Journal of Air Law and Commerce

Volume 65 | Issue 3 Article 5

2000

Flying the Not-so-Friendly Skies: Charas v. TWA's Definition of Service under the ADA's Preemption Clause Exposes Airlines to Tort Liability

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FLYING THE NOT-SO-FRIENDLY SKIES: CHARAS V. TWA'S DEFINITION OF "SERVICE" UNDER THE ADA'S PREEMPTION CLAUSE EXPOSES AIRLINES TO TORT LIABILITY

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I. INTRODUCTION

WHEN CONGRESS enacted the Airline Deregulation Act of 1978 (ADA), it included a preemption provision that prevented states from enacting or enforcing a law that "related to a price, route, or *service* of an air carrier."[1] Congress, however, did not define "service."[2] As a result, courts faced with ADA preemption issues were uncertain whether the ADA preempted run-of-the-mill personal injury claims because they "related to" a "service" provided by the airlines, such as serving hot drinks and food, stowing luggage, and passenger assistance.[3] Since its 1978 enactment, the courts have continued to struggle with the intended scope of the ADA's preemption provision as it applies to service-related airline torts.[4] In 1998, however, the Ninth Circuit delivered an opinion in *Charas v. Trans World Airlines, Inc.*,[5]

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[1] *See* 49 U.S.C. § 41713(b)(1) (1994) (emphasis added).

[2] *See* Somes v. United Airlines, Inc., 33 F. Supp. 2d 78, 83 (D. Mass. 1999). Although "service" was not defined, Congress did define "[a]ll-cargo air service" to mean "the carriage by aircraft in interstate or overseas air transportation of only property or mail, or both." 49 U.S.C. app. § 1301 (11) (1988) (amended and recodified at 49 U.S.C. § 40102 (1994)). Section 40102 does not define either "service" or "all-cargo air service." *See* 49 U.S.C. § 40102 (changing the name "all-cargo air service" to "all-cargo air transportation").

[3] *See Somes*, 33 F. Supp. at 84 (discussing the decisions of numerous courts regarding whether the ADA preempted such claims).

[4] *See* Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 192 (3d Cir. 1998) (noting that the courts have "struggled with the relationship between the Act's preemption clause and state tort claims").

[5] 160 F.3d 1259 (9th Cir. 1998) (en banc), *reh'g denied*, 169 F.3d 594, 595 (9th Cir 1999) (en banc).

that defined "service" in such a way that the ADA would not preempt routine aviation personal injury claims.[6]

This article examines the *Charas* decision, including the impact it may have on future ADA preemption cases. First, this article looks at the statutory evolution of the ADA.[7] Next, the author discusses Supreme Court precedent relating to the scope of the ADA's preemption provision.[8] Then, this article analyzes the court's opinion in *Charas*.[9] This article then addresses the potential impact of *Charas* on future cases, including the extent to which other federal courts are likely to adopt the *Charas* definition of "service."[10] Finally, the article concludes that the Ninth Circuit correctly decided *Charas*, and recommends that other courts apply its definition of "service" in future ADA preemption cases.[11]

II. STATUTORY EVOLUTION OF THE ADA

In 1938, Congress enacted the Civil Aeronautics Act of 1938[12] to "regulate entry into the interstate airline industry, the routes that airlines could fly, and the fares that they could charge consumers."[13] Although this provision granted the Civil Aeronau-

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[6] This article focuses on preemption as it relates to airline negligence in situations similar to those described in the Introduction. For a more detailed discussion of select preemption issues, such as employment related claims and negligent product design, see Richard Schoolman, *Developments in the Preemption of Otherwise Justiciable Employment-Related Claims by the Railway Labor Act and the Federal Aviation Act*, SA31 ALI-ABA 721 (1996); Lance M. Harvey, Note, *Cleveland v. Piper Aircraft Corp.: The Tenth Circuit Holds that the Federal Aviation Act of 1958 Does Not Preempt State Common Law Claims for Negligent Design*, 46 BAYLOR L. REV. 485 (1994); Shari L. Pitko, *Aviation Law: Preemption of State Law Tort Claims by the Federal Aviation Act Do State Law Tort Claims Survive the Attack? [Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993)]*, 33 WASHBURN L.J. 234 (1993).

[7] *See infra* Part II.

[8] *See infra* Part III.

[9] *See infra* Part IV.

[10] *See infra* Part V.

[11] *See infra* Part VI.

[12] Ch. 601, 52 Stat. 973, *repealed by* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as 49 U.S.C. app. §§ 1301-1557 (1988)) (recodified at 49 U.S.C. § 40101 et seq. (1994)).

