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FEDERAL PREEMPTION BY THE AIRLINE DEREGULATION ACT OF 1978: HOW DO STATE TORT CLAIMS FARE?

Matthew J. Kelly

Since the first scheduled passenger air transportation service began in 1914, the commercial air carrier (airline) industry in the United States has exploded into an enormous business employing over one million people and providing air transportation to more than 500 million passengers annually. Commentators credit the Airline Deregulation Act of 1978 (ADA) with allowing the airline industry to grow to the level it is today. However important the ADA is, or has been, to the growth of the airline industry, though, courts have had much difficulty defining its scope. This difficulty lies in understanding and defining the limits of the ADA's express preemption of state laws and state enforcement actions.

Beginning with the Air Commerce Act of 1926, Congress began en-

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1 J.D., May 2000, The Catholic University of America, Columbus School of Law.
3 Many of the authorities, including statutes and court opinions, relied on in this Comment use the term “air carrier” to describe the commercial airline industry. For purposes of brevity and clarity, the phrase “air carrier” is replaced by the term “airline” whenever possible. The use of the phrase “air carrier” is limited to direct quotations only.
5 See id. at 18.
6 See generally Air Transp. Ass'n, The Airline Industry, Competition, Service and Prices (1999) (asserting that the ADA increased airline competition, efficiency, and service, as well as lowered passenger fares, and increased airline profits by removing government control over the rates an airline may charge, the routes it may fly, and the markets it may enter).
7 See infra Part II.C (discussing the similarities and differences in some of the cases that have confronted ADA preemption).
8 See infra Part II.C (demonstrating that ADA preemption jurisprudence is, at best, piecemeal and incomplete).
acting legislation aimed at regulating the fledgling airline industry.\textsuperscript{10} Enactment of the Civil Aeronautics Act of 1938\textsuperscript{11} was next, followed by the Federal Aviation Act of 1958,\textsuperscript{12} and culminating with the Airline Deregulation Act of 1978.\textsuperscript{13}

In its efforts to deregulate the airline industry, Congress included a preemption clause in the ADA that prevents the states from enacting or enforcing any law or regulation relating to the prices, routes, or services of an airline.\textsuperscript{14} The clause, however, has resulted in uncertainties in the application of the ADA.\textsuperscript{15} These uncertainties arose, in part, because Congress neither defined the term “services” for purposes of ADA preemption,\textsuperscript{16} nor enumerated the types of state law actions or claims that fall victim to preemption.\textsuperscript{17} Courts left with the task of construing the federal statute on their own have defined the term “services” differently and arrived at different conclusions as to what types of state law claims

\begin{enumerate}

\item See infra Part II.C.
\item See 49 U.S.C. § 41713(a)-(b).
\item See id.
are subject to preemption. As a result, state law claims have survived preemption in one jurisdiction but have fallen in another. The lack of uniformity among jurisdictions leaves state law claimants, particularly tort plaintiffs and the airlines, without clear legal precedent to help them decide the appropriate state law claims to bring or defenses to assert. Under current law, neither state plaintiffs nor airlines know whether a state law claim relates to services, or is the type of claim subject to preemption, except in a few circumstances.

This Comment first briefly discusses the history of federal regulation over the airline industry. Then, this Comment explores the litigation that has attempted to define the scope of ADA preemption. Next, this Comment discusses state tort law and the legal ramifications of allowing state tort claims against airlines to proceed. This Comment distinguishes between state law tort claims that involve bodily injury or death and non-bodily injury tort claims, accepting facilely that bodily injury or death tort claims are preemption proof. Finally, this Comment concludes that a clear definition of the term "services" is necessary to resolve inter-jurisdictional conflict, and that non-bodily injury tort claims, without congressional action or Supreme Court construction, fall victim to ADA preemption.

I. A BRIEF HISTORY OF CONGRESSIONAL REGULATION OF THE AIRLINE INDUSTRY

Congress' first major legislation directed toward commercial aviation

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18. See infra Part II.C.
19. See id.
20. See id. But see infra text accompanying note 22 (citing an opposing view that, notwithstanding the state of the law at the time, Congress' intent was not to preempt state tort law).
21. See infra Part II.C. As discussed below, state plaintiffs and airlines can determine in some circumstances whether they have brought an appropriate claim or asserted an appropriate defense. The Supreme Court has construed the ADA's preemption clause to apply to claims based on state consumer protection laws, and has excepted routine breach of contract claims, such as claims that require judicial enforcement of only the bargain between the parties, from the purview of ADA preemption. See infra Part II.A-B.
22. But see Houchin, supra note 10, at 968-71 (arguing that the Ninth Circuit ignored congressional intent in finding that the ADA preempted the non-bodily injury tort claims at issue in Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995)).

The Ninth Circuit confirmed Houchin's arguments not long after his publication. In an en banc decision in late 1998, the Ninth Circuit reversed its position and held that Congress did not intend to supplant state tort law, including the non-bodily injury tort claim alleged in Harris, through the ADA preemption clause. See Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998).
was the Air Commerce Act of 1926. This Act vested regulatory authority over navigable airspace upon at least four distinct entities: the Department of Commerce, the President, the Department of Defense, and the states.

Realizing that vesting authority over navigable airspace with many different entities would cause conflict in the growing airline industry, Congress enacted the Civil Aeronautics Act of 1938 (CAA). The CAA was designed to give one government agency authority over navigable airspace, thus creating the Civil Aeronautics Authority, later renamed the Civil Aeronautics Board (CAB). Congress also enacted a general remedies saving clause as part of the CAA providing that the CAA would not alter any common law or statutory remedies then in existence.

The Federal Aviation Act of 1958 (FAA) created the Federal Aviation Agency, whose functions, powers, and duties were later transferred to promote civil aviation, promulgate safety regulations, and establish and enforce air traffic and navigational rules. Although the FAA retained the CAB, its powers were...
limited to overseeing certain areas of the industry, including economic regulation. The FAA left undisturbed the general remedies saving clause enacted in the CAA.

The strict regulatory scheme established under the CAA, as amended by the FAA, led Congress to enact the Airline Deregulation Act of 1978. The ADA allowed the airline industry to enhance competition and removed perceived onerous economic restrictions placed on airlines by the CAB. The ADA terminated certain portions of the CAB’s authority and gradually transferred the remainder to other government departments, with the ultimate goal of phasing out the CAB completely. To prevent the states from regulating what Congress was be-

33. See id. §§ 201-205, 72 Stat. at 741-44.
34. See id. §§ 204, 401-416, 72 Stat. at 743, 754-71.
37. See H.R. REP. NO. 95-1211, at 1-2 (1978), reprinted in 1978 U.S.C.C.A.N. 3737, 3737 (observing that airlines were “subject to extensive economic regulation by the CAB” and did not enjoy “the same control over basic operational decisions as management in other industries”); see also H.R. CONF. REP. NO. 95-1779, at 53-56 (1978), reprinted in 1978 U.S.C.C.A.N. 3773, 3773-75 (setting out a joint statement submitted by certain members of Congress that established specific programs for increased competition).

Interestingly, some viewed the CAB not as an overly restrictive agency but more as a paternalistic program necessary for the survival of the commercial airline industry. As one journalist who reported on the CAB wrote in his 1974 book:

[The] big battles today are among the airlines: Pan American vs. TWA; Eastern vs. National; United vs. American.
The airlines, like Killarney cats, would cheerfully swallow each other up, if given half a chance. But Congress created the Civil Aeronautics Board in 1938 to check, or at least control—hopefully, in the public interest—the self-destructive tendencies of the air transport companies.

CAB’s relationship to the airlines can perhaps be compared to the governor on a steam engine. When the airlines begin to over-reach themselves, and the industry starts to spin too fast, the [CAB] has ways of damping down the action before it gets out of control. And when the airlines find themselves in a period of stagnation, as happens now and again, the CAB seeks ways to help stimulate lagging traffic growth.


