

BEFORE THE DEPARTMENT OF TRANSPORTATION
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS
WASHINGTON, D.C.

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Benjamin Edelman and Mike Borsetti)
petitioners) Docket DOT-OST-2017-____
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PETITION FOR RULEMAKING: PASSENGER RIGHT TO RECORD

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1. We submit this petition for rulemaking under 14 CFR 302.16 to request that the Department reject airlines’ improper attempts to prohibit recordings by passengers of events onboard common carriage aircraft and their interactions with staff

I. FACTS

A. Passengers reasonably and properly record certain airline staff and onboard events

2. Passengers in a variety of circumstances reasonably and properly seek to preserve events pertaining to air travel, including recordings made in photographs, audio, or video (collectively, “recordings”).

3. The following sections present a small sampling of situations in which the public interest was or would have been served by passenger recordings, as well as situations in which passengers were improperly and arbitrarily penalized by airlines for recording.

B. Recordings are in the public interest as they provide a reliable factual record of disputed events

4. The importance of onboard recordings received international attention when United on April 9, 2017 sought to remove David Dao, a paid passenger on a United Airlines flight, after he had boarded and taken his assigned seat. Onboard video recordings, prepared by at least five passengers, reveal that Dao was at all times peaceful and indeed articulate in orally opposing United’s actions—undercutting the version of events offered by United (CEO Oscar Munoz’s initial email to all company employees called Dao “disruptive and belligerent”) and airport security officers (whose same-day sworn reports claimed Dao was “swinging his arms up and down with a closed fist” and “flailing and fighting”). Without video evidence, Dao would surely have been removed from the flight and forced to stay overnight at his own expense, and he might have been denied further travel on United, added to a ban list, or even faced criminal charges. But thanks to video evidence, legal proceedings went the other way: Dao had strong legal claims against United as well as the City of Chicago (employer of the security officers that United called to remove Dao)—claims which, by all indications, United paid a substantial sum to resolve.

5. In an incident later in April 2017, a mother traveling on AA with two young children claimed a flight attendant assaulted her as he took her stroller. While video does not show the incident, it does show the demeanor of those onboard including the demeanor of the flight attendant who on video threatened another passenger. The video also preserves contemporaneous reaction of those who were in a position to see the incident, providing evidence of their understanding of what occurred, based on what they had seen just seconds earlier. Based on the video, an AA statement indicated that an

investigation was warranted and that the flight attendant at issue did not act as trained or as required by AA. Moreover, the flight attendant was removed from duty pending investigation. By all indications, passenger allegations alone (without video) would not have prompted such an investigation or such removal from duty.¹

6. In April 2015, passenger Steven Leslie noticed JetBlue flight attendants remarking on the health of a boy with a serious illness who had been medically cleared to fly. Concerned that JetBlue might deny that passenger boarding, because he knew that another airline had recently denied travel to a child with cancer, Leslie began to record the situation in order to preserve a record in case of any dispute. He made this recording quietly from his seat, without interfering with airline crew. After JetBlue staff removed the boy and his family, a JetBlue employee ordered that Leslie delete the video. When he refused to delete the video, he was removed from the aircraft and delayed nine hours waiting for the next flight.²

7. In docket DOT-OST-2013-0024, petitioner Edelman documented American Airlines misrepresenting carrier-imposed fees as “tax.” Edelman’s evidence included twelve different call recordings, all posted to <http://www.benedelman.org/airfare-advertising/americanairlines.html>, in which twelve different AA telephone representatives independently used the term “tax” to describe carrier-imposed fees. Edelman resorted to making these recordings—and posting them and transcribing them in relevant part—because, prior to these recordings, AA disputed

¹ “Video: Mother allegedly hit by American Airlines employee on California flight,” ABC7 Eyewitness News, April 21, 2017, <http://abc7.com/news/mother-allegedly-hit-by-american-airlines-employee-during-flight/1902263/>.

² Christopher Elliott, “Read This Before You Take Pictures on a Plane,” The Blog, May 17, 2015, http://www.huffingtonpost.com/christopher-elliott/read-this-before-you-take_b_7300830.html.

that its staff had made these false statements. For example, no less an authority than prior AA general counsel Gary Kennedy claimed that any false statements about tax were made only “after the booking and purchase process has been completed” (namely, in the written receipts which were not in dispute).³ Call recordings were necessary to demonstrate the false statements repeatedly made by AA’s telephone reservations staff.

