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Trying to Squeeze into the Middle Seat: Application of the Airline Deregulation Act's Preemption Provision to Internet Travel Agencies

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INTRODUCTION

IN TODAY'S INCREASINGLY mobile society, internet travel agencies function as a vital part of the airline industry. What
was once predominantly controlled by brick-and-mortar travel agencies is now under the dominion of modern internet websites, such as Expedia, Travelocity, and Orbitz, which offer travel booking services to customers twenty-four hours a day, seven days a week. This revolution in booking travel is due largely to the growing popularity of the internet; and as the internet’s prominence continues to rise, so too will the prominence of internet travel agencies. With this growth comes questions regarding the legal implications of internet travel agencies’ actions.

Typically, a cause of action brought against an airline falls under the jurisdiction of the Airline Deregulation Act (ADA), as the ADA’s preemption provision expressly prohibits states from “enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier.”\(^1\) ADA preemption, however, is not black and white and this comment will seek to answer the question of whether internet travel agencies, which serve as a vital part of the airline industry by facilitating airline travel booking, may take advantage of the same preemption provision. Parts I and II provide a brief background on the development of internet travel agencies and discuss the ADA’s inception and evolution. Parts III and IV then analyze what role, if any, the ADA plays in the internet travel business. Because of the vagueness of many of the ADA preemption provision’s terms, however, application of the preemption provision is often dependant on factual determinations. Though Congress likely did not anticipate the development of internet travel agencies when it promulgated the ADA’s preemption provision, the preemption provision was developed as a flexible concept. Thus, if the facts and circumstances in a given case command it, internet travel agencies can indeed squeeze into the ADA’s preemption provision.

I. A BRIEF DISCUSSION OF INTERNET TRAVEL AGENCIES

A. Development

With the dawn of the internet came a revolution in travel booking. Gone are the days of travel agents, along with their hefty commissions and imposing influence over airlines.\(^2\) Dur-

ing the late 1990s and early 2000s, several internet travel agencies emerged, and three carved out a dominant niche in the market: Travelocity, Expedia, and Orbitz. As of 2003, the operations of these three companies comprised over forty percent of the market. Each company emerged from different beginnings, and each initially sought to serve different purposes.

Travelocity, the oldest of the three, has roots dating as far back as the 1960s. Travelocity evolved from Sabre Holdings, an electronic travel booking system created in the 1960s, and was used exclusively by airlines and travel agencies. In the mid-1990s, Sabre developed Travelocity in order to provide consumers a direct means of travel booking. This concept was revolutionary, as it provided the first means for customers to search for, compare, select, and book travel without the help of a travel agent or an airline. Travelocity was a publicly traded company until 2007, when Silver Lake Partners acquired Sabre and Texas Pacific Group. In 2004, Travelocity reported $7.4 billion in gross travel bookings, evidence of Travelocity's significant role in the travel industry.

Like Travelocity, Expedia emerged in the mid-1990s as a means to providing users "a revolutionary new way to research and book travel." Expedia began as a small subsidiary of Microsoft, and later spun out of its parent company to become a publicly traded company in 1999. Since its inception, Expedia has grown to be a leading independent company in the travel industry, acquiring several other travel agencies, including Inter-

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5 See id.
4 See id.
5 See id.
7 Id.
8 Id.
13 Id.
ActiveCorp (IAC) in 2002. In 2009, Expedia reported $21.5 billion in gross bookings. In 1999, a consortium of airlines formed to address Travelocity and Expedia’s growing dominance in the travel industry. To curb the increasing dominance of Travelocity and Expedia, this airline consortium—American Airlines, Continental Airlines, Delta Air Lines, Northwest Airlines and United Air Lines—sought to strike a bargain with Expedia. The airlines agreed to provide Expedia access to their discounted internet fares in return for half of Expedia. Expedia’s parent corporation, Microsoft, did not react favorably to this proposal and rejected the idea.

In retaliation, the airline conglomerate created their own internet travel agency; that company ultimately became known as Orbitz. Immediately out of the gate, Orbitz was one of the fastest growing internet sites in history, selling $950 million worth of tickets in its first six months. Today, Orbitz has evolved into one of the leading internet travel agencies and has grown to include other internet travel sites such as CheapTickets and the international online travel brand, ebookers. Most recently, Orbitz reported gross bookings of $2.565 billion for the third quarter of 2009.

B. Mechanics

Internet travel agencies, through their websites, provide individuals a way to search for, compare, and purchase airline tickets. Typically, the sale begins when a customer logs on to an internet travel agency’s website to search for a ticket. The search function allows customers to sort flights based on several different criteria, including cost, time, airline, and number of

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14 Id.
15 Id.
16 See Hansell, supra note 9.
17 See id.
18 See id.
19 See id.
21 See Hansell, supra note 9.
22 ORBITZ WORLDWIDE, supra note 20.
25 Id.
connections. This data is then compiled by computer software owned by the internet travel agencies to produce a list of possible flights and their correlating fares. This list includes specific information like seat availability and alternate routes, and customers can arrange the list in various ways to determine which flight best fits their needs. Once a customer selects an itinerary, the internet travel agency’s computer software transmits that selection to a global distribution system (GDS), which will confirm the flight availability and price for the customer. The internet travel agency then provides this information to the customer for confirmation and purchase. Once the customer purchases the ticket, the purchase information is transmitted back to the GDS.

Today, internet travel agencies occupy a prominent niche in the travel industry. Recently, however, the economic crisis has taken its toll on internet travel agencies and the travel industry as a whole. Because most internet travel agencies charge customers booking fees, many customers have been turning to other means of booking travel, such as using airline websites directly. To boost business, many internet travel agencies have begun lowering booking fees.

Another important aspect of internet travel agencies is the unique pricing structure for airline tickets. While there are often deals to be had on airline tickets, air transportation pricing is not a matter of simple supply and demand economics. The price-governing structure for airline tickets is referred to as “yield management.” Yield management is essentially a computer program that allocates fares on a “flight-by-flight, day-by-day basis,” which is designed to ensure that as many seats as possible are filled on each flight. Airlines then monitor this system and alter fares according to seat availability where

26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
33 Id.
34 Abdu-Brisson v. Delta Airlines, 128 F.3d 77, 84–85 (2d Cir. 1997).
35 Id.
36 Id. at 85.
necessary. Fare adjustments are also made as needed to address competition from other airlines. Indeed, "in no other industry has the idea of demand-based pricing been as thoroughly embraced as in the airline industry." Rather than focus on a cost-plus basis, airline prices are driven predominantly by demand, with seats on flights serving as their biggest commodity.

Over the past fifteen years, internet travel agencies developed significantly, and they now play a prominent role in the travel industry, providing booking and travel accommodations to millions of people every year. With their development and increasing prominence come questions about the legal implications of internet travel agencies' actions. Can internet travel agencies squeeze into the ADA's preemption provision?

II. THE AIRLINE Deregulation ACT

A. LIFE BEFORE THE ADA

Because internet travel agencies play such a dominant role in the travel industry, the question that arises is what sort of regulations or preemptions, if any, apply to these entities? More specifically, can internet travel agencies take advantage of the ADA's preemption provision? To fully answer these questions, it is important to first look at the history behind the ADA. Prior to the passage of the ADA in 1978 air travel was far too expensive for most people to afford. In 1964, fourteen years prior to the ADA, there were 88.52 million passenger enplanements; comparatively, in 2000, there were 666.15 million. Rather than being seen as an everyday mode of transport like it is today, air travel was seen as an elitist institution, meant only "for Jackie Kennedy and Ari Onassis and the Beatles." Indeed, the posh term "jet set" evolved from such stereotypes.

