(1). It is an indispensable component of the ban itself.

Plaintiffs point out that the ADA does not preempt all defamation claims against airlines,[57] but this does not salvage Plaintiffs' claim. When an airline makes defamatory statements that do not concern the airline or its services, claims arising out of those statements are not preempted.[58] When airlines make statements about their own services, claims challenging those statements *are* preempted.[59]

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57 Blue Br. at 29–30 & n.15.

58 Every case Plaintiffs cite fits this description. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433–34 (7th Cir. 1996) (airline's statements about a travel agency); *Wainwright's Vacations, LLC v. Pan Am. Airways Corp.*, 130 F. Supp. 2d 712, 714–15 (D. Md. 2001) (same); *Lewis v. Cont'l Airlines, Inc.*, 40 F. Supp. 2d 406, 408, 415 (S.D. Tex. 1999) (about a passenger); *Bayne v. Adventure Tours USA, Inc.*, 841 F. Supp. 206, 207 (N.D. Tex. 1994) (same); *Desardouin v. United Parcel Serv., Inc.*, 285 F. Supp. 2d 153, 155–57, (D. Conn. 2003) (about a customer).

59 *See, e.g.*, *Morales*, 504 U.S. at 388–91 (airline's statements about its fares); *Lagen v. United Cont'l Holdings, Inc.*, 774 F.3d 1124, 1128 (7th Cir. 2014) (Wood, C.J.) (about its rewards program); *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 853 (8th Cir. 2009) (about its billing practices); *Mastercraft Interiors, Ltd. v. ABF Freight Sys., Inc.*, 284 F. Supp. 2d 284, 288 (D. Md. 2003) (about its prices); *Weber v. USAirways, Inc.*, 11 F. App'x 56, 58 (4th Cir. 2001) (per curiam) (about the terms of a ticket voucher); *Chukwu v. Bd. of Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (about its reasons for not letting a passenger board), *aff'd*, 101 F.3d 106 (1st Cir. 1996); *Galbut v. Am. Airlines, Inc.*, 27 F. Supp. 2d 146, 152–53 (E.D.N.Y. 1997) (about its reasons for refusing a ticket upgrade); *Von Anhalt v. Delta Air Lines, Inc.*, 735 F. Supp. 1030, 1030–31 (S.D. Fla. 1990) (about its reasons for ejecting a passenger).

The case law draws a clean line, and Plaintiffs' claim falls on the wrong side of the line. Delta's public statement announcing its Big Trophy ban says nothing about Plaintiffs or their members. The challenged statements describe Delta and its services.[60] Delta's statement announcing its Big Five trophy ban is inextricably "related to" the ban itself, and the ban limits the scope of the cargo "service" that Delta "may provide" to the public. *See* 49 U.S.C. § 41713(b). The Court should affirm the dismissal of Plaintiffs' tortious interference claim as preempted.

B. Plaintiffs never moved for leave to amend their complaint, and amendment would have been futile.

There is no merit to Plaintiffs' contention that the district court erred by not allowing them to amend their complaint to re-plead their tortious interference claim. Plaintiffs never moved the district court for leave to amend, so this argument is waived. Regardless, since amendment would have been futile, the district court was correct to dismiss this claim with prejudice.

As an initial matter, the district court's decision to dismiss Plaintiffs' tortious interference claim without first providing leave to amend could not have been error. A district court need not grant leave to amend if the proposed amendment would fail to cure the deficiencies in the complaint and therefore be futile. *Varela v. Gonzales*, 773 F.3d 704, 707 (5th Cir. 2014) (quoting *Ackerson v. Bean Dredging LLC,* 589 F.3d 196, 208

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[60] ROA.21 ¶ 41; *see supra* note 4 and accompanying text.