8. In docket DOT-OST-2014-0033, passenger Miriam Edelman sought to demonstrate that a placard, required under 14 CFR § 250.11, was not present at the departure gate where she claimed to have been involuntarily denied boarding by AA. AA’s Answer admitted that the placard was missing as of the date of the disputed events, but the parties disagreed about the duration of its absence. AA’s contention was based on its business records. Ms. Edelman’s contention was based on the date-stamped photographs taken by a colleague of petitioner Edelman (who represented Ms. Edelman in this matter). Only thanks to the photograph was Ms. Edelman able to establish that AA’s business records were incorrect and that the placard had remained missing for a longer period than AA claimed.⁴ Were it not for that photographic evidence, Ms. Edelman would have been unable to rebut AA’s contention.

C. Recordings are in the public interest as they enable market-based mechanisms to discipline airline deficiencies

9. Passengers face significant challenges in their efforts to hold airlines accountable for service they view as deficient or worse. For example, courts have held that passengers cannot bring claims against airlines for practices that are allegedly unfair and deceptive in violation of state law. Furthermore, airlines disavow any obligation to

³ See <http://www.benedelman.org/airfare-advertising/pdf/kennedy-to-edelman-11jan2012.pdf> at page 2.

⁴ Because the parties have reached a tentative settlement on a portion of this matter, as detailed in document DOT-OST-2016-0107-0010, the details of this aspect of the dispute are not present in the docket.

operate on schedule, and courts have upheld airlines’ position. Civil litigation and DOT proceedings offer potential avenues for dispute resolution, but many consumers reasonably find the cost too high, and success too uncertain, for these to be attractive possibilities. Nor does competition necessarily assure high quality service, as many routes have a limited choice of carriers; mergers have reduced choice; and many airlines are similar in the respects that consumers frequently criticize, making it difficult to find a competitor with a different approach.

10. On the other hand, passengers have found that they can post photos, recordings, and videos of alleged airline misconduct—letting public scrutiny push airlines to improve, enabling a market-based demand-side mechanism for supplier quality control. Airlines and airline staff improperly attempt to block this market-based mechanism by banning recordings and purporting to ban recordings.

11. For example, in a May 2016 incident, United attempted to suppress public criticism of alleged service deficiencies. After cancelation of a United flight on which he was ticketed and confirmed, passenger Benjamin Godsill was disappointed by a long line of passengers seeking assistance, and he posted a photograph to Twitter showing insufficient United staff available to help. By all indications he hoped that United would find another way to assist affected passengers, and perhaps adjust future staffing in anticipation of other cancellations. Replying on Twitter using United’s official @united account, a United representative replied “Hi Benjamin, please delete these photos and DM us with them and if we may assist you.” The Twitter discussion does not reflect

@united assisting Mr. Godsill, nor did United offer any proper reason for insisting that Mr. Godsill remove the photograph in order to receive service.⁵

12. Consider also the Delta Airlines employee who on July 1, 2016 assaulted 12-year-old passenger Matthew Boggan by striking his hand and camera as he recorded her oral remarks. Traveling with his family, Mr. Boggan had faced a series of “rolling delays” in which Delta announced a brief delay, but failed to honor the subsequent departure time—keeping passengers in the gate area, and discouraging passengers from making other arrangements, as passengers invariably hoped that each delay would be the last. These delays stretched to 12 hours, overnight, and passengers including Mr. Boggan slept on the floor in an airport terminal. In response, Mr. Boggan sought to record subsequent statements by Delta representatives—both to document further promises about departure time (in order to criticize any further rolling delays) and also to facilitate public discussion of Delta’s service generally. But when Mr. Boggan recorded a gate agent making an announcement, the agent slapped the phone out of his hands—an incident itself recorded in his video.⁶

D. Airlines have retaliated against passengers for making recordings, including denying transport, summoning security officers, threatening to confiscate devices, and even committing physical assault

13. In May 2017, passenger Navang Oza had a disagreement with United Airlines ground staff in New Orleans as to the fee to check a bag. Believing the agent’s position to be incorrect, particularly because it was inconsistent with prior actions by other United agents, Mr. Oza sought to memorialize the agent’s position for further

⁵ Benjamin Godsill, @mrgodsil, May 17, 2016; 3:28pm, and United, @united, May 17, 2016, 3:43pm. <https://twitter.com/united/status/732657761662558208> .

⁶ Julia Marsh and Alex Taylor, “Family sues Delta over agent smacking phone out of kid’s hand,” New York Post, May 2, 2017, <http://nypost.com/2017/05/02/family-sues-delta-after-agent-smacks-phone-out-of-kids-hand/> .

dispute resolution, and he began to record their discussion. The agent responded “You did not have my permission to videotape” and instructed a colleague to cancel Mr. Oza’s reservation, which the colleague did. Mr. Oza had no choice but to travel on another airline at additional expense.⁷ Video evidence proves Mr. Oza’s version of events, which a United spokesperson admits does not reflect the airline’s intended procedures. Were it not for the video, Mr. Oza would be unlikely to obtain such an admission from United, not to mention the refund and apology that should follow the airline’s admission of error.