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37 Id.
38 Id.
39 Id.
40 Id.
41 Michelle McDonald, Change Forever: The Transition from Total Government Control of the Airline Industry to Open Competition Has Been a Wild Ride that Some Enjoyed and Some Did Not, AIR TRANSP. WORLD 36 (July 1, 2004).
42 Id.
43 Id.
44 Id.
prices reached such astronomical heights is a classic study in politics.45

Airline regulation began in 1938 with the passage of the Civil Aeronautics Act (CAA).46 Prior to this Act, the only form of airline governance was the Airmail Act of 1925.47 Originally, airlines could only profit from airmail contracts, but because of the extreme competitiveness of the awarding of these contracts, airlines were not making any money.48 It was at this time that C.R. Smith, the godfather of American Airlines, stepped in and convinced the government that airline regulation was necessary to the survival of the airline industry.49 As a result, the Civil Aeronautics Act of 1938 came to be, “giving birth to what would become a monument to bureaucracy gone very, very wrong.”50

The CAA significantly changed the aviation landscape, amending or repealing all prior legislation relating to the aviation industry.51 For the next four decades, the CAA-created Civil Aeronautics Board (CAB) governed the aviation industry.52 Though the CAA did not specify exclusive federal jurisdiction over aviation issues, “there was very little left for states to do in aviation except, perhaps, establish and maintain airports, and cooperate with the Federal Government.”53 Problematically, the CAB was far from an efficient governing body; instead, the CAB created an extremely expensive, inefficient, and non-competitive airline industry.54 Often, it took several years for an airline to apply for and be awarded a new route. Indeed, one notorious story tells of how the paperwork for an airline’s applications to acquire new Hawaii routes in the 1960s reached heights of over nine feet!55

45 Id.
48 See McDonald, supra note 41.
49 Id.
50 Id.
52 Id.
53 Id.
54 See McDonald, supra note 41.
55 Id.
A shakeup in the airline industry occurred in 1970 with the debut of the Boeing 747, a passenger airplane that could carry 550 passengers—a monster compared to already existing airplanes that had a maximum capacity of 190 passengers.\textsuperscript{56} Though airlines were quick to acquire the new airplane, because the price of tickets remained so high, ticket sales never equaled seating availability and the acquisition of 747s delivered a severe economic blow to airlines.\textsuperscript{57} For example, United Airlines, which had reported earnings of $45 million in 1969, reported a loss of $46 million the following year due, the airline admitted, to its "premature' introduction of the 'jumbo jet.' "\textsuperscript{58} Meanwhile, as transcontinental and intercontinental airfare prices remained astronomically high, a California-based airline, Pacific Southwest, found a way to provide cheap airfare to passengers.\textsuperscript{59} Pacific Southwest provided routes wholly inside the state of California, which kept it out of the purview of the CAB's regulation scheme.\textsuperscript{60} Pacific Southwest created a model that offered interstate fares for less than twenty-five dollars, a fare that was affordable to the everyday person.\textsuperscript{61} Most notably, at a time when airlines were struggling financially, Pacific Southwest was profiting.\textsuperscript{62} However, the major airlines were slow to catch on.\textsuperscript{63} Instead of following Pacific Southwest's example, the major airlines instead tried to attract customers by offering glitzy perks such as free drinks, onboard piano lounges, and even luaus on Hawaii flights.\textsuperscript{64} Needless to say, these "incentives" did nothing to attract customers and airlines continued to struggle.\textsuperscript{65}

It was not until the mid-1970s that the government began to realize that the bureaucratic CAB regulation system was not working.\textsuperscript{66} Senator Edward Kennedy was elected as chairman of the Subcommittee on Administrative Practice and Procedures of the Senate Judiciary Committee, and beginning in 1975 Senator

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} See id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
Kennedy, then with an eye on the White House, took it upon himself and his Committee to begin discussions about airline deregulation. Senator Kennedy's opening statements during one hearing beautifully summed up the state of airline deregulation: "Regulators all too often encourage or approve unreasonably high prices, inadequate service, and anti-competitive behavior. The cost of this regulation is always passed on to the consumer. And that cost is astronomical." Together with the support of President Carter, the ADA of 1978 was signed into law.

C. THE ADA'S PREEMPTION PROVISION

Prior to the ADA, expressed federal preemption of state airline regulation did not exist, which allowed states free reign to regulate intrastate airfares in areas not covered by the CAA. The old CAA even afforded a sort of savings clause for states, providing that "nothing contained in the Act would abridge or alter the remedies now existing at common law or by statute but the provisions of the Act would be in addition to such remedies." However, with the inception of the ADA, Congress determined that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation services." The theory behind the ADA was that if airlines were left to their own devices, airlines "could provide better services and lower fares for passengers through free entry into and expansion in the system, whereas the detailed regulatory procedures had restricted this in the past." With the passage of the ADA, the CAB was gradually phased out, and in its place free market forces now had control over airline prices, routes, and services.

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67 Id.
69 See McDonald, supra note 41.
72 Morales, 504 U.S. at 378 (internal quotations omitted).
73 Frenette, supra note 51, at 174.
74 Id.
To facilitate the ADA's objectives, Congress included a pre-emption provision in the Act.\textsuperscript{75} Section 1305(a)(1) of the Act provides that:

No State or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, or standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide air transportation.\textsuperscript{76}

The power of federal law to preempt state law comes from one of the fundamental principles asserted in the Constitution, the Supremacy Clause.\textsuperscript{77} Pursuant to the Supremacy Clause, state law in conflict with federal law is given no effect.\textsuperscript{78} In 1994, the ADA was superseded by the Federal Aviation Administration Authorization Act.\textsuperscript{79} The FAA Authorization Act retained the preemption provision, however, which is now found at 49 U.S.C. § 41713(b).\textsuperscript{80} With the new statute, Congress changed the phrase "rates, routes, or service" to "prices, routes, or services"; however, Congress did not intend this change to have any overarching effect or significantly alter the existing law.\textsuperscript{81}

As with any statute, the first step toward interpreting the ADA's preemption provision is to look to congressional intent and "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."\textsuperscript{82} The intent behind the ADA's preemption provision was to avoid any future conflicting state law regulations that might hinder the free market operation of the aviation industry.\textsuperscript{83} Essentially, Congress wanted to ensure that states would not attempt to fill "the regulatory void created by the ADA, which removed the preexisting

\textsuperscript{76} Id.
\textsuperscript{79} Lyn-Lea Travel Corp. v. Am. Airlines, Inc., 283 F.3d 282, 286 n.4 (5th Cir. 2002).
\textsuperscript{80} Id.
\textsuperscript{81} Id. For the purposes of clarity, both the ADA preemption provision and the FAA Authorization Act preemption provision will be referred to in this comment as "ADA preemption."
\textsuperscript{83} Frenette, \textit{supra} note 51, at 179.
utility-type federal regulatory structure.\textsuperscript{84} Under the ADA, state law is preempted "where the Congress has expressly preempted state law, where congressional intent to preempt may be inferred from the pervasiveness of the federal regulatory scheme, or where state law actually conflicts with federal law or interferes with the achievement of congressional objectives."\textsuperscript{85}