Congress obviously saw it differently and, a few short years after Mr. Burkhardt’s publication, began the dismantling of the CAB. See infra notes 39-41 (delineating the demise of the CAB).
39. See id. § 1601(a)(4), 92 Stat. at 1745 (providing that “[T]itle II of [the FAA] shall
ginning to deregulate, Congress included a clause in the ADA forbidding the states from regulating the industry’s prices, routes, or services. The ADA, however, neither defined the term “services” nor delineated the parameters of its preemptive effect.

II. SETTING THE STAGE FOR CONFUSION: THE SUPREME COURT ENUNCIATES THE GENERAL RULE AND THE EXCEPTIONS TO THE RULE, BUT GIVES THE LOWER COURTS LITTLE GUIDANCE

A. Morales v. Trans World Airlines, Inc.: The Supreme Court Hears the First Airline Deregulation Act Preemption Case

The Supreme Court first confronted the ADA’s preemption clause in Morales v. Trans World Airlines, Inc. At issue in Morales was whether the ADA preempted the Air Travel Industry Enforcement Guidelines (Guidelines) adopted by the National Association of Attorneys General (NAAG). The attorneys general argued that the Guidelines were not subject to ADA preemption because the Guidelines were not laws within the meaning of the ADA, but rather only detailed rules explaining how the various states’ laws applied to fare advertising, frequent flyer programs, and flight overbooking.
The Court determined that the ADA preempted the Guidelines, and the state laws underlying them, because they related to the airlines’ rates. In concluding that the Guidelines were subject to ADA preemption, the Court focused on the phrase “relating to” in the preemption clause. Reading the ordinary language of the preemption clause, the Court determined that it “express[ed] a broad pre-emptive purpose.” To reinforce its determination that the ADA preemption clause has a broad purpose, the Court compared similar preemptive language contained in the Employee Retirement Income Security Act of 1974 (ERISA), and cases construing that language, with the ADA’s preemption clause. Those cases, the Court noted, held that the language of ERISA’s preemption clause expressed a broad preemptive purpose and, by analogy, the ADA’s preemption clause also expressed a broad preemptive purpose.

The proponents of the Guidelines at issue in Morales raised five objections to preemption by the ADA, but the Court rejected all of them. In striking down the proponents’ arguments seriatim, the Court began to define the scope of preemption under the ADA. First, the

45. See id. at 388-91.
46. See id. at 383 (declaring that “[f]or purposes of the present case, the key phrase, obviously, is ‘relating to.’”).
47. Id. at 384 (relying on BLACK’S LAW DICTIONARY definitions).
49. See Morales, 504 U.S. at 383-84.
50. See id. The Court also observed: [Morales] appears to us much like Pilot Life [Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)], in which we held that a common-law tort and contract action seeking damages for the failure of an employee benefit plan to pay benefits “relate[d] to” employee benefit plans and was pre-empted by ERISA. Id. at 388 (second alteration in original).
51. See id. at 384-87. To invalidate each of the proponents’ objections to preemption, the Supreme Court, with one exception, deferred to its ERISA precedent. See id. at 384-87. The Court did not need to analogize ERISA precedent to dismiss the assertion by the proponents of the Guidelines that the ADA only preempts the states from actually prescribing prices, routes, or services. Rather, the Court read the language of the preemption clause and determined that such a view “simply reads the words ‘relating to’ out of the statute.” Id. at 385.
52. See id. at 384.
Guidelines' proponents argued that construing the ADA's preemption clause by comparing ERISA's preemptive language was inapposite because the breadth of ERISA preemption derives from language other than the ADA's similar "related to" language. The Court determined that ERISA is an appropriate statute with which to analyze the ADA because of the similarities in the language between their respective preemption clauses. Additionally, the Court analogized ADA preemption to ERISA preemption jurisprudence, which relies heavily on the express preemption clause and the interpretation of the phrase "relates to."

Second, the proponents argued that the saving clause, still in effect after Congress enacted the ADA, was broader than its ERISA counterpart; thus, the ADA's preemption clause did not reach state common law and statutory claims. Although it recognized that the saving clause remains in the United States Code, the Court decided that the saving clause was not controlling in the face of an express preemption clause.

Third, the proponents contended that the ADA only forbids the states from directly regulating airline rates, routes, or services, and because the drafters of the Guidelines based them on general state consumer protection laws, the Guidelines escaped preemption. The broad interpretation of the "relating to" language in the ADA led the Court to conclude, however, that the ADA's preemption clause is not limited only to those state laws or actions that actually seek to prescribe rates, routes, or services.

Next, the proponents asserted that the ADA only preempts state laws specifically directed at the airline industry, not laws of general applica-
Because of the breadth of the ADA's preemptive scope, the Court held that state laws with general applicability are preempted; to hold otherwise "ignores the sweep of the 'relating to' language." In other words, because of its breadth, the ADA preempts laws that do not specifically address the airline industry.

Fifth, the proponents argued that because the Guidelines were consistent with federal law on the issues they addressed, the Guidelines were not subject to the preemption clause. In rejecting the petitioners' fifth argument, the Court held that ADA even preempts state laws that are consistent with federal law.

In Morales, the Court noted an exception to the ADA's broad preemptive effect. If a claim relates to the prices, routes, or services of an airline "in too tenuous, remote or peripheral a manner," the claim may survive preemption. The Court did not define any other terms in the preemption clause, including "rates," "routes," and most notably, "services." The holding in Morales demonstrates that the ADA preempts claims based on a particular state's consumer protection laws.

60. See id. at 386.

61. Id. (citing, inter alia, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987), which held that ERISA preempts common law tort and contract actions). In Harris v. Ford Motor Co., 110 F.3d 1410, 1414 n.8 (9th Cir. 1997), the court of appeals noted that state tort laws are laws of general applicability. This definition of the nature of state tort law becomes an important issue later in this Comment. See infra Part III.A-C; see also infra note 155 and accompanying text.

62. See Morales, 504 U.S. at 386.

63. See id.

64. See id. at 387.

65. See id. at 390.

66. See id. (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).

67. The Court did discuss airlines' rates, but did not proffer a definition. See id. at 387. The Court observed: "[I]t is hardly surprising that petitioner rests most of his case on such strained readings of [the preemption clause], rather than contesting whether the NAAG guidelines really 'relat[e] to' fares. They quite obviously do." Id. (second alteration in original); see also id. at 388 (concluding that "[o]ne cannot avoid the conclusion that...the guidelines 'relate to' airline rates. In its terms, every one of the guidelines...bears a 'reference to' airfares.'").

68. See id. at 378 (framing the issue as whether the ADA "pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes"). The Court ultimately concluded that the states may not enforce their consumer protection laws against the airlines. See id. at 390-91.
B. American Airlines, Inc. v. Wolens: Preemption Under the Airline Deregulation Act Revisited

The Supreme Court next confronted ADA preemption in *American Airlines, Inc. v. Wolens.* The plaintiffs in *Wolens* filed suit against the airline because the airline unilaterally devalued the plaintiffs' frequent flyer credits. The plaintiffs alleged that the airline violated the Illinois Consumer Fraud and Deceptive Business Practices Act and was in breach of contract. The airline asserted that the ADA preempted both causes of action. The airline did not argue, however, that its contracts were not enforceable; instead, they contended that the Department of Transportation should decide such matters, not state courts. The Court rejected components of each party's arguments.

First, the Court rejected the plaintiffs' claims under the Illinois consumer protection legislation and held, as it did in *Morales,* that the ADA preempts claims based on that type of legislation. Second, the Court carved out an additional exception to the ADA's preemptive effect on state law claims: standard breach of contract claims against airlines survive preemption under the ADA if those claims merely seek judicial enforcement of the obligations undertaken by the airlines. In arriving at this conclusion, the Court interpreted the phrase "enact or enforce any law" in the ADA preemption clause to mean obligations placed upon the airlines by the states, but not judicial enforcement of obligations under-

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70. See id. at 222, 224-25. The devaluation occurred because the airline instituted a policy that limited the number of seats that persons obtaining tickets with frequent flyer credits could occupy, and because the airlines excluded certain time periods when passengers could obtain tickets with frequent flyer credits (so-called "blackout dates"). See id. at 225. The plaintiffs in *Wolens* brought two causes of action—one for breach of contract and the other for a violation of the Illinois Consumer Fraud Act and Deceptive Business Practices Act. See id. The plaintiffs conceded that the airline had a contractual right to change the terms of the frequent flyer program unilaterally. See id. Thus, the plaintiffs' grounded their complaint on the argument that the airline's change in policy was retroactive against frequent flyer credits already earned. See id.