14. In a February 2013 incident, travel blogger Matthew Klint was involuntarily removed from a United flight from Newark to Istanbul. Mr. Klint photographed his seat in anticipation of posting an online review. United cabin crew told him that he was not permitted to take pictures onboard, and the pilot then required him to leave the flight, threatening to call the police if Mr. Klint did not leave on his own.⁸ Notably, the pilot claimed that the specific reason for removing Mr. Klint was that he had purportedly continued to take photographs even after a flight attendant instructed him to stop, a claim which Mr. Klint emphatically denies. Four other passengers supported Mr. Klint’s version of events.⁹ As Mr. Klint was taking only still images, no video record or other recording helps resolve the differing reports of Mr. Klint and the flight attendant as to whether he continued photographing after being told to stop.

⁷ Travis Gettys, “Watch: United Airlines employee orders passenger’s ticket canceled for recording baggage dispute,” May 9, 2017, Raw Story, <http://www.rawstory.com/2017/05/watch-united-airlines-employee-orders-passengers-ticket-canceled-for-recording-baggage-dispute/>.

⁸ Matthew Klint, “Thrown Off a United Airlines Flight for Taking Pictures!”, Live and Let’s Fly – Boarding Area Blogs, February 19, 2013. <http://liveandletsfly.boardingarea.com/2013/02/19/thrown-off-a-united-airlines-flight-for-taking-pictures/>.

⁹ Matthew Klint, “Update: United Airlines Responds to Photo Incident,” Live and Let’s Fly – Boarding Area Blogs, February 22, 2013. <http://liveandletsfly.boardingarea.com/2013/02/22/update-united-airlines-responds-to-photo-incident/>. (At heading “Here’s some of the words from others on my flight.”)

15. In January 2016, a passenger known as “John P.” photographed his seat on an AA 787, later describing himself as an “excited” “787 first-timer.” John reports being summoned by flight attendants who, he reported, claimed that a “clearly published policy” prohibited onboard photography; demanded that they see every picture on his phone; demanded that he delete all photos taken onboard; and threatened that they would confiscate his phone and have him detained upon arrival if he did not comply.¹⁰

16. When Mr. Leslie refused to delete the video showing JetBlue staff removing the sick child from the aircraft and documenting the reasons why they said they were doing so, JetBlue staff similarly removed Mr. Leslie from the aircraft. ¶6

17. In April 2017, passenger Michael Nissensohn took what he described as a “selfie” video on a JetBlue flight—a 2:04 narrative about his flight, his visit to the onboard restroom to wash his hands, and his travelling apparel.¹¹ By all indications, Mr. Nissensohn intended this video for his personal use and perhaps viewing by interested friends, and as a way to pass the time on the flight. Unbeknownst to Mr. Nissensohn, he was recording video during a portion of the flight when the cockpit door was open (although by all indications his camera was pointed in a different direction). In response, he reports that a JetBlue flight attendant told him “I need to take your cell phone,” although he refused to surrender it. JetBlue requested that airport police meet the plane on arrival, and Mr. Nissensohn was detained by more than an hour.¹²

¹⁰ John P., “Taking pictures aboard aircraft,” Ask Lucky – One Mile At A Time. January 23, 2016. <http://asklucky.onemileatime.com/threads/taking-pictures-aboard-aircraft.5232/>.

¹¹ “Michael Nissensohn’s video which caused incident with JetBlue flight attendant,” The Palm Beach Post. <http://video.palmbeachpost.com/Michael-Nissensohns-video-which-caused-incident-with-JetBlue-flight-attendant-32287298>.

¹² Eliot Kleinberg, “Delray man says JetBlue told him to stop making phone video,” Palm Beach Post, April 19, 2017. <http://www.palmbeachpost.com/news/local/new-delray-man-says-jetblue-crew-told-him-stop-making-phone-video/rpQqU7p7r6sRMjPZGZs93M/>.

18. In June 2017, passenger Ana Heitmann was removed from a delayed AA flight. Disappointed in a departure delay when other airline statements said the flight would be on time, Ms. Heitmann photographed a crew member whose answer she found unsatisfactory. She was removed from the flight and required to take a later flight. AA staff told her that it was “illegal” to take photos of crew members onboard an aircraft.¹³

19. Passenger Matthew Boggan was assaulted by a Delta Airlines employee who struck his hand and camera as he recorded her remarks (¶12). Mr. Boggan’s video reveals the agent defending her actions under color of law, claiming it was “illegal” for Boggan to record her.