Though Congress intended the ADA's preemption provision to be broad in nature, Congress did not intend "to preempt all state claims for personal injury."\textsuperscript{86} Evidence of this is found in the fact that airlines are required to hold insurance or self-insurance under the FAA Act that covers "amounts for which . . . air carriers may become liable for bodily injuries to or the death of any person, or for loss of or damages to property of others, resulting from the operation or maintenance of aircraft."\textsuperscript{87} If the ADA was meant to preempt every state law dealing with airlines' tortious conduct, the statutory requirement for insurance coverage would be rendered "nugatory."\textsuperscript{88}

Further, Congress did not intend for the ADA to preempt ordinary breach-of-contract claims, as evidenced by the fact that the statute mentions nothing about the preemption of causes of action "seeking recovery solely for the airline's breach of its own, self-imposed undertakings."\textsuperscript{89} The Supreme Court recognized this fact, noting that "terms and conditions airlines offer and passengers accept are privately ordered obligations" and thus should not be preempted.\textsuperscript{90} Enforcing contract obligations "simply holds parties to their agreements" and further, "advances the market efficiency that the ADA was designed to promote."\textsuperscript{91} Court adjudication of contract claims also "accords due recognition to Congress' retention of the FAA's saving clause, which preserves the remedies now existing at common law or by statute."\textsuperscript{92} Thus, congressional intent is best served by an interpretation of the ADA's preemption statute that does not


\textsuperscript{85} Huntleigh v. La. State Bd. of Private Sec. Exam'rs, 906 F. Supp. 357, 360 (M.D. La. 1995).

\textsuperscript{86} Hodges v. Delta Airlines Inc., 44 F.3d 334, 338 (5th Cir. 1995).

\textsuperscript{87} 49 U.S.C. app. § 1371(q) (2009).

\textsuperscript{88} Hodges, 44 F.3d at 338.


\textsuperscript{90} \textit{Id.}.

\textsuperscript{91} \textit{Id.}.

\textsuperscript{92} \textit{Id.}.
apply to contract claims, nor broadly to all tort claims for personal injuries.

III. APPLICATION OF THE PREEMPTION PROVISION

Though not all-encompassing, since its inception the preemption provision of the ADA has enjoyed a wide-reaching effect. Prior to the Supreme Court's decision in Morales v. Trans World Airlines, case law determining whether the ADA preemption applied "divided fairly neatly between economic or regulatory issues and personal injury, damage or negligence issues," with the former being preempted and the latter being open to state-law governance. Though there was some disagreement on the subject, most courts that took up the issue of ADA preemption broadly interpreted the provision as a "prohibition against incursions into the field of air carrier regulation." In 1992, the Supreme Court adjudicated the issue of ADA preemption and analyzed the language of the provision to hold that it was meant by Congress to have a wide-reaching effect, prohibiting "[s]tate enforcement of actions having a connection with or reference to airline rates, routes, or services." Application of the preemption provision, however, is not a black and white process. Many of the terms that make up the preemption provision are vague, such as "relates to," "services," "prices," and "air carrier." To determine whether ADA preemption can apply to internet travel agencies, each of these ambiguities must be analyzed in turn to discover Congress's underlying intent.

A. "Relates To"

The preemption provision is somewhat vague and has led to some divergence between courts as to the section's application. First, the phrases "relates to" or "relating to" have been the source of much debate. In construing "relating to," the Supreme Court in Morales, determined that Congress intended the preemption provision to have a broad scope. Justice Scalia, writing for the majority, first cited Black's Law Dictionary to define the term "relating to" as "to stand in some relation; to have

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94 Id.
96 See generally id.
97 See generally id.
98 Id. at 383.
bearing or concern; to pertain; refer; to bring into association with or connection with," espousing that these words "express a broad pre-emptive purpose." The Court then went on to compare the ADA preemption provision to similar preemption statutes that were the subject of previous judicial interpretation, noting that "the relevant language of the ADA is identical." For example, in Shaw v. Delta Air Lines, Inc., the Court held that under the ERISA preemption provision, which also uses the phrase "relates to," any state law that has a "connection with, or reference to, such a plan," is preempted by the statute. Thus, since the ADA preemption language is identical to other such statutes, the Court found "it appropriate to adopt the same standard" and determined that "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted." Given this conclusion, the Supreme Court in Morales held that, because the term "relates to" is meant to be interpreted broadly, fare advertising guidelines promulgated by the National Association of Attorneys General were preempted by the ADA.

Since Morales, courts have followed the Supreme Court's guidance and broadly interpreted the ADA preemption provision to hold that the statute preempts state causes of action that have "a connection with or reference to" air transportation. For example, the First Circuit interpreted the term "relates to" to pertain to state laws that have "a forbidden significant effect upon rates, routes or services." In United Parcel Service, Inc. v. Flores-Galarza, UPS challenged a Puerto Rican statute that prohibited interstate carriers from making deliveries without first showing proof of the recipient's or carrier's payment of a territorial excise tax. The court held that ADA preemption does apply to the statute because "[t]he challenged scheme both refers to and has a forbidden significant effect on UPS's prices, routes or services." Likewise, the Eleventh Circuit, in Branche

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99 Id. at 382.
100 Id. at 384.
102 Morales, 504 U.S. at 384 (internal citation omitted).
103 Id. at 390.
104 Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1253–54 (11th Cir. 2003); United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323, 335 (1st Cir. 2003); Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77, 84 (2d Cir. 1997).
105 United Parcel Serv., Inc., 318 F.3d at 335.
106 See id. at 335–36.
107 Id. at 335.
v. Airtran Airways, Inc., used the interpretation of "relates to," promulgated by the First Circuit in United Parcel Services, to hold that the Florida Whistleblower Act was not preempted by the ADA because the Act did not specifically address airline prices, routes, or services.108 Indeed, "the only possible basis for pre-emption is if it has a sufficient—i.e., significant—impact on those services."109 Similarly, the Second Circuit, in Abdu-Brisson v. Delta Airlines Inc., held that a New York anti-age discrimination statute was not preempted by the ADA.110 The court compared the anti-age discrimination statute to the regulations at issue in Morales, which were a direct regulation on marketing practices, noting the contrast to the statute at issue and holding that "whether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition or efficiency."111

Undoubtedly, the ADA's preemption provision and the term "relates to" has an "unusual breadth," and is interpreted broadly in order to "further [Congress'] purpose of deregulating the airline industry."112 Though broad, ADA preemption is not without limits. Indeed, in Morales, the Supreme Court stated that it was not seeking to "set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines," and further noted that "some state actions may affect [airlines] in too tenuous, remote, or peripheral a manner to have pre-emptive effect."113 This language surfaced again when the Supreme Court decided American Airlines, Inc. v. Wolens.114 In Wolens, the Court struck down a state consumer fraud statute affecting airlines, yet declined to apply the ADA's preemption provision to the consumers' breach-of-contract claim. The Court held that the provision should not be read so broadly as "to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airlines' alleged breach of its own, self-imposed undertakings."115

Though neither the ADA nor the Supreme Court have provided a specific definition for the term "relates to," the term has

108 Branche, 342 F.3d at 1253-54.
109 Id. at 1255.
110 128 F.3d at 84.
111 Id.
115 Id. at 228.
been construed by various circuits and courts to generally refer to statutes or regulations that both mention and have a "forbidden" or "significant" effect on airline prices, routes, or services. While this interpretation necessarily promotes a broad application of the ADA, courts understand the term to have some limits; ADA preemption is not to be applied to situations that are only tenuously or remotely related to airline prices, routes, or services.