71. 815 ILL. COMP. STAT. ANN. § 505/2 (West 1999); see *Wolens,* 513 U.S. at 225.

72. See *Wolens,* 513 U.S. at 225.

73. See id. at 228-29, 230-32.

74. See id. at 230-32.

75. See id. at 228 (holding that the ADA preemption clause "preempts plaintiffs' claims under the Consumer Fraud Act").

76. See id. at 228-29.

77. See id. at 226-27 (observing that the Illinois Consumer Fraud Act "controls the primary conduct of those falling within its governance").
taken by the airlines themselves. The Wolens Court rejected the airline's claim that the Department of Transportation should determine whether the airline breached its contract with its passengers, and agreed with the position of the United States, arguing as amicus curiae, that the Department of Transportation had neither the authority nor the resources to be the arbiter of such claims.

Similar to Morales, the Wolens decision further clarifies the ADA's preemptive scope, but again fails to define the term "services" for ADA purposes. Accordingly, the lower courts have had to make decisions on how ADA preemption applies to state law claims without the benefit of a precise definition.

C. The Lower Courts Struggle to Define the Terms Left Untouched by the Supreme Court: Differing Interpretations, Treatment, and Outcomes

Since the most recent Supreme Court decision in Wolens, four circuit courts of appeals have addressed preemption of state law claims under the ADA directly and each court has reached different results.

1. Hodges v. Delta Airlines, Inc.: A Broad Definition of "Services"

The plaintiff in Hodges v. Delta Airlines, Inc. brought a state claim against the defendant airline alleging it was negligent for allowing a box of rum to be stowed in an overhead compartment after the box fell and struck her when the compartment opened. The issue before the court was the "breadth of [the] express preemption of state law [by the ADA]." In deciding that the plaintiff's tort claims were not subject to ADA preemption, the Hodges court reasoned that Congress' intent in enacting the ADA's preemption clause was not to preempt state tort
It arrived at this conclusion based on a statute that requires airlines to carry liability insurance, or be self-insured, for bodily injuries or death resulting from the operations or maintenance of an aircraft. The 

The Hodges court distinguished between the services of an airline and the operations and maintenance of an aircraft. The court found that claims relating to the operations and maintenance of an aircraft fell implicitly into an exception to ADA preemption created by the compulsory insurance statute. Rather than finding that the plaintiff's claim related to "services," the Hodges court found that the claim fell within the operations and maintenance of the aircraft and was thereby beyond the scope of ADA preemption.

The Hodges court recognized that Morales requires preemption of state law claims relating to prices, routes, or services, but also noted that Morales did not define the term "services." Thus, the Hodges court fashioned its own interpretation of the term. Notwithstanding the holding in Hodges, the court adopted a broad definition of the term "services" in its analysis. The court determined that the term "services" includes items such as ticketing, boarding, provisions of food and beverages, baggage handling, and the actual transportation of passengers.

86. See id. at 338.
87. See id. This insurance provision of the United States Code was originally codified at 49 U.S.C. § 1371(q) (1976), and mandated that air carriers maintain insurance, or be self-insured, to cover "amounts for which . . . air carrier[s] may become liable for bodily injuries to or the death of any person . . . resulting from the operation or maintenance of aircraft." After Congress revised title 49, see Revision of Title 49, U.S.C., Pub. L. No. 103-272, 108 Stat. 745 (1994), this section was re-codified in substance at 49 U.S.C. § 41112(a) (1994).

The Hodges court believed that Congress did not intend to preempt state law personal injury claims in light of the compulsory insurance provision of the United States Code. See Hodges, 44 F.3d at 338. The court stated that "Congress did not . . . intend [the ADA] to preempt all state claims for personal injury" because "[a]ir carriers are required to maintain [liability] insurance or self insurance . . . . Congress explicitly preserved airlines' duty to respond to tort actions, inferentially state law actions, for physical injury or property damage." Id. at 338-39.
88. See Hodges, 44 F.3d at 338-39.
89. See id. at 339-40.
90. See id. at 340.
91. See id. at 336 (observing that "Morales commands that whatever state laws 'relate to rates, routes or services' are broadly preempted, but it does not define 'services'").
92. See id. at 336-37.
93. See id.
94. See id. at 336. The court in Hodges stated:
"Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual
This was the first, and perhaps the broadest, definition of “services” that any circuit court had advanced to date.\textsuperscript{95}

2. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia: Reliance on the Hodges Definition of Services

Evaluating the plaintiffs’ allegations of breach of contract, defamation, and other tort causes of action, the court in \textit{Travel All Over the World, Inc. v. Kingdom of Saudi Arabia}\textsuperscript{96} found that the breach of contract claim survived preemption under the ADA.\textsuperscript{97} Plaintiffs’ based their breach of contract claim on the defendant airline’s cancellation of their clients’ flights because the plaintiffs lost the commissions on the reservations they sold.\textsuperscript{98}

In determining that the breach of contract claim was safe from federal preemption, the court reasoned that the underlying contract was a self-imposed obligation undertaken by the airline, rather than a state-imposed obligation.\textsuperscript{99} Asserting that federal regulations govern its “bumping” practices, the airline argued that the court cannot look only to the privately ordered undertakings of the parties, but must also examine federal regulations to determine whether a breach occurred as a result of the “bumping.”\textsuperscript{100} The defendant argued that the \textit{Wolens} exception to preemption, i.e., the survival of routine breach of contract claims based on the airline’s self-imposed obligations, did not apply to the plain-

arrangement between the airline and the user of the service. Elements of the air carrier service include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger \ldots and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as “services” and broadly to protect from state regulation.

\textit{Id.} (quoting with approval the panel decision in \textit{Hodges v. Delta Airlines, Inc.}, 4 F.3d 350, 354 (5th Cir. 1993) (alteration in original)).

\textsuperscript{95} \textit{See} \textit{Hodges}, 44 F.3d at 336. A blurry dichotomy was enunciated in \textit{Hodges} because of the court’s reliance on the compulsory insurance statute. \textit{See id.} at 338-39. That statute requires airlines to carry insurance to cover damages resulting from the “operation or maintenance of the aircraft.” \textit{See} 49 U.S.C. § 41112(a). The court distinguished between the operations and maintenance of an aircraft and the services of an aircraft, and hence found that the plaintiff’s claims implicated the operation and maintenance of the aircraft, but not airline services. \textit{See} \textit{Hodges}, 44 F.3d at 338-39. Because the court characterized the plaintiff’s claims in this way, those tort claims survived preemption under the ADA. \textit{See id.}

\textsuperscript{96} 73 F.3d 1423 (7th Cir. 1996).

\textsuperscript{97} \textit{See id.} at 1427-28.

\textsuperscript{98} \textit{See id.} at 1428.

\textsuperscript{99} \textit{See id.} at 1432.

\textsuperscript{100} \textit{See id.}
tiffs' claims that the ADA preempted them. The court in *Travel All Over the World* did not accept the defendant's attempt to distinguish *Wolens* on a "federal defenses" basis, and instead held that the preemption of state law claims is not dependent on whether federal regulations exist that govern the issue.

In finding that the ADA preempted plaintiffs' other tort claims, the court in *Travel All Over the World* adopted the same definition of "services" as the court in *Hodges*. The court found that the plaintiff's claims of intentional infliction of emotional distress and fraud, to the extent that they were based on the defendant's refusal to transport the reserved passengers, were preempted by the ADA because they related to the services of "ticketing as well as the transportation itself." Conversely, the plaintiffs' defamation and slander claims escaped preemption because they did not relate to the airline's services.

Both *Hodges* and *Travel All Over the World* accepted a broad definition of the term "services" as it relates to the preemption of state law claims. Additionally, the results arrived at by the two courts do not differ significantly because the claims at issue in *Travel All Over the World*...