E. Passengers fail to make recordings in the public interest due to well-founded fear of airline retaliation

20. In online forums, a variety of passengers report false statements made by cabin crew in marketing credit cards. On information and belief, cabin crew are usually compensated based on the number of credit card applications submitted or number of credit card applications approved, bearing their respective referral codes. Cabin crew therefore have a direct incentive to overstate the benefits of the cards such as by exaggerating redemption availability, or by claiming that a given signup offer is the best available when in fact better offers are available elsewhere. Online reports indicate that cabin crew often make statements that are at least deceptive, and sometimes literally false, in order to induce passengers to apply for credit cards. Petitioner Edelman has encouraged passengers who notice such misstatements to record them for dispute resolution. Some passengers have advised Edelman that they understand such recordings

¹³ Ana Heitmann, “Just got kicked off American Airlines flight...” June 7, 2017. <https://www.facebook.com/anaheitmann1911/posts/1447252542004980> .

to be prohibited by airline policy, and they have therefore declined to record the false or misleading statements. As a result, these false or deceptive statements have not been scrutinized by the Department, the Consumer Financial Protection Board, or appropriate courts. For lack of recorded evidence of what was said, these statements are not likely to receive such scrutiny, and any false or deceptive statements are likely to continue.

F. Airlines sometimes require passengers to delete recordings

21. Airline staff sometimes demand that passengers delete recordings on pain of denial of transport or referral to law enforcement. John P.’s experience (¶15) is representative—onboard staff demanding that he delete photos and show them that he had done so, or else they would confiscate his phone and have him detained upon arrival. Mr. Leslie’s experience is in accord, and when he stood fast in his refusal, he was indeed removed from the aircraft. (¶6)

G. Airline policies purport to limit or prohibit recording

22. A variety of airlines purport to limit or prohibit recording. The following paragraphs present applicable policies of the five largest domestic airlines, in descending order by revenue passenger miles.¹⁴

23. American Airlines is the largest domestic airline based on revenue passenger miles. The American Airlines onboard magazine *American Way* purports to disallow onboard recording. The magazine states as follows:

Unauthorized photography or video recording of airline personnel, other customers, aircraft equipment or procedures is prohibited.¹⁵

¹⁴ Bureau of Transportation Statistics, “Airline Domestic Market Share March 2016 - February 2017,” <https://www.transtats.bts.gov/>, as of May 30, 2017

¹⁵ May 2017 issue, page 105, retrieved on 29 May 2017 from <http://edition.pagesuite.com/html5/reader/production/default.aspx?pubname=&edid=c47d9aea-084f-4c8d-aca8-8fa400a6045f>

On information and belief, this requirement is not present in the AA Conditions of Contract, International General Rules, or other contract documents. On information and belief, this requirement is not published on American’s website.

24. Southwest is the second-largest domestic airline based on revenue passenger miles. Southwest recently told the Washington Post that its policy allows recording of “personal events” but “can never interfere with the safety of a flight and should always respect others’ privacy.” Southwest further indicated that passengers who want to record Southwest employees must “Let [them] know first”—suggesting that Southwest believes employees have the right to withhold permission for such recordings.¹⁶ However, on information and belief, Southwest’s current Contract of Carriage makes no mention of any prohibition on recordings. On information and belief, no such restriction is published on Southwest’s website.

25. Delta is the third-largest domestic airline based on revenue passenger miles. In litigation, Delta has claimed that a passenger’s recording constituted “failure to abide by the contract of carriage.”¹⁷ On information and belief, Delta has a policy purporting to ban or limit passenger recordings. However, on information and belief, Delta’s current Contract of Carriage makes no mention of any prohibition on recordings. On information and belief, no such restriction is published on Delta’s website.

26. United is the fourth-largest domestic airline based on revenue passenger miles. United’s “electronic device policies” instructs as follows:

¹⁶ Andrea Sachs, “You’re on a plane. A situation is brewing. You have a camera. Do you press record?” Washington Post. May 22, 2017. https://www.washingtonpost.com/lifestyle/travel/youre-on-plane-a-situation-is-brewing-you-have-a-camera-do-you-press-record/2017/05/19/31d007e6-350b-11e7-b373-418f6849a004_story.html .

¹⁷ Matthew Boggan, et al., v. Delta Airline Inc, Supreme Court of the State of New York, County of Rockland, Index No. 032947/16, Verified Answer, August 24, 2016. ¶66.

The use of small cameras or mobile devices for photography and video is permitted on board, provided you keep the purpose of your photography and video to capturing personal events. Photographing or recording other customers or airline personnel without their express consent is prohibited.

This policy is posted online at <https://www.united.com/web/en-US/content/travel/inflight/devices.aspx> and, on information and belief, is or was previously included in the United *Hemispheres* online magazine. Because the policy is posted online, passengers could in principle learn about the policy before purchasing tickets. However, on information and belief, the policy is not incorporated into the United Conditions of Contract, International General Rules, or other contract documents.