B. "Services"

The second source of ambiguity in the ADA's preemption provision is the term "services." Because neither the statute nor the Supreme Court provides a precise definition for the sorts of actions that constitute "services," courts have continued to struggle with application of the term. Case law has promulgated two lines of thought regarding what constitutes a "service" for the purposes of ADA preemption. The first line of cases favors a more narrow definition of the term, typically holding that "services" refers only to common occurrences that take place on an airplane during a flight, not instances before or after a flight. In Charas v. Trans World Airlines, for example, the Ninth Circuit held that the ADA's preemption provision did not apply to a passenger's suit against an airline seeking damages for injuries sustained when the passenger tripped over a piece of luggage left in the airplane aisle by a flight attendant. The court held that "Congress did not intend to preempt passengers' run-of-the-mill personal injury claims" when it enacted the ADA; therefore, the use of the word "services" refers only to "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail" and not to actions such as beverage service, baggage handling, or boarding and deplaning procedures. Similarly, in Taj Mahal Travel, Inc. v. Delta Airlines, Inc., the Third Circuit held that a defamation
claim made by a travel agency against an airline for allegedly distributing letters to the travel agent's customers claiming that the tickets customers had purchased from the travel agent were "considered stolen" was not preempted by the ADA. The court, like the Ninth Circuit in Charas, found support for this determination in the congressional intent behind the ADA, espousing that the ADA was "intended to prevent the states from re-regulating airline operations so that competitive market forces could function." Thus, the proper inquiry is to determine whether the regulation at issue "frustrates deregulation by interfering with competition through public utility-style regulation," but when the law at issue "does not have a regulatory effect, it is 'too tenuous, remote, or peripheral' to be preempted." Because the "application of state law" to the circumstances at bar in Taj Mahal "[did] not frustrate Congressional intent, nor [did] it impose a state utility-like regulation on the airlines," the Third Circuit determined that the travel agency's claim for defamation against Delta did not relate to the airline's service, despite the fact that the airline's actions arguably may refer to a service. Thus, the travel agent's claims were not preempted by the ADA.

While some circuits have narrowly interpreted the term "services," other circuits follow a second line of thought and believe that the term should be more broadly construed, defining "services" to "refer[] to the provision or anticipated provision of labor from the airline to its passengers." For example, the Fifth Circuit, in Hodges v. Delta Airlines, Inc., determined that a passenger's suit against an airline for injuries sustained when a case of rum fell from an overhead compartment and struck her on the arm, causing injury, was not preempted by the ADA, as the claim had "no specific reference to airline services" and enforcement of the claim would not significantly affect the airline's service. The Fifth Circuit determined that the term "services" is typically meant to refer to "a bargained-for or anticipated provision of labor from one party to another." Evi-
idence of this bargain includes “ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.” Further, the Seventh Circuit in *Travel All Over the World v. Kingdom of Saudi Arabia* held that a travel agent’s claims against an airline for canceling customers’ tickets and for slander and defamation were not preempted by the ADA because the claims did not constitute a “bargained-for or anticipated provision of labor from one party to another.” “Certainly,” the court noted, the airline’s disparaging comments regarding the travel agent’s services “were not part of any contractual arrangement” between the airline and the travel agent’s clients. Likewise, the Eleventh Circuit, in *Branche v. Airtran Airways, Inc.*, determined that a terminated airline employee’s cause of action for breach of the Florida Wistleblower Act against a former employer-airline was not preempted, opining that a “broader reading of the term ‘services’ is preferable.” The court favored a broad reading of the term “services” as there was no reason for a more “truncated reading” of the term since “the ADA’s pre-emption clause is properly afforded an extremely broad scope” and concerns regarding the preemptive language’s misapplication are misplaced. Thus, because the terminated airline employee’s cause of action did not “significantly affect any bargained-for element of air carrier operations, and accordingly . . . did not affect airline services,” it was not preempted by the ADA.

Recently, the Supreme Court again addressed the issue of what actions fall within the definition of “services” for the purposes of federal preemption statutes when it examined the preemption provision of the Motor Carrier Act of 1980 (MCA) in *Rowe v. New Hampshire*. The Court addressed the issue of whether or not a Maine state statute that regulated shipment of tobacco products into Maine was preempted by the MCA, which borrowed its preemption provision language from the ADA, specifically the stipulation that “[a] state . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of prop-

130 *Id.*
131 73 F.3d 1423, 1433 (7th Cir. 1996).
132 *Id.*
134 *Id.*
135 *Id.* at 1257.
The Court, citing *Morales*, held that "federal law must . . . pre-empt Maine's efforts directly to regulate carrier services."138 Courts since *Rowe* have taken this decision to define services broadly, not narrowly, so as "to extend beyond prices, schedules, origins, and destinations."139 For example, in *Air Transport Ass'n of America v. Cuomo*, the Second Circuit construed the *Rowe* decision to broadly interpret the term "services," holding that "requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delay *does* relate to the service of an air carrier." Thus, the ADA preempts actions such as these.140

Of the circuits that have adopted a broader interpretation of the term "services," courts are often split on the methodology they employ to ultimately make the determination. District courts have largely followed one of two methods: (1) an "ad hoc approach," under which "courts examine the totality of the circumstances and determine whether the action at issue is commonly related to air travel;" or (2) a "three-part test" promulgated by Justice Sotomayor during her tenure as a district judge, which takes the analysis beyond an ad hoc approach to ascertain whether the claim affects airline service directly or remotely, and further, whether the underlying conduct was necessary to the provision of that service.141 Though the application of one test over another may affect the ultimate determination of whether or not something constitutes a service, often the result under each test is the same.142

Under the first method—the ad hoc approach—courts examine "the extent to which [the actions at issue] are commonplace and ordinary, and relate directly to air travel."143 "For example, aiding an elderly passenger" to board and deplane is "commonplace and ordinary, and relate[s] directly to air travel."144 Therefore, any action by that elderly passenger against the airline for injuries suffered while boarding or de-

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137 *Id.* at 993 (quoting 49 U.S.C. § 14501(c)(1)).
138 *Id.* at 998.
139 *See Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008).
140 *Id.* (emphasis added).
142 *Id.*
144 *Id.* at 360 (citing *Howard v. Nw. Airlines, Inc.*, 793 F. Supp. 129 (S.D. Tex. 1992)).
planing would be preempted by the ADA because the airline’s actions relate to its "service." On the other hand, actions that are not commonplace and ordinary do not constitute services for the purposes of the ADA’s preemption provision. It is not commonplace or ordinary, for example, for a pilot to contact a ground crew to inform them he believes a passenger is smoking marijuana on the airplane. Therefore, any claim by the alleged pot-smoking passenger against the airline relating to the pilot’s actions would not be preempted by the ADA. This line of cases applying an ad hoc approach is careful to distinguish services from negligent actions that resulted in personal injury. While services may be preempted, “ADA preemption will not apply even to actions that are regularly performed” if the “action was performed in a negligent manner and resulted in personal injury.” Thus, this approach complies with the Supreme Court’s determination that ADA preemption should not be extended to the negligent acts of airlines.