101. See id.
102. See id. The court asserted that "[t]he question of whether a State has 'enacted or enforced a law' cannot depend on the existence of federal regulations in the same area." *Id.* Curiously, however, after making this assertion, the court indicated in a footnote that federal regulations could preempt state law claims by implication, but that the court would only imply preemption when a state claim is in conflict with the federal regulations. See *id.* at 1432 n.9. This revelation by the court seems to be inimical to the Supreme Court's opinion in *Morales*:

> Nothing in the language of [the ADA] suggests that its "relating to" pre-emption is limited to inconsistent state regulation; and once again our ERISA cases have settled the matter: The pre-emption provision . . . displaces all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.


Necessarily, states would be required to look to federal law and regulations to determine whether a state law cause of action lies. See *Smith v. Comair, Inc.*, 134 F.3d 254, 258 (4th Cir. 1998)

103. See *Travel All Over the World*, 73 F.3d at 1433 (quoting with approval *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (1995) (en banc)).

104. See *id.* at 1434. The court did indicate, however, that these claims may survive independent of the defendant's refusal to transport if the claims were based on the false statements alleged in the defamation and slander claims. See *id.*

105. *Id.* The plaintiff also asserted a defamation claim against the defendant; however, the court held that this claim did not relate to services of the airline, and, therefore, was not subject to preemption. See *id.* at 1433.

106. See *id.*

107. See *Hodges*, 44 F.3d at 336; *Travel All Over the World*, 73 F.3d at 1433.
did not implicate the operations or maintenance of an aircraft as did the claim in *Hodges*.

3. Smith v. Comair, Inc.: *Implicit Reliance on the Definition of “Services” Set Forth in Hodges*

The plaintiff in *Smith v. Comair, Inc.* filed a breach of contract action against the defendant airline for refusing to allow him to board an aircraft, in addition to tort claims of false imprisonment and intentional infliction of emotional distress. The issue before the *Smith* court was the ADA’s preemptive scope because the Fourth Circuit had not yet considered it.

The airline asserted defenses under federal law that give broad discretion to airlines, allowing them to refuse boarding to passengers it believes pose a safety risk. In addition, the airline asserted that the plaintiff did not comply with the Federal Aviation Administration’s safety directive that imposes an affirmative duty on the airlines to refuse boarding if a passenger does not present proper identification.

In passing on the plaintiff’s breach of contract claim, the *Smith* court determined that the *Wolens* exception was not controlling because the claim could only be resolved by looking to sources of law outside the parties’ agreement, namely federal statutes, regulations, and Federal Aviation Administra-

108. *See Hodges*, 44 F.3d at 339. The *Hodges* court recognized that the “general vindication of state tort claims arising from the maintenance or operation of aircraft does not extend to all conceivable state tort claims.” *Id.* (emphasis omitted). The court then observed that *O’Carroll v. American Airlines, Inc.* 863 F.2d 11 (5th Cir. 1989), is one such case that illustrates that point. *See Hodges*, 44 F.3d at 339. The plaintiff’s claim in *O’Carroll* that he was wrongfully excluded from a flight was preempted by the ADA because “[n]o claim was made that the airline breached any safety-related tort duty by bumping O’Carroll.” *Id.* at 339. As in *O’Carroll*, the plaintiffs in *Travel All Over the World* did not allege any tort involving airline safety. *See Travel All Over the World*, 73 F.3d at 1428 (alleging “breach of contract, tortious interference with a business relationship, defamation, slander, fraud, [and] intentional infliction of emotional distress”).

The *Hodges* court noted that the Fifth Circuit’s interpretation *sub judice* and in *O’Carroll* was in conflict with the Ninth Circuit’s opinion in *West v. Northwest Airlines, Inc.* 995 F.2d 148 (9th Cir. 1993). *See Hodges*, 44 F.3d at 339-40. In *West*, the Ninth Circuit held that the plaintiff’s claim that the airline wrongfully bumped him from an overbooked flight did not relate to “services” and was not preempted by the ADA. *See id.* The *Hodges* court further observed that “[u]nder either *Morales* or the analysis advanced here, it is difficult to see how a lawsuit for overbooking would not ‘relate to’ the airline’s contract for ‘services’ with its passenger.” *Id.* at 340.

109. 134 F.3d 254 (4th Cir. 1998).
110. *See id.* at 256.
111. *See id.* at 257.
112. *See id.* at 257-58; *see also* 49 U.S.C. § 44902(b) (1994).
113. *See Smith*, 134 F.3d at 256.
tion directives.\textsuperscript{114}

The \textit{Smith} court determined that the ADA also preempted the remaining tort claims to the extent they were based on the airline’s refusal to allow the plaintiff to board the aircraft because the denied boarding related to the “services” of the airline.\textsuperscript{115} Although the \textit{Smith} court did not attempt to define the scope of the term “services” within the meaning of the ADA, it did rely on \textit{Hodges} to imply that boarding procedures of the airline are “services.”\textsuperscript{116} Thus, the Fourth Circuit joined the Fifth and Seventh Circuits in utilizing the broad definition of “services” first enunciated in \textit{Hodges}.\textsuperscript{117}

4. Charas v. Trans World Airlines, Inc.: A Polar Opposite Approach and a Bare Bones Definition of “Services”

Although the above three circuits took a broad approach to the definition of “services,”\textsuperscript{118} the Ninth Circuit took an exceptionally limited view

\textsuperscript{114} See id. at 258 (observing that the plaintiff’s claim could only “be adjudicated by reference to law and policies external to the parties’ bargain”).

The defendant airline in \textit{Travel All Over the World} attempted to use this very defense, a so-called “federal defenses” argument. See \textit{Travel All Over the World} v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1432 (7th Cir. 1996). The argument failed. See id. (stating that whether a state enacts or enforces a law does not depend on federal regulations in the same area). In \textit{Smith}, however, this argument succeeded. See \textit{Smith}, 134 F.3d at 258.

The airline in \textit{Hodges} also attempted to assert a defense based on federal regulations. See \textit{Hodges} v. Delta Airlines, Inc., 44 F.3d 334, 339 n.12 (5th Cir. 1995) (en banc). There, the airline argued that the “state tort suit should not be permitted to proceed because it could impose duties that conflict with Federal Aviation Administration regulations governing carry-on baggage.” \textit{Id.} The court dismissed the airline’s contention because “[t]here [were] no facts in the record that intimate the basis for such a conflict.” \textit{Id.}

\textsuperscript{115} See \textit{Smith}, 134 F.3d at 259. The court also found that the two intentional tort claims failed to state a claim as a matter of state law. See id. at 259-60.

\textsuperscript{116} See id. at 259. The \textit{Smith} court also relied on \textit{Chukwu v. Board of Directors British Airways}, 101 F.3d 106 (1st Cir. 1996), to imply that boarding procedures are services within the meaning of the ADA.

\textsuperscript{117} See \textit{Hodges} v. Delta Airlines, Inc., 4 F.3d 350, 354 (5th Cir. 1993) (adopted with approval in \textit{Hodges}, 44 F.3d at 337). Even though the Fourth, Fifth, and Seventh Circuits appear to rely on a broad interpretation of the term “services,” the way in which each circuit has applied the definition is different. Compare \textit{Smith}, 134 F.3d at 259 (holding that false imprisonment and intentional infliction of emotional distress claims related to services and therefore preempted), with \textit{Hodges}, 44 F.3d at 338-39 (holding that tort claims did not relate to services, rather they related to the operations and maintenance of the aircraft and were not preempted), with \textit{Travel All Over the World}, 73 F.3d at 1434 (holding that intentional infliction of emotional distress and fraud claims related to services and were preempted).