(5th Cir. 2009)); *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 390 (5th Cir. 2005). Against the backdrop of the ADA's preemption provision, Plaintiffs cannot state a viable claim for tortious interference. There are no additional facts Plaintiffs could have pleaded that would have avoided preemption, making any amendment futile.[61]

Moreover, a "party who neglects to ask the district court for leave to amend cannot expect to receive such a dispensation from the court of appeals." *United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 387 (5th Cir. 2003). By failing to file a motion requesting leave to amend, Plaintiffs waived any challenge to the district court's dismissal of their tortious interference claim.[62]

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61 In the body of their brief, Plaintiffs contend only that the district court should have allowed them to re-plead their tortious interference claim. Blue Br. section II(B) (at 33–35). But at various other points, Plaintiffs seem to assert that they should have been allowed to re-plead all of their claims. *See id.* at 2 (Statement of the Issues); *id.* at 9–10 (Summary of the Argument); *id.* at 36 (Conclusion). These stray one-sentence assertions do not adequately brief any alleged error. *See, e.g.*, *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016). In any event, whether Congress created a private right of action under 49 U.S.C. § 41310(a) is a pure question of law. So is the scope of a common carrier's duties under the common law. Additional factual allegations in an amended pleading could not have cured the legal infirmities of Plaintiffs' statutory and common-law claims.

62 *See Wentzell v. JPMorgan Chase Bank, Nat'l Ass'n*, 627 F. App'x 314, 319 (5th Cir. 2015) (per curiam); *Ransom v. Nat'l City Mortg. Co.*, 595 F. App'x 304, 306 & n.4 (5th Cir. 2014) (per curiam); *McClaine v. Boeing Co.*, 544 F. App'x 474, 477–78 (5th Cir. 2013) (per curiam); *see also Viqueira v. First Bank*, 140 F.3d 12, 20 (1st Cir. 1998); *Roth v. CitiMortgage Inc.*, 756 F.3d 178, 183 (2d Cir. 2014) (per curiam); *Piecknick v. Commw. of Pa.*, 36 F.3d 1250, 1262 n.13 (3d Cir. 1994); *Zachair, Ltd. v. Driggs*, 141 F.3d 1162, 1998 WL 211943, at *3 (4th Cir. 1998) (per curiam); *Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994); *Pride v. Holden*, 1 F.3d 1244,

Plaintiffs contend that they requested leave to amend in the district court,[63] but in reality they did nothing more than quote the text of Federal Rule of Civil Procedure Rule 15(a)[64] and include a footnote on the last page of their response to the motion to dismiss that contained a conditional request for leave to amend.[65] This lone footnote did not fairly present the request to the district court and therefore does not preserve the issue for appellate review. A "bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which the amendment is sought—does not constitute a motion within the contemplation of Rule 15(a)." *Willard*, 336 F.3d at 387 (quoting *Confederate Mem'l Ass'n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993) (internal citation omitted); *accord Kuyat v. BioMimetic Therapeutics, Inc.*, 747 F.3d 435 (6th Cir. 2014); *Calderon v. Kan. Dep't of Soc. and Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999).

The district court was not required to *sua sponte* remind Plaintiffs of their right to seek leave to amend before ruling on the motion to dismiss or entering final judgment. *Gomez v. Wells Fargo Bank, N.A.*, 676

1993 WL 299328, at *1 n.3 (7th Cir. 1993); *Steele v. City of Bemidji*, 257 F.3d 902, 905 (8th Cir. 2001); *Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000); *Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1150 (10th Cir. 1998); *Long v. Satz*, 181 F.3d 1275, 1279–80 (11th Cir. 1999); *City of Harper Woods Emps.' Ret. Sys. v. Olver*, 589 F.3d 1292, 1304 (D.C. Cir. 2009).

63 Blue Br. at 34–35 (citing ROA.203); *id.* at 36 (citing ROA.184 & 203).

64 ROA.184.

65 ROA.203 n.29.

F.3d 655, 665 (8th Cir. 2012); *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251–53 (3d Cir. 2007); *Frazier v. Flores*, 628 F. App'x 614, 615 (10th Cir. 2016). The plaintiffs could have moved for leave to amend before the district court ruled on the motion to dismiss, *see, e.g.*, *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003), or after, *see, e.g.*, *Willard*, 336 F.3d at 387. Their failure to do so forecloses them from raising this issue on appeal.

Plaintiffs also failed to comply with the local rules for the Northern District of Texas, which required Plaintiffs to submit a copy of their proposed amended complaint if they were requesting leave to amend. *See* N.D. Tex. Loc. R. 15.1. This requirement is no formality; it allows "the court and the adverse party to know the precise nature of the pleading changes being proposed." 6 CHARLES A. WRIGHT & ARTHUR R. MILLER, 6 FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1485 (3d ed. 2016). Plaintiffs' "failure to follow local court rules" is an independent "basis for upholding a district court's denial of leave to amend." *G.M. ex rel. Lopez v. Shelton*, 595 F. App'x 262, 266–67 (5th Cir. 2014).