27. JetBlue is the fifth-largest domestic airline based on revenue passenger miles. A JetBlue spokesperson recently told the Associated Press that the airline does not publish its photography policy for security reasons.¹⁸ By all indications, JetBlue bans some onboard recordings, as it called airport police in response to passenger Nissensohn's recording (¶17).

II. ANALYSIS

A. Airline's recording policies lack any basis in contract

28. The above-referenced airline policies are not binding on passengers through traditional mechanisms of contract. A policy presented to customers only in an onboard magazine (as AA does, ¶23) cannot be said to be part of any meeting of the minds under longstanding principles of contract, as such a policy is unknown to customers and unknowable to customers before the customers make purchases. A policy presented only in an arbitrary web page (as United does, ¶26) (but not included within, or

¹⁸ David Koenig, "Airlines have rules about taking photos, video on planes," Associated Press, May 25, 2017.

incorporated by reference from, the governing contract documents, such as Contract of Carriage or International General Rules) is not part of a passenger’s contract and is not part of the bundle of obligations the customer accepts. If an airline intentionally withholds a policy from customers (as JetBlue apparently does, ¶26), passengers manifestly do not “agree” to such a policy.

29. On information and belief, airlines sometimes purport to prohibit recording based on contractual provisions that purport to allow removal for substantially any reason. For example, AA’s Conditions of Carriage specifies:

American may refuse to transport you, or may remove you from your flight at any point, for one or several reasons, including but not limited to: ...
(10) Refuse to obey instructions from any flight crew member.

Reliance on a such a general provision would be improper in response to the passenger recording scenarios discussed herein. If an airline has not established a specific rule disallowing such recording, it cannot rely on a sweeping backstop such as the quoted language, which could be invoked to impose arbitrary requirements which the passenger did not know in advance and could not accept or reject. 14 CFR 221.40(a)(4) prohibits vague and indefinite provisions, mandating that “rules shall state definitely what the carrier will or will not do under the exact conditions stated in the rules.”

B. Airline’s recording policies lack any basis in law or regulation

30. On information and belief, airlines sometimes purport to prohibit recording pursuant to 49 USC § 46504, which prohibits passengers from interfering with the performance of flight attendants. But a passenger who merely records, from within his assigned seat or other areas accessible to passengers, without blocking flight crew or indeed even speaking to flight crew, cannot reasonably be claimed to interfere with the performance of their duties. 14 CFR 91.11 clarifies that “intimidate[ing]” a crew

member is similarly prohibited. But passively recording a crew member's actions, in the crew member's workplace in the public view, cannot reasonably be claimed to constitute intimidation.

31. On information and belief, airlines sometimes purport to prohibit recording pursuant to 14 CFR § 121.317(k), which requires that

Each passenger shall comply with instructions given him or her by a crewmember regarding compliance with paragraphs (f), (g), (h), and (l) of this section.

For example, airlines sometime tell passengers “Federal law requires passengers to comply with crew member instructions.” But the specified paragraphs pertain to seat belts, no smoking signs, smoking in lavatories, and tampering with smoke detectors. Nothing in 14 CFR § 121.317 or elsewhere in applicable regulations requires passengers to comply with arbitrary requests from crewmembers. Nothing in § 121.317(k) would require a passenger to honor a crewmember's request that a passenger cease recording or delete recordings.

32. On information and belief, airlines sometimes purport to prohibit recordings pursuant to 14 CFR § 121.580, prohibiting “interference with crewmembers” which instructs that “No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft.” But a recording, made from a place where a passenger has a right to be, cannot be aid to “threaten, intimidate, or interfere.” A crewmember might report feeling intimidated by the prospect of a passenger grievance well supported by recorded evidence, particularly if such evidence supports the passenger's version of events and undermines a false report by the crewmember. But such a feeling is not a legally recognized notion of “intimidat[ion]” as the true source of crewmember fear is the subsequent dispute

resolution process, not the recording itself. A crewmember might similarly report that knowledge of recording prevented him or her from feeling confident in performing his or her duties. But such a feeling is similarly beyond the scope of § 121.580 and is well beyond a fair reading of that provision.

33. Airlines sometimes claim that banning recordings is proper in order to assure that staff can complete their duties. For example, when Mr. Boggan recorded a gate agent’s remarks, a Delta spokesperson defended the gate agent’s action to block the recording, claiming that Mr. Boggan “interfered with the Delta agent’s ability to communicate an announcement.”¹⁹ As a threshold matter, it is unclear whether such interference actually occurred; the video shows the agent capably making remarks unaffected by Mr. Boggan’s recording device, and a passive bystander’s recording cannot ordinarily be claimed to “interfere” with anything. In any event, no obvious principle of law would justify stopping a passenger from making a recording—not to mention committing assault—because the recording purportedly distracted the speaker or perhaps sparked interest by other onlookers.