\textsuperscript{118} See, e.g., \textit{Hodges}, 44 F.3d at 334; \textit{Travel All Over the World}, 73 F.3d at 1423; \textit{Smith}, 134 F.3d at 254.
of the term in Charas v. Trans World Airlines, Inc.\textsuperscript{119} Charas involved several individual cases consolidated for the purposes of en banc review.\textsuperscript{120} All of the plaintiffs filed negligence claims against the defendant airlines.\textsuperscript{121} In expressly overturning two other cases from the same circuit that took a broader view of the term “services” and of the ADA’s preemptive effect,\textsuperscript{122} the Charas court, much like the court in Hodges,\textsuperscript{123} did not believe that Congress intended to preempt all state law personal injury claims.\textsuperscript{124} The court, however, did diverge from Hodges in two respects.\textsuperscript{125}

First, the Charas court disagreed that claims related to operations and maintenance of an aircraft escape preemption while claims relating to services are subject to preemption because such a distinction creates an unworkable dichotomy.\textsuperscript{126} Second, the Charas court differed from Hodges in its interpretation of the term “services,” and fashioned a severely limited definition, encompassing only the transportation itself.\textsuperscript{127}

\textsuperscript{119} 160 F.3d 1259, 1265-66 (9th Cir. 1998) (en banc).
\textsuperscript{120} See id. at 1261 n.1.
\textsuperscript{121} See id. at 1261-62.
\textsuperscript{122} The court expressly overruled Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995) (holding claims for intentional infliction of emotional distress, negligence, and violation of state public accommodation law preempted under the ADA), and Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997) (holding two of four separate plaintiffs’ claims for emotional distress and negligence preempted). The Charas decision only overruled these two cases “to the extent that they [were] inconsistent with [the court’s] interpretation.” Charas, 160 F.3d at 1261. The ADA did not preempt all of the claims in Gee, and the Charas opinion appears to have preserved some of the original rulings of the three-judge panel. See Gee, 110 F.3d at 1404-08.

The Gee court found that the ADA preempted two of the plaintiffs’ safety-related personal injury torts, but did not preempt two other plaintiffs’ non-safety related emotional injury torts. See id. The Charas opinion apparently overruled only the Gee court’s holding that the two safety-related tort claims are preempted, while preserving the Gee court’s findings that non-safety related tort claims survive preemption. See Charas, 160 F.3d at 1261. The only preemption of the safety-related tort claims were those inconsistent with the court’s holding in Charas. See id.
\textsuperscript{123} 44 F.3d 334, 338 (5th Cir. 1995).
\textsuperscript{124} See Charas, 160 F.3d at 1261. The court determined that “Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry,” but “did not intend to preempt passengers’ run-of-the-mill personal injury claims.” Id.
\textsuperscript{125} See id. at 1261, 1263; see also infra notes 127-28 (discussing the differences of the court’s opinion from the Fifth Circuit’s opinion in Hodges).
\textsuperscript{126} See Charas, 169 F.3d at 1263 (noting that “the distinction [enunciated in Hodges] between an airline’s operations and its service turn[s] out to be as elusive as it is unworkable”).
\textsuperscript{127} See id. at 1261. The court defined services as:

[T]he prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. In the context in which it was used in the
Under the Charas opinion, all of the plaintiffs’ tort claims against the defendant airlines escaped ADA preemption.128

Where Hodges and the cases relying on it may represent the broadest interpretation of the term “services,” Charas represents the opposite extreme. These four cases represent the difficulty facing the courts in evaluating state law claims in relation to the ADA’s preemption clause without the benefit of a clear definition of the term “services.”129 Since Congress left the task of formulating definitions of key terms in the ADA to the courts, it is hardly surprising that the application of those definitions yields different and inconsistent results in the quest to define the parameters of the preemptive scope of the ADA.130

III. LESSONS LEARNED: WHAT IS KNOWN ABOUT PREEMPTION UNDER THE AIRLINE DEREGULATION ACT OF 1978

Although ADA preemption jurisprudence is far from clear, and often inconsistent,131 Morales and Wolens provide some instruction regarding the basic framework for ADA preemption. Morales advocates that the ADA has a broad preemptive purpose132 and that the phrase “relates to” expresses that purpose.133 The Morales Court concluded that the ADA preempts state enforcement of legislation aimed, either directly or indirectly, at airlines’ prices, routes, or services; claims based on state policies,134 and even state laws or enforcement actions that are consistent with federal law.135 The one exception enunciated in Morales removes

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128. See Charas, 160 F.3d at 1261.
129. See id. at 1263 (observing that “the scope of [ADA] preemption has been a source of considerable dispute since its enactment”); see also Volluz, supra note 10, at 1207 (observing that “a far more contentious area of jurisprudence has developed concerning what exactly are ‘services’ for purposes of the ADA”).
130. See supra Parts II.C.1-4 (discussing the similarities and differences between circuit courts on the definition of “services” and the application of the ADA’s preemption clause to state law tort claims).
131. See supra Parts II.A-C (discussing the Supreme Court and lower courts’ treatment of the ADA preemption clause).
133. See id. at 384 (holding claims that have “a connection with, or reference to, airline ‘rates, routes, or services’ are pre-empted under [the ADA]”).
134. See id. at 385-87; see also supra notes 61, 63-64 and accompanying text (reporting that Morales stands for the proposition that state laws of specific and general applicability are subject to the preemption clause).
135. See Morales, 504 U.S. at 385-87.
from the ambit of ADA preemption any state law claims that relate too tenuously to services.\textsuperscript{136}

\textit{Wolens} takes the view that breach of contract claims are not preempted if such claims do not seek to effectuate state policies\textsuperscript{137} because the phrase “enact or enforce” in the ADA means the imposition of substantive standards of state law on the airlines.\textsuperscript{138} Additionally, \textit{Wolens} hints at what the term “services” means.\textsuperscript{139} Although \textit{Wolens} carved out an exception to ADA preemption, the Court explicitly sustained the holding in \textit{Morales} and the general proposition that the ADA preempts claims based on state consumer protection legislation.\textsuperscript{140} What remains unclear is the ADA’s effect on state law claims other than consumer protection claims\textsuperscript{141} and non-state policy-based breach of contract claims.\textsuperscript{142} Hence, whether the ADA’s preemption clause allows survival of state law tort claims that relate to airlines’ services remains an open question.\textsuperscript{143} Indeed, we cannot ascertain the answer unless Congress or the courts fashion a precise definition of “services.” Additionally, the answer would necessarily change depending on which definition of “services” is utilized; for example, the definition crafted by the \textit{Charas} court would yield a different result than the interpretation imposed by the \textit{Hodges} court.\textsuperscript{144}

\textsuperscript{136} See \textit{id.} at 390 (analogizing ERISA preemption to the ADA and finding that “[s]omewhere a state action may affect [airline fares] in too tenuous, remote, or peripheral a manner to have pre-emptive effect”).

\textsuperscript{137} See \textit{American Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995)} (holding that the ADA does not protect the airlines from claims alleging no violation of state law, and airlines are subject to claims alleging violations of self-imposed obligations).

\textsuperscript{138} See \textit{id.} at 228; \textit{see also id.} at 232-33 (stating that the ADA, in connection with the saving clause at 49 U.S.C. § 40120 (c) (1994), “stops States from imposing their own substantive standards with respect to rates, routes, or services [on airlines]”).

\textsuperscript{139} See \textit{id.} at 226 (indicating, without expressly limiting, that “services” include “access to flights and class-of-service upgrades”).

\textsuperscript{140} See \textit{id.} at 234-35.

\textsuperscript{141} See \textit{generally Wolens, 513 U.S. 219, 222} (finding preemption under the ADA of state consumer protection legislation); \textit{Morales v. Trans World Airlines, 504 U.S. 374, 391 (1992)} (same).

\textsuperscript{142} See \textit{Wolens, 513 U.S. at 228}.

\textsuperscript{143} But cf. \textit{Hodges v. Delta Airlines, Inc., 44 F.3d 334, 340 (5th Cir. 1995)} (en banc) (allowing bodily injury negligence claim to proceed despite ADA preemption clause); \textit{Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998)} (en banc) (same); \textit{infra Part III.B} (discussing whether tort claims alleging bodily injury or death implicitly survive ADA preemption).