IV. Plaintiffs' Due Process arguments are frivolous.

In a desperate final gambit, Plaintiffs raise various Due Process challenges to the district court's decision. Plaintiffs' brief gestures towards four distinct arguments. All four are waived. All four are frivolous.

First, Plaintiffs incorrectly contend that the dismissal of their common-law claim violates Due Process because it leaves them without a remedy for a violation of their rights.[66] Plaintiffs did not raise this argument below, so it is waived; they cannot raise it for the first time on appeal. *See, e.g.*, *Celanese Corp. v. Martin K. Eby Const. Co.*, 620 F.3d 529, 531 (5th Cir. 2010) (citing *AG Acceptance Corp. v. Veigel,* 564 F.3d 695, 700 (5th Cir. 2009)); *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007).

On the merits, Plaintiffs' position is frivolous. Plaintiffs contend that Congress cannot strip them of a vested common-law right without providing a reasonably equivalent remedy. Every leg of that argument is wrong. To begin, the district court correctly concluded that Plaintiffs have no vested right under the common law to force Delta to carry Big Five trophies.[67]

In addition, Congress did not strip Plaintiffs of anything. Just the opposite: The ADA contains a savings clause that expressly *preserves* all common-law remedies in existence as of 1978. 49 U.S.C. § 40120(c).

Moreover, it is settled law the Congress does not offend Due Process when it uses a statute to abolish common-law rights. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978) (collecting cases).

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[66] Blue Br. at 25–27.

[67] ROA.261.

Nor is it true that Due Process requires Congress to provide some kind of reasonably equivalent substitute remedy. *Id.* at 88; *Ducharme v. Merrill-Nat'l Labs.*, 574 F.2d 1307, 1310 (5th Cir. 1978). *See generally Jones v. State Bd. of Med.*, 555 P.2d 399, 408–09 (Idaho 1976) (chronicling the Supreme Court's rejection of the so-called "quid pro quo" doctrine). And even if there were such a requirement, the alternative remedies Congress provided in the Federal Aviation Act are constitutionally adequate. *Crowell v. Benson*, 285 U.S. 22, 46–47 (1932); *Noell v. Bensinger*, 586 F.2d 554, 558 (5th Cir. 1978).

Second, Plaintiffs incorrectly contend that dismissal of their statutory claim violates Due Process because it leaves them without a remedy for an alleged violation of their statutory rights. Here again, Plaintiffs failed to raise this argument below, so it is waived. *Celanese*, 620 F.3d at 531; *LeMaire*, 480 F.3d at 387. The argument is also frivolous. Plaintiffs have no individual rights under 49 U.S.C. § 41310(a).[68] Even if they did, the Due Process Clause does not require Congress to create a private right of action under every statute it passes. *See TAMA*, 444 U.S. at 15–16; *Touche Ross*, 442 U.S. at 578; *Hamm v. City of Rock Hill*, 379 U.S. 306, 316 (1964).

Third, Plaintiffs briefly argue that the ADA's preemption of their

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[68] ROA.271–72; *see also supra* section II(B)(1).

tortious-interference claim violates Due Process.[69] This argument Plaintiffs did raise below, but by mentioning it only in a footnote they have failed to adequately brief it before this Court, so it, too, is waived. *See, e.g.*, *Delaval*, 824 F.3d at 479 n.2; *Justiss Oil*, 75 F.3d at 1067. It is also frivolous. Preemption is constitutional. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981); *City of Morgan City v. S. La. Elec. Coop. Ass'n*, 31 F.3d 319, 321–22 (5th Cir. 1994).

Finally, Plaintiffs intimate that the district court's dismissal of their complaint was an independent denial of Due Process. Again, this argument is waived due to Plaintiffs' failure to raise it below. *Williams v. Brown & Root, Inc.*, 828 F.2d 325, 329 n.9 (5th Cir. 1987). Plus, a district court does not violate a litigant's Due Process rights by dismissing a legally deficient complaint under Rule 12(b)(6). *Perales v. Sup. Ct. of Tex.*, 140 F.3d 1039 (5th Cir. 1998).

CONCLUSION

For all of these reasons, the Court should affirm the judgment of the district court.

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[69] Blue Br. at 25 n.14.

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, an electronic copy of the foregoing Brief for Appellee Delta Air Lines, Inc. was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,482 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2.

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