The second broad method to ADA preemption consists of a three-part test promulgated by Justice Sotomayor during her tenure as a district court judge. Under this approach, courts must “first determine whether the activity at issue in the claim is a service,” then, if the activity is in fact a service, courts must “ascertain whether the claim affects the airline service directly or tenuously, remotely, or peripherally,” and finally, courts “must determine whether the underlying tortious conduct was reasonably necessary to the provision of the service.” The first prong of this test is similar to the ad hoc approach “in that the determination of service[s] rests heavily on the extent to which the activity in question is ordinary and relates directly to air travel.” Thus, an activity such as an air carrier’s refusal to board passengers is preempted because it is “a service related to air travel,” yet preemption would not apply to injuries suffered by passengers on a bus tour that was part of a package sold by an airline because “ground transportation is not related to air travel.”

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145 See id.


148 Id. at 360.

149 Id.

150 Id. at 361 (citing Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 222 (S.D.N.Y. 1996)).

151 Id.

152 Id. (citing Rombom, 867 F. Supp. at 221–22).
The second prong of the test seeks to ensure that the claim is not related too remotely or tenuously to the services provided by an air carrier. For example, tort claims that arise from an airline bumping passengers from a flight, resulting in fatigue and exhaustion, can be preempted by the ADA as the mistreatment was a direct result of the airline rendering a service. Finally, the third prong of the test seeks to establish the reasonableness of the air carrier's actions. As long as the action in question is "reasonably necessary," ADA preemption can apply; however, if the action is "outrageous or unreasonable," it is likely that ADA preemption will not apply. For example, rude service, while perhaps unprofessional, does not rise to the level of "outrageous" so as to prevent application of ADA preemption. On the other hand, claims involving "assault, battery, false arrest, or false imprisonment" would rise to the level of "outrageous," and would not be preempted by the ADA. While the three-prong test created by then-Judge Sotomayor delves further into an air carrier's actions to determine whether or not they constitute a service, there is a certain level of overlap between this method and the ad hoc method used by other courts. And while the results under each method may be divergent, typically, they are congruent. Though a majority of circuits have interpreted the term "services" in a broad manner, circuits are still split on the proper analysis, and until either Congress or the Supreme Court promulgates a more precise definition of the term, the incongruity is likely to remain.

C. "Prices"

The ADA's preemption provision also applies to statutes that regulate the "prices" of air carriers. Though the term "prices" is certainly less ambiguous than the term "services," determining what does and does not in fact affect prices is not always clear-cut. Air carriers are not susceptible to typical pricing structures; rather than being driven by cost-plus bases, air transportation

155 Id.
154 Id.
156 Id. at 361–62.
157 Id. at 362.
158 Id. (citing Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391, 399–401 (S.D.N.Y. 2004)).
prices are driven largely by “yield management systems.” Yield management systems are designed to schedule flights at the maximum capacity possible. Because yield management systems “allocate fare on a flight-by-flight, day-by-day basis,” airlines are able to constantly monitor flight demand and make necessary adjustments to prices to reflect need. Additionally, air transportation prices are driven by competition between airlines. Thus, because air transportation prices are not driven by common cost bases, things that may appear to affect air carrier prices for the purpose of ADA preemption may in fact only have an insignificant effect.

For example, in Abdu-Brisson v. Delta Airlines Inc., Delta argued that the ADA preempted plaintiffs’ claims because “there [was] a direct relationship between the relief sought and Delta’s prices.” The Second Circuit, however, did not allow Delta to invoke ADA preemption, holding that because of the airline pricing structure, the plaintiffs’ claims would have only an “inconsequential impact on Delta’s pricing,” though they may affect fixed costs.

On the other hand, in Buck v. American Airlines, Inc., the First Circuit held that the ADA did preempt airline customers’ claims for recovery of various fees associated with the purchase of tickets that were never used. Customers claimed that because the fees occur after the prices “have been determined by the Air Industry” their suit could not affect the prices. But the court determined that the fees were “inextricably intertwined” with the base fare, and as such, “when an airline establishes the base fare, it must take cognizance of any surcharges that will be imposed by operation of law.” Therefore, the claim for the ticketing fees would affect prices, so ADA preemption was applicable. Typically, courts side with the reasoning in Buck and find that the ADA does preempt suits for the refund of fees

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161 Id.
162 Id.
163 Id.
164 Id.
165 Id. at 79.
166 Id.
167 Buck v. Am. Airlines, Inc., 476 F.3d 29 (1st Cir. 2007).
168 Id. at 35.
169 Id.
170 Id. at 36.
associated with air travel.\textsuperscript{171} While the term "prices" is not as ambiguous as the term "services," courts still occasionally struggle with the application of "prices" because the price structure behind airfare is driven by demand and not by cost bases, thus making it difficult to determine what would and would not affect ticket prices.

D. "Air-Carrier"

A fourth area of ambiguity in the ADA’s preemption provision is interpretation of the term "air carrier" and whether ADA preemption can extend to entities other than actual airlines. Courts have noted that "[n]othing in the ADA suggests that § 1305(a) applies only to suits against an air carrier" and instead, the focus should be on whether the state law at issue has a "‘connection with or reference to’ airline rates, routes or services."\textsuperscript{172} Indeed, courts have extended ADA preemption to several entities other than actual airlines.\textsuperscript{173} For example, the U.S. District Court for the Southern District of Texas determined that the ADA could be extended to apply to an airline’s parent company.\textsuperscript{174} In \textit{Continental Airlines v. American Airlines}, Continental filed a suit, alleging antitrust violations, against American and its parent company, AMR Corporation (AMR).\textsuperscript{175} AMR claimed the suit was preempted by the ADA, but Continental asserted that because AMR was "not an air carrier as defined by the ADA," the ADA preemption provision did not apply.\textsuperscript{176} The court, however, disagreed and found that interpreting the preemption provision to apply only to claims against actual airlines "would frustrate congressional intent."\textsuperscript{177} In passing the ADA, Congress sought to "assert federal control" over the regulation of the airline industry. Thus, "it is preposterous to assume that Congress intended to block the prosecution against air carriers of certain suits but to allow those same suits to proceed against

\begin{footnotesize}
\begin{enumerate}
\item \textit{Cont'l Airlines, Inc.}, 824 F. Supp. at 696–97.
\item Id. at 696.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
all others." Further, the court stressed that the overall aim of the ADA’s preemption provision is not to protect airlines in particular, but to avoid “the enforcement of any state laws that have a ‘connection with or reference to’ airline rates, routes, or services.” Therefore, the claim against AMR alleging violations of state laws was preempted.

The ADA’s preemption provision has also been extended to jetbridge operators. In Marlow v. AMR Services Corp., a former employee alleged violations of a state whistleblower act against his former employer, AMR Services, a jetbridge operator. AMR Services, however, claimed that the cause of action was preempted by the ADA because, though they freely admitted that they were not an air carrier, “section 1305(a)(1) applies to non-air carriers” and air carriers alike. The court agreed with this assertion and noted, like the court in Continental, that the ADA preemption provision is meant specifically to prevent enforcement of any state laws that “have a ‘connection with or reference to’ airline rates, routes, or services,” and not simply to apply only to suits involving airlines. Because jetbridges are “an integral part of air carrier services, no matter who maintains them,” the former employee’s cause of action against AMR Services was preempted by the ADA.

Further, the ADA’s preemption provision has been extended to predeparture screening companies. In Huntleigh Corp. v. Louisiana State Board of Private Security Examiners, Huntleigh, a corporation that contracted with airlines to provide predeparture screening services, brought a suit against the state of Louisiana, challenging Louisiana’s regulation of the predeparture screening industry. While Huntleigh was not an airline, because Huntleigh was “certainly an agent of an air-carrier,” state regulation “would frustrate the intent of Congress to provide uniform federal standards.” Because the Louisiana law “af-

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178 Id. at 697.
179 Id. at 696–97.
180 Id. at 697.
182 Id. at 297.
183 Id. at 297–98.
184 Id. at 298.
185 Id. at 299.
187 Id. at 358.
188 Id. at 362.
fected the ‘services’ of air carriers,” the law was within the reach of the ADA’s preemption provision. Therefore, Huntleigh could take advantage of ADA preemption.