\textsuperscript{144} \textit{Compare Charas, 160 F.3d 1259} (construing a limited definition of services), \textit{with Hodges, 44 F.3d 334} (adopting a broad definition of services).
A. Fundamental Elements of Tort: Duties, Obligations, and Damages Imposed Under State Law

A tort is a civil wrong or injury for which the law provides a remedy that arises out of a breach of duty that is imposed, not by the agreement of the parties, but by operation of law.\textsuperscript{145} Negligence, for example, requires a plaintiff to prove a duty owed by one party to another; a breach of that duty; causation of injury; and damages suffered.\textsuperscript{146} The first element of negligence is that a duty must exist.\textsuperscript{147} Because there is generally no federal common law,\textsuperscript{148} the source of the duty derives from state law.\textsuperscript{149}

\begin{itemize}
\item[145.] See BLACK'S LAW DICTIONARY 1496 (7th ed. 1999); JOSEPH W. GLANNON, THE LAW OF TORTS 172 (1995) (professing that "[t]ort duties . . . do not exist in nature; they are made up by judges because they conclude that a duty ought to exist under the circumstances"); see also Hodges, 44 F.3d at 339 (observing that a defendant's duty to respond to tort actions is based inferentially on state law.)
\item[146.] See RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 166 (6th ed. 1995).
\item[147.] See id.
\item[148.] See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (finding that, generally, no federal common law exists). Later opinions have determined that federal common law may exist, but only in rare circumstances. See, e.g., O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (stating that situations where judicial creation of special federal rule is warranted are "few and restricted," limited to situations where there is "significant conflict between some federal policy or interest and the use of state law"); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (concluding that "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations" and admiralty); Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc., 164 F.3d 123, 127 (2d Cir. 1999) (illustrating that "federal common law applies only where there is a 'significant conflict between some federal policy . . . and the use of state law'"); Alcan Aluminum Corp. v. United States, 165 F.3d 898, 902 (Fed. Cir. 1999) (maintaining limitations on the use of federal common law in diversity cases); Moriarty v. Svec, 164 F.3d 323, 328 (7th Cir. 1998) (same); Kobatake v. E.I. DuPont De Nemours & Co., 162 F.3d 619, 624 n.3 (11th Cir. 1998) (same); FDIC v. Gladstone, 44 F. Supp. 2d 81, 86-87 (D. Mass. 1999) (same); Meoli v. American Med. Servs. of San Diego, 35 F. Supp. 2d 761, 765 (S.D. Cal. 1999) (same).
\item[149.] See Hodges, 44 F.3d at 339 (recognizing that "Congress explicitly preserved airlines' duty to respond to tort actions, inferentially state law actions, for physical injury or property damage") (emphasis added); see also id. (observing that state tort laws are enforced under its analysis); Williams v. United States, 50 F.3d 299, 307-08 (4th Cir. 1995) (stating that state law governs duties owed by landowners); Schuck v. United States, 56 F. Supp. 2d 185, 191 (D.R.I. 1999) (recognizing that a state "enjoys the power to chart its own course in the law of torts"); Koffman v. Osteoimplant Tech., Inc., 182 B.R. 115, 123 (D. Md. 1995) (observing that tort claims affect state law standards); International Ass'n of Heat & Frost Insulators & Asbestos Workers Local Union 42 v. Absolute Envtl. Servs. Inc., 814 F. Supp. 392, 399 (D. Del. 1993) (noting that tort duties are imposed by state law).
\end{itemize}
The Supreme Court in *Morales* and *Wolens* was concerned that the states would impose substantive standards of law on airlines' prices, routes, and services. Unlike with tort claims, the *Wolens* court recognized that it is not state law, but the parties' agreement, which allows one party to recover against an airline for breach of contract. The *Wolens* Court found that judicial enforcement of those private terms did not amount to the state enforcing its substantive standards.

In tort cases, however, it is the substantive law of the state that dictates the duties owed and whether one is liable in tort. Further, the imposition of state-created duties upon airlines, through judicially fashioned

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150. See American Airlines, Inc. v. Wolens, 513 U.S. 219, 226-27 (1995). The Court recognized that "[t]he [Illinois Consumer Fraud and Deceptive Business Practices] Act is prescriptive; it controls the primary conduct of those falling within its governance. This Illinois Law, in fact, is paradigmatic of the consumer protection legislation underpinning the NAAG guidelines [at issue in *Morales*]." *Id.* at 227 (emphasis added). Continuing, the Court noted that the NAAG Guidelines illustrate that the Illinois Consumer Fraud Act "does not simply give effect to bargains offered by the airlines and accepted by the airline customers." *Id.* at 228. The Illinois Consumer Fraud Act serves as a governing structure on the practices of the airlines. See *id.* "[R]ead together with the FAA's saving clause," the preemption clause

stops States from imposing their own substantive standards with respect to rates, routes, or services . . . . The distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

*Id.* at 232-33 (emphasis added).

151. See *id.* at 232-33.

152. See *id.* at 228-29 (recognizing that "terms and conditions airlines offer and passengers accept are privately ordered obligations and thus do not amount to a State's enactment or enforcement of any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of [the ADA]") (internal quotations, alterations, and footnote omitted); cf. Smith v. Comair, Inc., 134 F.3d 254, 258 (4th Cir. 1998). The *Smith* court refused to give *Wolens* controlling effect where the defendant airline raised federal law and federal administrative rules as a defense, because in order to determine whether the airline breached its contract, the court would have to look those federal laws and regulations, which are beyond the terms of the parties' agreement. See *id.*

153. See *supra* note 151 and accompanying text (describing tort duties as a matter of state law); see also *In re TMI*, 67 F.3d 1103, 1106-07 (3d Cir. 1995). The court in *TMI* held that federal law preempts state tort law because tort law imposes state duties. See *id.* The court addressed whether the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, dealing with liability resulting from nuclear accidents, called for the preemption of state tort law with respect to duties imposed. See *id.* The *TMI* court spelled out the nature of duties in tort, namely that they are substantive standards prescribed by the states and, in relation to the specific federal legislation, are preempted. See *id.*

damage awards, amounts to state enforcement of substantive standards of state law, having the effect of directing the airlines' to conform affirmatively to those standards.

154. See Wolens, 513 U.S. at 228-29. The Supreme Court in Wolens held that a breach of contract exception to preemption under the ADA is warranted because damages are awarded based upon the self-imposed obligations of the parties, not overriding state law policies. See id. The converse of this exception is necessarily true: that where the parties do not self-impose obligations, but rather a state imposes them, the ADA preempts these obligations. See id.; see also Smith, 134 F.3d at 258 (holding that the plaintiff's breach of contract claim was preempted because it could "only be adjudicated by reference to law and policies external to the parties' bargain, and therefore, is preempted under the ADA").


155. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388 (1992). In Morales, the Supreme Court was also concerned that the NAAG Guidelines affirmatively controlled the practices of the airlines. See id. In Wolens, it was the Illinois Consumer Fraud and Deceptive Business Practices Act that directed the airlines to conform to certain standards of conduct. See Wolens, 513 U.S. at 227-28 (recognizing that, like the NAAG Guidelines at issue in Morales, the Illinois Consumer Fraud Act "highlight[s] the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation"); see also TMI, 67 F.3d at 1106-07 (holding that state tort law imposes state duties.)

In construing the ADA's preemption clause, the Morales Court relied on similar provisions in the ERISA statute to conclude that the ADA has a broad preemptive purpose. See Morales, 504 U.S. at 383-86. In its analysis, the Court noted that ERISA preempts common law tort suits. See id. at 386. Numerous other cases have interpreted the ERISA statute to preempt state law tort claims. See, e.g., Electro-Mechanical Corp. v. Ogan, 9 F.3d 445, 450 (6th Cir. 1993) (finding tort action preempted by ERISA); Spain v. Aetna
B. Personal Injury Tort Claims that allege Bodily Injuries or Death: Implicit Survival from ADA Preemption?