34. On information and belief, airlines sometimes claim that recordings are prohibited under state laws protecting privacy. But no airline personnel have a reasonable expectation of privacy in their statements to passenger-customers, nor in their statements to or actions in the passenger areas of an aircraft cabin.

C. Airlines’ recording policies are ambiguous and lead to incorrect interpretations and incorrect enforcement

35. Unpublished policies create an increased likelihood of policies being enforced or applied improperly or even opportunistically. With policies not available to

¹⁹ See note 6, above.

passengers, airline staff are more likely to perceive that they can make up rules, resolving any ambiguity in their favor since passengers do not have the underlying documents that might reveal errors or misinterpretations. Moreover, with policies not available to passengers, airline staff are more likely to perceive that they can impose harsh policies of their own creation, including threatening police intervention (as in ¶4, 13, 17, 15), cancellation of onward travel (¶13), removal from the aircraft (¶14), and/or seizure of personal devices (¶15, 17). These threats both undermine passenger rights and create additional disputes.

36. Even under the most generous reading of airlines' policies, the policies are widely enforced incorrectly. Consider the report of passenger John P. who indicates that AA staff claimed not just that AA's policy disallows recording, but that they have the authority to seize a passenger's electronic device if the passenger records (¶15). Even assuming *arguendo* that AA's policy (¶23) is effective through principles of contract, despite appearing only in an inflight magazine where passengers could not know about it at the time of booking, nothing in the stated policy gives AA the extraordinary remedy of seizing a passenger's device. If the policy is a contract and if the passenger breached, AA's proper remedy is a civil suit in a court of competent jurisdiction, seeking AA's actual damages as provable under law.

37. Unpublished or unclear policies also invite confusion about what requirements stem from federal law or regulation, versus which requirements are of an airline's own creation. The experiences of Ms. Heitmann and Mr. Boggan are illustrative: AA and Delta agents claimed that recordings are "illegal" (¶12, 18) without any apparent training on the applicable law; and, by all indications, they were incorrect in

their claims. By conflating airline policies with federal law or regulation, airlines purport to circumvent the requirements of contract formation: A federal law or regulation would be binding on passengers whether or not made known to passengers in advance. In contrast, airline policies are effective through principles of contract, requiring that the policies be provided to passengers and incorporated into the contract formation process, which the relevant airline policies (if they exist at all) manifestly were not. Lack of clarity about legal violation versus contractual breach also strengthens airlines' threats to invoke law enforcement if passengers do not accede to airlines' demands: Passengers anticipate that law enforcement officers would not intervene in a private contractual dispute, whereas officers might be would likely be more willing to enforce federal law.

38. In failing to implement recording policies through a proper contractual framework, airlines increase the likelihood of both disputes and errors. Indeed, airlines have repeatedly been forced to admit that their staff acted improperly when banning passenger recordings or retaliating against passengers who made recordings. Mr. Nissensohn reported that a JetBlue supervisor later told him that flight attendants were incorrect to say he could not record onboard.²⁰ John P. reported that another flight attendant apologized for the actions of those who disallowed his photographs, and that this other flight attendant offered to take pictures of him and his wife.²¹ United admitted that its employee did not follow policy in cancelling Mr. Oza's ticket when he recorded her remarks (¶13). After media inquiries as to JetBlue's removal of Mr. Leslie for recording a sick child removed from the aircraft, JetBlue admitted that the incident was a "gray area" and paid some of Mr. Leslie's expenses resulting from the delay.²²

²¹ See note 10, above.

²² See note 2, above.

Meanwhile, airlines repeatedly ask police to respond to passenger recording, only to have no action taken because nothing unlawful occurred (including as to Mr. Nissensohn and Mr. Oza).

D. Even if airlines’ recording policies were proper under contract, law, or regulation, they cannot support the extraordinary remedies that airlines seek

39. Airlines have imposed extraordinary remedies in response to passengers’ supposed violations of recording policies. In general, an aggrieved party’s remedy for breach of contract is a civil lawsuit if authorized by law, seeking provable damages to the extent recoverable under law. Civil litigation is also the proper remedy for an alleged violation of state privacy law. In contrast, airlines and airline employees widely impose other remedies of their own extra-legal creation, such as requiring passengers to delete recordings, denying transport, summoning security officers, or even committing assault, all as described in section I.D.

E. Recorded factual evidence is in the public interest

40. Recordings can help to avoid disputes. Knowing that they are being recorded, airline staff have a heightened obligation to review applicable reviews and comport themselves accordingly. For example, had officers anticipated that passengers would record and share videos of their use of force against passenger Dao (¶4), it is unlikely that the officers would have proceeded as they did.