Though the ADA’s preemption provision has been extended to include an airline’s parent company, a jetbridge operator, and a predeparture screening company, courts are careful not to extend the provision to entities that are too tenuously or remotely related to air carriers. For example, in *Stearns Airport Equipment Co. v. FMC Corp.*, a provider of airline boarding bridges argued that a competitor’s suit alleging violation of antitrust laws was preempted by the ADA because the state law claims “necessarily relate to rates and services in the airline industry,” as the jetbridge provider was an air carrier under the preemption provision. The court disagreed, however, finding that the provider was too remotely related to air carriers to be preempted. Unlike the jetbridge operator in *Marlow*, the issue in this case was “not maintenance and servicing” of the jetbridge, but instead the actual sale of jetbridges themselves. To allow the provider here to take advantage of the ADA’s preemption would create a slippery slope, suggesting that “any cost associated with building an airport would necessarily relate to the rates or services of an airline.” Therefore, while courts have extended the ADA’s preemption provisions to entities beyond air carriers themselves, courts are still careful to ensure that the entity is not too tenuously related to air carriers so as to affect only rates, routes, or services in a remote or peripheral manner.

Though no court has specifically addressed the issue of whether or not the ADA preemption statute applies to internet travel agencies, two courts have addressed ADA application to brick-and-mortar travel agencies. An Ohio appellate division court, in an unpublished opinion, addressed the issue of whether the ADA’s preemption provision could apply to a travel

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189 *Id.* at 361.
191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.*
agency. The court postulated that the ADA preempted a state statute that governed consumer sales practices directed against airlines in a suit by a customer against a travel agent for the cost of a trip after the customers missed their scheduled flight. However, the court went on to state that ADA preemption did not include "business activities of travel agent[s]" without expanding on its reasoning. Thus, while this case may indicate that internet travel agencies, and travel agents as an industry, may not be able to take advantage of the ADA's preemption provision, the holding is far from concrete and provides little reason not to apply the provision to travel agencies.

In El-Menshawy v. Egypt Air passengers brought suit against an airline for failing to honor confirmed reservations and against a travel agent for failing to confirm those reservations. The court decided, without extensive discussion, that the claims against the airline were preempted by the ADA, but then the court delved further into the issue of whether or not ADA preemption could apply to the travel agent. The court focused on the preemption provision's language—"relating to rates, routes, or services of any air carrier"—and paid special attention to the phrase "air carrier." The court opined that if a travel agent can fit within the FAA's definition of "air carrier," the travel agent might successfully take advantage of the ADA's preemption provision. The FAA defines "air carrier" as one "who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." To determine what exactly constitutes an "indirect air carrier," guidance can be found in the Civil Aeronautics Board (CAB) and in case law. "Indirect air carriers" are described by the CAB as:

Any persons whose relationship to the public is such that the passengers with whom they deal are well aware that the transportation which is being offered will subsequently be provided by an airline pursuant to arrangements with such person, but where the person is not acting as an authorized agent of any airline in

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197 Kneuss, 2002 WL 31518175, at *1–2.
198 Id. at *3.
199 Id.
200 El-Menshawy, 647 A.2d at 491–92.
201 Id. at 493.
202 Id.
203 Id. at 494.
204 Id. at 493–94 (citing 49 U.S.C. app. §1301(3) (1958)).
the consummation of arrangements between any such airline and the passengers.205

Therefore, a travel agent can only fit within the definition of "air carrier" and thus take advantage of the ADA's preemption provision "if it can be determined that it indirectly is engaged in air transportation."206

The court noted that the FAA also defines the term "ticket agent" and points out that a travel agent may alternatively fall under this category.207 The term "ticket agent" is defined by the FAA as "[a]ny person, not an air carrier . . . who, as principle or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation."208 Because the ADA's preemption provision applies to "air carriers" but not to "ticket agents," the question of which category the travel agent falls under "must necessarily turn on the facts and circumstances or its activities in relation to the events in question."209 The court did not ultimately decide whether or not the travel agent in El-Menshawy could take advantage of the ADA's preemption provision because the travel agent's materials before the court made no argument either way.210

Additional case law discussing the application of ADA preemption to travel agents does not offer much guidance. Travel agents have been involved in suits dealing with the preemption provision, but predominantly on the claimant side.211 Travel agents' claims against airlines are treated the same as any other claimants, with the court deciding whether or not to apply ADA preemption based on the claim itself and the surrounding circumstances.212 For example, the Seventh Circuit gave no deference to the fact that a travel agency was the claimant.213 The

205 Id. at 494.
206 Id. (original emphasis).
207 Id.
208 Id. (quoting 49 U.S.C. app. § 1301(32) (1958)).
209 Id.
210 Id.
211 See Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 188 (3d Cir. 1998); Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1427 (7th Cir. 1996); Ill. Corporate Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751, 752 (7th Cir. 1989).
212 See Taj Mahal Travel, Inc., 164 F.3d at 194–95; Travel All Over the World, Inc., 73 F.3d at 1427–28; Ill. Corporate Travel, Inc., 889 F.2d at 751–53.
213 Ill. Corporate Travel, Inc., 899 F.2d at 754.
court held that the travel agency’s claims against an airline for terminating an agency relationship and for refusing to allow the travel agency to advertise discounted tickets on that airline’s flights were preempted by the ADA because the claims related to “rates, routes, or services” provided by the airline.\textsuperscript{214} Likewise, the Third Circuit gave no consideration to the fact that one of the litigants was a travel agency and, instead, held that the travel agent’s defamation claim was not preempted by the ADA, reasoning that the action was “simply ‘too tenuous, remote, or peripheral’ to be subject to preemption, even though [the airline’s] statements refer to ticketing, arguably a ‘service.’”\textsuperscript{215} Thus, courts typically view travel agencies as ordinary litigants and offer no special ADA treatment.

IV. ADA APPLICATION TO INTERNET TRAVEL AGENCIES

Because there is little case law answering the question of whether or not internet travel agencies may take advantage of the ADA’s preemption provision, answers must instead be inferred from congressional intent and strict application of the statute’s requirement of “relates to” the “rates, routes, or services” of an “airline.” Through analysis of each of these terms, depending upon the factual circumstances in an individual case, the ADA’s preemption provision may in fact be applied to internet travel agencies.