Taking the Supreme Court's interpretation of the ADA in *Morales* and *Wolens* to its logical end, it appears that the ADA preempts all claims that have something more than a tenuous connection to airline services, and that seek to effectuate state policies or impose substantive standards.\(^{156}\) Such a broad interpretation leads to the conclusion that the ADA preempts all personal injury claims based on state tort law because awarding damages in tort imposes state duties and amounts to state regulation.\(^{157}\) The lower courts have not adopted such an expansive view, however.\(^{158}\) Indeed, the *Wolens* Court recognized that personal injury/safety claims would probably survive preemption.\(^{159}\)

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\(^{156}\) *See generally Hodges*, 44 F.3d at 338 (suggesting that taking the ADA's preemption clause "to its logical extreme . . . suggest[s] that a lawsuit following a fatal airplane crash could relate to 'services' . . ." and hence, be subject to preemption); *see also supra* note 155 (interpreting the imposition of state tort duties as a form of state regulation).

\(^{157}\) *See Garman*, 359 U.S. at 247 (stating that judicially awarded damages are a form of state regulation designed as a "potent method of governing conduct"); *see also supra* note 155. The Supreme Court in *Morales* held that laws of general applicability, even if consistent with federal law, are preempted if they relate to rates, routes, or services of an airline. *See Morales*, 504 U.S. at 385-87. Indeed, state tort laws are laws of general applicability, *see Harris*, 110 F.3d at 1410, that seek to impose state obligations, *see supra* notes 150 & 154, and that result, effectively, in state regulation. *See Garman*, 359 U.S. at 247; *see also supra* note 155. *Morales* brings state tort law within the gamut of the ADA's preemption clause, as state tort law are laws of general applicability, even though they may be consistent with federal law. *See Morales*, 504 U.S. at 385-87.

\(^{158}\) *See, e.g., Hodges*, 44 F.3d at 388 (refusing to recognize the preemption of all state tort actions by the ADA). *But see Wolens*, 513 U.S. at 229 n.5 (pointing out that the United States recognized that enforcing state law refers to "binding standards of conduct that operate irrespective of any private agreement").

\(^{159}\) *See Wolens*, 513 U.S. at 231 n.7 (recognizing that federal law requires airlines to carry liability insurance to cover claims for personal injuries, and that American Airlines
The lower courts often base their reasoning that personal injury claims escape preemption both on Supreme Court dicta and on statutes associated with the regulation of the airline industry. Some of the lower courts have relied on a compulsory liability insurance statute found in the United States Code to find a way for bodily injury claims that relate to services to proceed despite the ADA's preemption clause. This statute, relied upon in Hodges, requires airlines to carry insurance, or be self-insured, in the event the airline becomes liable for any claim of bodily injury or death arising from the operations or maintenance of an aircraft.

Judicial enforcement of tort duties, in the form of damage awards against airlines on claims relating to airlines' services is equal to the imposition of state standards of conduct. Morales and Wolens illustrate that the ADA preemption clause prohibits the states from imposing standards of substantive state law. The plain language of the ADA preemption clause and the Supreme Court's broad interpretation thus
preempt state tort claims. The ADA preemption clause, read together with the saving clause and the statute that requires airlines to carry liability insurance for bodily injury or death, implicitly allows personal injury and death claims that relate to services to survive.

C. If Bodily Injury and Death Claims Implicitly Survive Preemption Under the ADA, Does It Follow that Other Non-Bodily Injury Tort Claims Also Survive?

Accepting as true the proposition that bodily injury and death claims relating to airlines’ services implicitly survive ADA preemption, a question arises as to whether non-bodily injury tort claims also survive. The answer turns on whether a court entering judgment in favor of a plaintiff for a non-bodily injury claim relating to airline services is, or has the effect of, enforcing state law.

Tort duties imposed by state substantive law against the airlines, and the accompanying judicial damage awards, are matters preempted by the ADA because imposition of those duties and damages amounts to state

166. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) (adopting the same standard of preemptive breadth as in ERISA cases). The ERISA statute preempts tort claims brought under state law that relate to employee benefit plans. See supra note 156 (citing cases). The Court in Morales found that ERISA is an appropriate statute to compare to the ADA and, indeed, cited to cases that demonstrate preemption of tort claims under ERISA. See Morales, 504 U.S. at 384, 386. In relying on ERISA to construe the scope of the ADA’s preemption clause, and by citing cases that preempt state tort claims under ERISA, the Morales Court held, at least inferentially, that tort claims relating to the services of an airline are also preempted. See id.; see also supra notes 154-55 (pointing out that state tort laws seek to impose state obligations resulting in regulation by the state).


168. See American Airlines, Inc. v. Wolens, 513 U.S. at 231 n.7 (1995); see also Hodges v. Delta Airlines, Inc., 44 F.3d 334, 338 (5th Cir. 1995) (en banc). But cf. Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1263 (9th Cir. 1998) (en banc) (adopting Judge O’Scannlain’s view in Gee on the “operations or maintenance” and “services” dichotomy); Gee v. Southwest Airlines, 110 F.3d 1400, 1410 (9th Cir. 1997) (O’Scannlain, J., concurring) (arguing that state tort claims survive not because of the compulsory insurance statute and a problematic dichotomy between service and operations/maintenance, rather because Congress simply did not intend to supplant state tort law with the ADA).

169. As demonstrated supra in Part III.B, judicial enforcement of state law tort claims does have the effect of imposing substantive standards of state law and amounts to a form of state regulation. See supra notes 150, 154-55 and accompanying text. However, bodily injury and death claims may survive preemption, see supra Part III.B, based on the compulsory insurance statute. See 49 § U.S.C. 41112(a). This statute, however, only requires insurance for the bodily injury or death of a person. See id. The statute does not require airlines to carry or provide insurance for non-bodily injury claims. See id.
To overcome preemption in the case of bodily injury or death claims, courts have found different ways around the pre-emption clause. First, courts have determined that the claims do not relate to prices, routes, or services. Second, courts have found claims to be too tenuous, remote, or peripheral to prices, routes, or services to implicate the preemptive effect of the ADA. Finally, courts have relied on other provisions of the United States Code or federal regulations to infer an implied cause of action.

Deferring to related provisions of the United States Code or federal regulations, however, does not allow courts to imply a cause of action for non-bodily injury claims as it does for bodily injury or death claims. This situation exists because there appears to be no related provisions in title 49 of the United States Code, or in the Federal Aviation Regulations, that give plaintiffs an implied private right of action against an airline for damages resulting from non-bodily injuries. The same authority that allows courts to find that bodily injury or death claims survive ADA pre-emption does not appear to be available in the case of non-bodily injury torts. Based on this analysis of the nature of tort law and the broad preemptive effect of the ADA’s preemption clause, the ADA appears to preempt non-bodily injury tort claims that relate to services.

170. See supra section III.B (discussing the nature of and regulatory effect of state tort law).
171. See Hodges, 44 F.3d at 340 (finding plaintiff’s claim related to operations and maintenance of aircraft, rather than services of the airline).
172. See, e.g., West v. Northwest Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1993) (finding plaintiff’s claim for wrongful exclusion from a flight related to airline services in too tenuous, remote, or peripheral a way to be preempted by the ADA); see also Wolens, 513 U.S. at 242 (O’Connor, J. concurring in part, dissenting in part).
173. See Wolens, 513 U.S. at 231 n.7; see also Hodges, 44 F.3d at 338; supra note 169 (discussing reliance on a compulsory insurance statute).
174. See Wolens, 513 U.S. at 231 n.7; Hodges, 44 F.3d at 338.

The Warsaw Convention applies to, among other things, international transportation of persons by air. See Warsaw Convention, art. 1(1). The contract (ticket) between the individual and the airline determines whether the individual is engaged in international travel. See id. art. 1(2). Hypothetically, if a person purchases a ticket from New York City, with an intermediate stop in San Francisco, to an ultimate destination in Japan, the person would be considered an international passenger on all legs of his or her journey. See id.