41. Indeed, myriad aspects of traveling experience could give rise to disputes best resolved through recordings. Consider a seat malfunctioning in a way that allegedly fell short of a carrier’s contractual obligations (i.e. promising a premium passenger a seat with certain advanced functions). Consider a passenger of size that allegedly reduced space available to others and whose presence, ticketed for a single seat, allegedly violated an airline’s policy. Consider an onboard animal that allegedly disrupted other

passengers. Consider airline staff who allegedly orally imposed restrictions beyond the requirements of applicable contracts, or who denied passengers benefits promised by contract. Consider airline staff who allegedly denied boarding without the oral disclosures required by regulation. Each allegation is difficult to resolve without an appropriate recording. But a tamper-proof contemporaneous electronic record eliminates the he-said-she-said fact-finding and dramatically simplifies dispute resolution.

42. Passenger recordings are especially important because airline staff and contractors may provide inaccurate statements about what happened. As mentioned above (¶4), Mr. Dao was falsely accused of “disruptive and belligerent” conduct by no less than United CEO Oscar Munoz, and was accused of violence by airport security officers who are now themselves under investigation both for their apparent misconduct and their false reports. Only thanks to passenger video recordings were these false accusations called into question. AA’s business records as to the timing of restoration of a IDB placard were similarly inaccurate, and Ms. Edelman was able to rebut these records only through electronic recordings made by a passenger assisting her (¶8). Meanwhile, the absence of such recordings also harms passengers. For example, for lack of a recording of onboard events, Mr. Klint could not adequately rebut an accusation by a United flight attendant which he claimed was false (¶14).

43. Remarkably, at the same time that airlines criticize passenger recordings and purport to ban them, they also seek to use these recordings to resolve the very same disputes. For example, responding to a media inquiry, a JetBlue spokesperson cited Mr. Leslie’s video—the same video for which he was removed from the flight he had paid

for!—as a possible basis to understand what occurred.²³ In response to a formal DOT complaint from complainant Edelman, AA criticized portions of the complaint that resulted from “an unrecorded telephone conversation”²⁴ between Edelman and an AA reservations agent. As to other false statements Edelman alleged by another AA agent, AA similarly complained that “there is no recording of the call to verify the details of this telephone exchange.”²⁵ Yet even as AA claimed Edelman’s claims were weak or stillborn for lack of such recordings, AA also claimed that Edelman was prohibited from recording its employees’ allegedly-false statements.²⁶ There is considerable irony to JetBlue first removing Mr. Leslie for making the video, then wanting to see it; and similarly to AA criticizing the lack of call recordings while simultaneously arguing that such recordings were prohibited. But both airlines’ statements nonetheless confirm the importance of recordings in understanding what happened and resolving a dispute.

F. Both airline employees and the traveling public lack a clear understanding of the rules that govern recording

44. By all indications, neither airline staff nor the traveling public adequately understand the laws, regulations, contract provisions, and airline policies that govern passenger recordings. Lack of understanding creates an increased risk of incorrect application of policy, overstatement of applicable prohibitions, and associated errors. Airlines’ multiple admissions of errors in this area—repeatedly removing passengers and

²³ Lysee Mitri, “Man kicked off Albuquerque flight after taking cell phone video,” KRQE News 13, April 14, 2015. <http://krqe.com/2015/04/14/man-kicked-off-albuquerque-flight-after-taking-cell-phone-video/> .

²⁴ Answer of American Airlines, March 22, 2013, footnote 8, docket [DOT-OST-2013-0024-0012](#).

²⁵ *Id.*, page 12.

²⁶ Supplement to the Answer of American Airlines Inc., Admissions and Denials, paragraph 5, docket [DOT-OST-2013-0024-0012](#) (admitting that AA’s telephone system states “this call may be recorded,” but denying that “this statement authorizes anyone other than American to record the telephone calls”).

taking harsh actions, only to later admit that they had done so incorrectly (§36)—reveal and confirm the inadequate understanding of responsible airline staff.

45. For example, when Mr. Oza recorded a ground agent’s insistence that he pay a high fee, the agent called airport police—but airport police reported that he was within his rights to record the discussion because he was in a public place. The United agent’s decision to call airport police appears to reflect her incorrect view that Mr. Oza’s recording was unlawful. Department guidance could help reduce such confusion and such errors.

46. The prospect of a secret policy, such as JetBlue’s, prevents public understanding and undermines compliance. The Department should ban secret policies, as passengers cannot be expected to comply with rules of which they are not told.