A. CONGRESSIONAL INTENT

First, looking at the congressional intent behind the ADA, one reoccurring theme emerges: the overarching goal of the ADA was “to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services.”\textsuperscript{216} The theory behind airline deregulation was that if government restrictions were removed, “maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety [and] quality . . . of air transportation services.”\textsuperscript{217} Further, deregulation would allow easier entry into

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Taj Mahal Travel, Inc., 164 F.3d at 195.
\item \textsuperscript{216} Frenette, supra note 51, at 174.
\item \textsuperscript{217} Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77, 84 (2d Cir. 1997) (internal quotations omitted).
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the marketplace for emerging airlines.\textsuperscript{218} It is important to remember that before the ADA and its preemption provision, the heavily-regulated airline industry was not succeeding. To resuscitate the airline industry, Congress wanted to ensure that nothing stood in the way of the free operation of the marketplace.\textsuperscript{219}

Many factors go into providing successful airline service, such as: the planes themselves; ticketing, boarding, and baggage procedures; ticket purchasing; and food service. In short, airline service is multifaceted. To say that something that customers connect to airline service—such as ticket sales—is not actually related to airline service for the purposes of the ADA because the tickets were not sold by the airline itself would directly contradict congressional intent. The goal of the preemption provision was to allow competitive market forces to flow—nothing in this goal, however, hints that the ADA may not apply to entities such as internet travel agencies.\textsuperscript{220} Indeed, some courts have postulated that to interpret the statute as only applying to air carriers would "frustrate congressional intent."\textsuperscript{221}

However, courts attempting to apply the ADA's preemption provision to internet travel agencies must be careful to interpret properly the statute at issue and its purpose. The various steps and analysis courts utilize to interpret the ambiguous sections of the preemption provision serve as a type of check on congressional intent, ensuring that the statute is not construed too broadly. But regardless of which tests or methods courts employ, it is important that courts look not to what entity is seeking ADA preemption but, instead, to the statute or regulation's purpose and the effect it has on the prices, routes, or services of air carriers. By focusing on this inquiry, courts can best serve congressional intent in their application of the ADA's preemption provision.

B. The "Relates To" Inquiry

Next, examining the language of the ADA's preemption provision itself provides some guidance to determine whether internet travel agencies may take advantage of the provision. First, it is pertinent to establish whether or not services provided by

\textsuperscript{218} Calvin Davison, \textit{The Two Faces of Section 105 – Airline Shield or Airport Sword}, 56 J. AIR L. & COM. 93, 94 (1990).
\textsuperscript{219} \textit{Id.} at 105.
\textsuperscript{221} \textit{Id.}
internet travel agencies "relate to" airline prices, routes, or services. The seminal case on this issue is *Morales*. The term "relates to," the court postulated, is meant to be a broad one; indeed, the plain meaning of the phrase itself suggests this. Additional evidence of the fact that the phrase "relates to" is inherently broad can be found in *Black's Law Dictionary*, which defines the term as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," as well as in the interpretation of other statutes that use the phrase, such as the Employee Retirement Income Security Act. Both of these sources indicate that the term "relates to" is construed broadly.

Because the term "relates to" is construed broadly, if a state invoked a statute that regulated internet travel agencies, it is possible that internet travel agencies could utilize the ADA's preemption provision. Internet travel agencies and the services they offer are deeply integrated with airlines. At their core, the purpose of internet travel agencies is to sell airline tickets. Without a ticket, a person cannot travel by airplane. Further, several internet travel agencies have deep-seeded roots in the airline industry. For example, Travelocity emerged out of the Sabre system, which served as airlines' electronic booking system for decades prior to the inception of Travelocity. Therefore, it is likely that any statute seeking to regulate internet travel agencies could be found to "relate to" airline rates, routes, and services. To prohibit internet travel agencies from using the ADA's preemption provision would hinder the competitive market forces that Congress intended to govern the air travel industry when it passed the ADA. To allow states to regulate internet travel agencies would be to allow states to "undo federal deregulation with regulation of their own." Thus, state regulation of internet travel agencies could "relate to" the prices, routes, and services of air carriers.

C. THE "PRICES, ROUTES, OR SERVICES" INQUIRY

The next step in determining whether an internet travel agency may fall within the purview of the ADA's preemption

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223 Id. at 383.
224 Id.
225 See id.
226 See discussion of Travelocity *supra* Part I.A.
227 *Morales*, 504 U.S. at 378–79.
provision is to determine whether the cause of action at issue involving the internet travel agency relates to the “price, routes, or services” of an air carrier. Interpretation of the term “services” is heavily reliant on the facts and circumstances in each situation and also depends on which definition of “services” the jurisdiction deciding the issue follows. As noted above, some courts have adopted a very narrow definition of the term “services,” determining that only “the provision of air transportation to and from various markets at various times” constitutes a “service.”

Under this narrow definition, internet travel agencies may not succeed in establishing that ADA preemption should apply to their actions since internet travel agencies are not in the business of providing the actual air transport itself. Courts that promote a more narrow definition of services generally opine that to promulgate a broader definition of services would run the risk of extending the statute beyond congressional intent.

Thus, even if internet travel agencies are able to succeed in showing a state statute at issue “relates to” the airline industry, because internet travel agencies are not in the business of providing the actual air transport, the second prong in determining whether a cause of action would be preempted by the ADA would not be met.

However, most circuits reject this narrow construction of the term “services” and, instead, utilize a broad definition that includes a wide array of events and circumstances that relate to air travel. Under this definition, an occurrence can be deemed a “service” as long as it “refer[s] to the provision or anticipated provision of labor from the airline to its passengers,” and it can include events such as “boarding procedures, baggage handling, and food and drink.”

Under this broad interpretation of “services,” internet travel agencies could succeed in proving that their actions are a “service” for the purposes of the ADA’s preemption provision. Indeed, the business of organizing, providing, and selling airline tickets can be referred to as “the provision or anticipated provision of labor from the airline to its passengers.”

Thus, if a state enacted a statute regulating internet travel agencies in their sales practices, the internet travel agencies could show that their ticket selling practices are a “service” related to airlines.

228 Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998).
229 See id.
231 Id.
Determining whether an activity fits within the broad definition of the term “services” is not completely straightforward. As noted in Weiss v. El Al Israel Airlines, Ltd., courts have adopted various methodologies to determine whether an action may in fact be classified as a “service.” Under the ad hoc method, the court would “examine the totality of the circumstances” to determine whether the action at issue is a “service.” This approach focuses heavily on the facts at hand, and because it is an intense factual determination, it is difficult to determine whether or not internet travel agencies pass this test. If a state statute regulated a minor part of an internet travel agency's ticket sales procedures or dealt with some other aspect of the business that was only tangentially related to airlines, internet travel agencies may not be able to invoke ADA preemption. However, if the state statute regulated an area of internet travel agencies' business that was more closely related to airlines, then under an ad hoc approach internet travel agencies could show that the statute sufficiently relates to airline service.

Instead of this ad hoc method, a court may use a second methodology to determine whether an action constitutes a “service”—the three-part test laid out by then-Judge Sotomayor in Rombom. Though the first prong of the test is virtually the same as the ad hoc approach and would depend on the same sorts of factual determinations, the second and third prongs of the test may operate to a different effect. If the activity in question is deemed a service under the first prong, “the court must then determine whether the claim affects the airline service directly or tenuously, remotely, or peripherally.” This prong of the test—determining whether the claims go directly rather than remotely to the service established in the first prong—is also heavily dependent on the facts in each case. As long as the activity at issue “directly implicates a service,” this prong of the test is met. For example, a claim arising from an internet travel agency's refusal to mail a customer's ticket would meet this prong because it stems from the denial of services it-

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233 Id. at 359.
234 Id.
236 See id.
237 Id. at 222.
238 Id.
On the other hand, a negligence action arising out of a severe paper cut that a customer suffered when he opened the envelope containing the ticket would fail this prong because it falls outside the domain of services provided by the internet travel agency. In this case, the internet travel agency would not be able to take advantage of ADA preemption. As to the third prong of the test, the underlying conduct at issue must be "reasonably necessary to the provision of the service." This prong would insulate actions that would be so out of the ordinary or outrageous as to fall outside the purview of the ADA's aims. "Unreasonable" has been interpreted to mean necessarily rising to the level of outrageousness. Actions may rise to the level of "rude" or "unprofessional" without being unreasonable. Therefore, as long as the internet travel agency's actions were not outrageous, the third prong of this test would be satisfied. Thus, if the jurisdiction in which an issue involving an internet travel agency is being adjudicated utilizes the three-part test laid out by then-Judge Sotomayor in Rombom, whether or not the action at issue constitutes a "service" is heavily based on the facts at hand. In some cases, an internet travel agency may be able to invoke ADA preemption, yet, in other cases the services the internet travel agency provides may be deemed too remote or peripheral to successfully invoke ADA preemption. Each prong of the test must be met to successfully show that the action constitutes a service, and if the internet travel agency fails to satisfy any one of these prongs, it would not be able to successfully invoke the ADA's preemption provision.