Under article 17 of the Warsaw Convention, an airline "shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suf-
IV. SOLVING THE DEFINITIONAL PROBLEMS AND CLEARLY DELINEATING THE SCOPE OF PREEMPTION UNDER THE AIRLINE DEREGULATION ACT OF 1978

A. Narrow or Broad: Which Definition of Services Best Serves Congress’ Purpose of Deregulating the Airline Industry?

Discerning the true definition of the term “services” is crucial to defining the ADA’s preemptive scope because, by its terms, the ADA’s preemption clause is not triggered if a claim does not relate to prices, routes, or services of an airline. As a definitional matter, without knowing what the term “services” encompasses, courts and litigants are uncertain as to the outer limits of preemption under the ADA. A review of the circuit court decisions addressing the scope of ADA preemption demonstrates as much.

If the definition of “services” is as limited as it is in Charas, many more state court claims will survive the ADA’s preemptive effect because they

ferred by a passenger, if the accident which caused the damage so sustained took place” during the transportation. Id. art. 17. The Supreme Court has determined that injuries to passengers must occur in the context of an accident, see Air France v. Saks, 470 U.S. 392, 405 (1985), that an individual may only recover under the Warsaw convention for physical injuries, see Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 553 (1991), and that the Warsaw Convention provides the exclusive remedies to passengers for the injuries that fall within its purview, i.e., physical injuries. See El Al Israel Airlines, Ltd. v. Tseng, 119 S. Ct. 662, 668, 675 (1999).

If the ADA does not preempt non-bodily injury state law tort claims, it is out-of-line with Warsaw Convention jurisprudence. See id. Consider Wallman v. Tower Air, Inc., No. C-99-0557 MJJ (N.D. Cal. filed Feb. 4, 1999), currently sub judice in the United States District Court for the Northern District of California. In Wallman, the plaintiff stated that a flight leaving New York, bound for San Francisco, experienced an engine fire requiring the flight to make an emergency landing. See id. Compl. ¶¶ 11, 16. The plaintiff alleges that the airline is liable to her in tort for mental or psychic injuries, occasioned by no physical injury or death. See id. Compl. ¶ 30, Causes of Action I-III.

The causes of action for alleged “mental” or “psychic” injuries, should they survive ADA preemption and be proven by the plaintiff, would result in the disparate treatment of any individuals engaged in international transportation, e.g., individuals who began their journey with the airline in Tel Aviv, Israel, having an intermediate stop in New York, with a final destination of San Francisco. Domestic travelers would have a cause of action, but anyone on the flight engaged in international transportation would be foreclosed from pursuing “mental” or “psychic” tort claims against the airline.

176. See 49 U.S.C. § 41713(b)(1)-(4)(A) (1994); see also Travel All Over the World v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996) (finding defamation claim did not trigger preemption because it did not relate to defendant airline's services).

177. Compare Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (construing a limited definition of “services”), with Hodges, 44 F.3d at 336 (finding a broad definition of “services”).

178. See supra Part II.C (discussing cases confronting the ADA’s preemption clause and the varying interpretations and results).
will not relate to "services" as required by the statute. On the other hand, if the definition is as broad as defined in Hodges, many more matters could fall victim to preemption. The ADA's preemptive purpose is to "ensure that the States would not undo federal deregulation with regulation of their own," and "leave largely to the airlines themselves, and not at all to [the] States" the proper standards of conduct in providing air transportation services. With no clear guidance from the Supreme Court on Congress' intent with respect to the definition of "services," the proper interpretation of that term to serve Congress' intent remains unknown. Either the Court must construe the term, or Congress must define clearly what it intended "services" to mean. Otherwise, courts will continue to interpret the ADA preemption clause and its scope differently.

B. Can Non-Bodily Injury Tort Claims be Saved from the Effects of ADA Preemption?

However one defines "services" under current authority, without express legislative or judicial direction, courts should interpret the ADA preemption clause to preclude non-bodily injury tort claims. Save for


180. See 49 U.S.C. § 41713 (1994); Smith v. Comair, Inc., 134 F.3d 254, 259 (1998) (finding that the ADA preempted tort claims as they related to airline services of boarding); Travel All Over the World, 73 F.3d at 1434 (finding that the ADA preempted tort claims as they related to service of transporting). This also assumes, of course, that the courts cannot find any other reason to allow such claims to proceed, i.e. the claim is too tenuous, remote, or peripheral to services, see Morales, 504 U.S. at 390, or the claim does not ask the state to enforce its own substantive standards, see Wolens, 513 U.S. at 228-29.


182. See supra Part II.C. The Supreme Court has spoken on Congress' intent in enacting the ADA's preemption clause. See Morales, 504 U.S. at 378-79 (stating that it was Congress intent to ensure the states would not regulate what Congress was deregulating); see also Wolens, 513 U.S. at 228 (stating it was Congress intent to leave to the airlines acceptable standards of conduct in the services they provide).

183. Compare Smith, 134 F.3d at 259, and Travel All Over the World, 73 F.3d at 1434 (finding that tort claims preempted as related to airline services), with Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc) (finding tort claims not preempted because they were not related to airline services), and Hodges v. Delta Airlines, Inc., 44 F.3d 334, 338 (5th Cir. 1995) (en banc).

184. Although bodily injury and death claims implicitly survive preemption because of a related statute, see, e.g., Wolens, 513 U.S. at 231 n.7; Hodges, 44 F.3d at 339, only those claims that allege no bodily injury would remain subject to ADA preemption. See supra Part III.C.
an interpretation by the Supreme Court\footnote{186} that all tort claims escape preemption because interpreting otherwise would be against congressional intent, non-bodily injury claims that relate to such services should fall victim to the ADA.\footnote{187}

V. CONCLUSION

At best, ADA preemption jurisprudence is haphazard, checkered, and, in many respects, uncertain. The lack of meaningful definitions of key terms causes much difficulty in the ADA's application to state tort law. In Morales and Wolens, the Court began to define the standard by which lower courts should evaluate state law claims under the ADA preemption clause: the ADA preempts claims that result in the imposition of state obligations on the airlines, but those claims that only seek enforcement of the self-imposed obligations of the airlines escape preemption. Although Supreme Court jurisprudence affords a sense of what the ADA preempts, the limits of the ADA's preemptive effect remain blurred. The evaluative standards and policies enunciated by the Supreme Court in Morales and Wolens, however, lead to the conclusion that the ADA should preempt state tort claims alleging no bodily injury.\footnote{188} Until Congress or the courts define terms crucial to the applica-

\footnote{186. Certainly, if it chose to do so, Congress could amend the ADA to exempt state tort actions from the ADA's preemptive effect. As it stands now, however, the broad interpretation of the ADA in Morales, and the narrow exception carved out in Wolens, lean more toward preemption of state tort law, with the exception of bodily injury or death claims. See, e.g., Wolens, 513 U.S. at 231 n.7; Hodges, 44 F.3d at 339; supra Part III.B; supra note 170.}

\footnote{187. \textit{See supra} Parts III.B-C; see also Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998). Perhaps adapting the language from Smith to the area of torts would state best the underlying policy of preempting state tort law: "If passengers could challenge airlines' boarding procedures under general [tort law], . . . we would allow the fifty states to regulate an area of unique federal concern—airline boarding practices." \textit{Id.} at 258-59.}

\footnote{188. \textit{See Wolens}, 513 U.S. at 228-29 (explaining that judicial enforcement of "privately ordered obligations . . . do not amount to a State's enactment or enforcement of any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of [the ADA]"). The Wolens Court further stated that "the ADA's preemption clause [does not] . . . shelter airlines from suits alleging no violation of state-imposed obligations," and allows for claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." \textit{Id.} at 228. The converse of this statement is, arguably, that the ADA's preemption clause \textit{does} shelter airlines from suits alleging violations of state imposed obligations, including state imposed tort duties and obligations. \textit{See supra} notes 150, 154-55. Additionally, the Court accepted the posture of the United States, as amicus curiae, on the issues presented in Wolens. \textit{See Wolens}, 513 U.S. at 226, 228. In discussing the language of the preemption clause, the United States suggested, and the Court seemed to accept, the assertion that the phrase "enact or enforce" is "naturally read to refer[\textit{t}] to \textit{bind-}
tion of the ADA's preemption clause, thus placing passengers and airlines on notice of what claims and defenses they may properly assert, it is likely that many more court decisions will yield inconsistent results.