47. Even airline attorneys appear to have an incomplete understanding of the relevant law and contract pertaining to passenger recordings. Defending litigation by Mr. Boggan, Delta offers an affirmative defense that the events at issue—the Delta ground agent assaulting Mr. Boggan—“were caused solely by [Boggan’s] conduct and failure to abide by the contract of carriage, failure to follow lawful directives from gate agents in connection with boarding procedures and failure to abide by Federal Aviation regulations.”²⁷ Tellingly, Delta fails to cite an applicable provision of the Contract of Carriage, fails to identify any authority that the gate agent’s request was lawful, and fails to identify any federal regulations on point. On information and belief, there is no such authority.

²⁷ Delta Airline Verified Answer, *supra* note 17.

G. Market competition is unlikely to provide the benefits of recording

48. Airlines' recording policies are often secret and, in any event, difficult to find on their web sites. Competition will not discourage airlines from implementing harsh policies if customers cannot know about these policies when choosing travel.

49. Moreover, passengers are unlikely to choose an airline on the basis of right to record or right to collect information to resolve disputes. Instead, traditional metrics such as price and schedule are likely to dominate decisions for substantially all passengers. Meanwhile, increased concentration among just a few airlines further reduces the opportunity for, and likelihood of, an airline distinguishing itself through a superior policy in this regard.

H. Rulemaking would advance the Department's mission and the Secretary's stated policies

50. The Department's mission affirms its aspiration to “enhance[] the quality of life” through transportation. A troubling series of disputes between passengers and airlines, including high-profile disputes and disputes culminating in physical injury, reveal that much is left to be done in service of this worthy goal. Recordings play an important role in assuring that both passengers and airline personnel do their part, and we call for DOT rulemaking to assure that passengers can make such recordings with appropriate confidence.

51. Secretary Chao on June 7, 2017 reaffirmed that the Department's consumer protection program “requires that all sellers of air transportation provide consumers with timely, accurate, and complete information on which to base their purchasing decisions” and that “the Department recognizes the importance of market

forces in shaping this system while closely monitoring the industry to prevent unfair, deceptive, and anti-competitive practices.”²⁸

III. REQUEST FOR RULEMAKING

52. We ask that the Department issue rules indicating that:

- a. passenger recordings, subject to reasonable conditions, are in the public interest;
- b. recordings made to resolve bona fide disputes are presumptively in the public interest;
- c. recordings made from a place where a passenger has a right to be, without interfering with airline personnel, are presumptively in the public interest;
- d. the mere fact that a recording preserves statements of airline personnel, or shows airline or airport equipment, does not render the recording improper or impermissible.

53. We ask that the Department issue rules declaring that recordings consistent with ¶52 are a passenger’s right and do not violate any statutory or regulatory prohibitions.

54. We ask that the Department find that recording, in and of itself, does not “intimidate” a crew member within the meaning of 14 CFR 91.11; and to find that recording, in and of itself, does not “assault, threaten, intimidate, or interfere with a crewmember” within the meaning of § 121.580.

²⁸ Secretary Chao letter dated June 7, 2017, in DOT-OST-2016-0204-58442.

55. We ask that the Department issue rules prohibiting any airline policies purportedly disallowing recordings consistent with ¶52. Furthermore, we ask that the Department issue rules requiring that any airline policies purportedly limiting recording have a proper and articulated purpose; that such policies be part of the airline's Conditions of Contract, International General Rules, or other applicable contract; that they be readily and reasonably available to passengers prior to purchase at all points of purchase; and that that all such policies be consistent with ¶52.

56. We ask that the Department issue rules prohibiting airline personnel from asserting that recordings consistent with ¶52 are prohibited by law; from removing or threatening to remove passengers for such recordings; from conditioning travel or other benefits on failure to record, promising not to record, or deleting recordings; or from otherwise interfering with such recordings.

57. We ask that the Department find that it is an unfair and deceptive practice for an airline to ban, or purport to ban, recordings consistent with ¶52.

58. We ask that the Department reaffirm that it is an unfair and deceptive practice for an airline to impose restrictions on passengers beyond the requirements contained in the airline's Conditions of Contract, International General Rules, or other applicable contract;

59. We further ask that the Department assess whether any of the acts reported herein, or uncovered during rulemaking, constitute unfair or deceptive practices within the meaning of 49 USC § 41712; and if so, we ask that the Department bring appropriate and timely enforcement proceedings.

Benjamin Edelman and Mike Borsetti
Petition for Rulemaking – Passenger Right to Record

Respectfully submitted,

/s/

Benjamin Edelman

/s/

Mike Borsetti

Certificate of Service

I, Benjamin Edelman on behalf of both filers, hereby certify that I have, this 19th day of June, 2017 caused a copy of the foregoing document to be served by electronic mail on the following persons:

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