However, if the "services" inquiry is not met, internet travel agencies may be able to show the issue at hand relates to the "prices" of air carriers. For example, in Abdu-Brisson, Delta sought to establish application of the ADA's preemption provision by arguing that the claim at issue was an attempt to manipulate the economic terms of Delta's purchase of Pan American World Airways, which thus had a direct effect on Delta's

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239 See id.
240 See id.
241 Id.
242 Id.
244 Id.
245 See Rombom, 867 F. Supp. at 121-22.
246 See id.
prices.\textsuperscript{247} However, the Second Circuit determined that this claim would not allow Delta to take advantage of the ADA's preemption provision because, although the plaintiffs' demands may have increased costs, the unique price structure of the airline industry would cause the satisfaction of the demands to have "an inconsequential impact" on pricing.\textsuperscript{248} Therefore, though the ADA preempts statutes that have an effect on the "prices" of airlines, since airlines are not susceptible to common-cost basis concerns, things that would seemingly effect airline prices may in fact be inconsequential. But, because the ADA preempts state statutes that have a detrimental effect on air carrier prices, if the issue at hand has the effect of raising or lowering air carrier prices, internet travel agencies could take advantage of the ADA's preemption provision.

\textbf{D. THE "AIR CARRIER" INQUIRY}

Finally, it is important to determine whether internet travel agencies can be classified as "air carriers" for the purposes of the ADA's preemption provision. As noted above, the ADA's preemption provision is not meant to apply to airlines exclusively.\textsuperscript{249} Indeed, the aim of the ADA was not to protect airlines themselves, but to ensure that the industry operated in a free market environment.\textsuperscript{250} To best achieve this goal, preemption necessarily needs to apply to entities other than just airlines.

Courts have extended the ADA's preemption provision to a variety of other entities, including airline parent companies, jet-bridge operators, and preboarding security providers. Courts have been careful to adhere to the aims and goals of the ADA and have promulgated a flexible application of the term "airline."\textsuperscript{251} Those courts look to see what it is that each of the entities claiming ADA preemption do in relation to airlines and the services they provide.\textsuperscript{252} Where the internet travel agency relates in such a way that their operation is a necessary part of the

\textsuperscript{247} Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77, 80 (2d Cir. 1997).
\textsuperscript{248} Id. at 85.
\textsuperscript{250} Abdu-Brisson, 128 F.3d at 84.
\textsuperscript{252} See, e.g., Cont'l Airlines, Inc., 824 F. Supp. at 696–97.
air travel process, courts typically classify that entity as an “air carrier.” However, courts are also careful to ensure they do not apply the provision so loosely as to promulgate rules that would essentially allow any entity to take advantage of the ADA’s pre-emption provision.

Courts have noted that there are two very similar definitions that a travel agency may fall under: “indirect air carrier” and “ticket agent.” It is certainly feasible that an internet travel agency could fall within the definition of “indirect air carriers.” The same predicament may also apply to internet travel agencies. “Indirect air carriers” are described by the CAB as:

Any persons whose relationship to the public is such that the passengers with whom they deal are well aware that the transportation which is being offered will subsequently be provided by an airline pursuant to arrangements with such person, but where the person is not acting as an authorized agent of any airline in the consummation of arrangements between any such airline and the passengers.

Internet travel agencies’ customers are typically aware that the transportation being offered by the internet travel agencies “will subsequently be provided by an airline pursuant to arrangements” between the internet travel agency and the customer. Further, internet travel agencies do not serve as “authorized agent[s] of any airline in the consummation of arrangements” between airlines and customers. While internet travel agencies may fall under the definition of “indirect air carriers,” it is equally feasible to fit internet travel agencies into the definition of “ticket agent.” “[T]icket agent” is defined as not being an air carrier, that is one who offers or sells air transportation or who holds himself out as one who is “selling, providing, or arranging for” air transport. Internet travel agencies fit this description too. Therefore, whether an internet travel agency fits more into the definition of “indirect air carrier” or “ticket agent” must be left up to courts to determine based on the facts and circumstances in a case.

Internet travel agencies and the services they provide are more closely related to the prices, routes, and services of an air-

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254 Id.
255 Id.
256 Id.
line than other entities that have successfully invoked ADA pre-
emption, like airline-parent companies, jetbridge operators, or
fully invoke ADA preemption because the state law at issue in
the case “relate[d] to airline routes, rates or services.”\footnote{Marlow, 870 F. Supp. at 298 (internal quotations omitted).} Cer-
tainly an internet travel agency—a company that is integrated
into the provision of the air transport itself—is more closely re-
lated to an airline than a jetbridge operator. Thus, the point of
focus in determining whether this part of the ADA’s preemption
 provision is met is heavily dependent on the facts in each situ-
ation. Depending on which definition the internet travel agency
at issue falls under, it may or may not be able to take advantage
of the ADA’s preemption provision.

V. CONCLUSION

Today, more people are traveling by air than ever before. To
best accommodate air travelers, internet travel agencies
emerged and grew to occupy a significant role in the air travel
industry. Just as with the last rise in air travel in the mid and late
1970s, how to (or how not to) regulate air travel entities has
become an issue. To best ensure that market forces would drive
the aviation industry, Congress passed the ADA in 1978, which
included a preemption provision to prevent states from undoing
deregulation. Since its inception, the preemption provision has
been the source of confusion and ambiguity. Courts have strug-
gled with the meaning of the term “relates to,” the phrase
“rates/prices, routes, or services,” and the term “air carrier.”
Each has been subject to differing interpretations, which often
depend heavily on the facts in an individual case.

A broad, flexible preemption provision was exactly what Con-
gress intended when it passed the preemption provision. But
whether the provision was intended to go so far as to preempt
regulation of internet travel agencies is yet to be determined.
The ADA’s preemption provision has in fact applied to entities
other than airlines, and nothing in the statute prevents the pro-
vision from extension to internet travel agencies. Factual deter-
minations are important in deciding whether the ADA's preemption provision applies in any situation. In those situations when the ADA has applied to entities other than airlines, it is typically due to a close correlation between what that entity does and its effect on the airline industry. Where an entity is merely tangentially connected to the prices, routes, and services of air carriers, the ADA preemption will not apply.

Just as the climate in the air transportation industry shifted in the late 1970s, the climate has again changed with the emergence and growth of the internet. Congress wanted airline deregulation to be a flexible concept. Though Congress likely did not anticipate the development of internet travel agencies when it promulgated the ADA's preemption provision, the nature of these companies and the services they provide indeed allow internet travel agencies to squeeze into the ADA's preemption provision if the facts and circumstances in a given case command it.