[13] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 422 (1992) (Stevens, J., dissenting) (citing the Civil Aeronautics Act of 1938, § 411, 52 Stat. at 987-994); *see also* Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 298-300 (1976). For historical purposes, the 1938 Act was actually Congress's second effort to regulate aviation. Congress first used its Commerce Clause power to regulate interstate aviation in 1926 with the enactment of the Air Commerce Act. *See* Air Commerce Act of 1926, § 1, 44 Stat. 568 (1926) (repealed 1938).

tics Board (CAB)[14] the primary authority to regulate interstate air transportation, the 1938 Act did not expressly preempt concurrent state regulation.[15] The Act also specifically contained a "savings clause" that preserved existing common law and statutory remedies.[16] The 1938 savings clause provided that "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[17]

In 1958, Congress passed the Federal Aviation Act of 1958 (FAA).[18] Although the FAA replaced the 1938 Act, it left in place the states' authority to regulate the airline industry as well as the savings clause.[19] For the next twenty years, the FAA's statutory scheme permitted heavy interstate federal government regulation of the airlines without specifically preempting concurrent state regulation of intrastate air travel.[20] One House Report summarized the problem:

> Existing law contains no specific provision on the jurisdiction of the States [sic] and the Federal Government [sic] over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the [Civil Aeronautics Board], or intrastate passengers, whose fare is regulated by a State.[21]

As a result of this uncertain regulation, states continued to enforce their own laws on the airlines, despite the additional regulation and economic impact these laws had on the airline

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[14] Initially, the 1938 Act created the Civil Aeronautics Authority (CAA). In 1940, the CAA's name was changed to the Civil Aeronautics Board. *See Morales*, 504 U.S. at 422 n.2 (Stevens, J., dissenting) (referring to the name change pursuant to Reorganization Plan No. IV of 1940).

[15] *See* American Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995).

[16] *See* § 1106, 52 Stat. at 1027; *Nader*, 426 U.S. at 298-300. The current version of the savings clause is codified at 49 U.S.C. § 40120(c) (1994).

[17] § 1106, 52 Stat. at 1027.

[18] Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 49 U.S.C. app. §§ 1301-1557 (1988) (current provisions codified as amended at 49 U.S.C. § 40101 et seq.).

[19] *See Morales*, 504 U.S. at 422.

[20] *See Morales*, 504 U.S. at 378. (citing California v. CAB, 581 F.2d 954, 956 (D.C. Cir. 1978) (recognizing that "[d]ual economic regulation by federal and state agencies has produced a conflict").

[21] H.R. REP. No. 95-1211, at 15-16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3751-52.

industry.[22] In addition, with the savings clause provision still in force, common law suits under this provision continued.[23]

Until 1978, federal regulation, state regulation, and savings clause suits continued to impact the aviation industry's economy and market forces.[24] In 1978, Congress responded to this threat by determining that "maximum reliance on competitive market forces," rather than pervasive federal regulation, would best improve the quality, innovation, efficiency, and prices of air transportation.[25] To accomplish this objective, Congress enacted the Airline Deregulation Act of 1978.[26] "To ensure that the States would not undo federal deregulation with regulation of their own," the ADA included a specific preemption provision applicable to the states.[27] The teeth of the ADA's preemption provision provided that: "[n]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to the rates, routes, or service* of any air carrier."[28]

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[22] *See, e.g., Nader*, 426 U.S. at 300-01 (finding that the preemption provision did not prevent states from prohibiting deceptive trade practices laws against the airlines); *Taj Mahal Travel*, 164 F.3d at 190 (noting that interstate travel was "heavily regulated by the federal government"); California v. CAB, 581 F.2d at 956 (permitting states to regulate airfares despite its economic impact on airlines with interstate air transportation).

[23] *See Nader*, 426 U.S. at 300-01 (noting that the savings clause allowed a state tort action to coexist with the Federal Aviation Act).

[24] *See Morales*, 504 U.S. at 422-23 (Stephens, J. dissenting) (discussing Congress's decision to enact the ADA); *Somes*, 33 F. Supp. 2d at 80-81.

[25] *Morales*, 504 U.S. at 378; *see also* 49 U.S.C. § 40101(a)(6), (12) (1994) (setting forth the economic policy of airline deregulation).

[26] Pub. L. No. 95-504, 92 Stat. 1705, 49 U.S.C. app. §§ 1301-1557 (1988) (current provisions codified at 49 U.S.C. § 40101 et seq.).

[27] *Morales*, 504 U.S. at 378.

[28] 49 U.S.C. app. § 1305(a)(1) (emphasis added) (current version at 49 U.S.C. § 41713 (1994)). Congress amended and recodified section 1305(a)(1) in the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569 (1994) (codified at 49 U.S.C. § 40101 et seq.). The current version of the preemption provision, § 41713, provides, in relevant part: "Preemption. - - (1) Except as provided in this subsection, a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b).

Although Congress changed the language from the 1978 to 1994 version, the Supreme Court has declared that Congress intended no substantive change in the Act's meaning and effect. *See* American Airlines, Inc. v. Wolens, 513 U.S. 219, 223 n.1 (1995) (citing Pub.L. No. 103-272, § 1(a), 108 Stat. 745); *see also* Deerskin Trading Post, Inc. v. UPS, 972 F. Supp. 665, 668-69 (N.D. Ga. 1997) (noting that Congress intended identical application of the preemption provision).

Following the ADA's enactment, courts recognized a significant uncertainty in aviation tort law.[29] Specifically, the courts were unclear about the interrelationship between the ADA's preemption clause and Congress's retention of the savings clause.[30] For example, did Congress intend the language "relating to . . . service" to include the various and sundry activities carried on by airlines such as stowing baggage, serving beverages, and controlling passenger behavior, or did it mean something else? Did the ADA preempt all passenger-assistance-related state tort law claims because they related to "service," or were those claims still viable under the savings clause? Because Congress did not define "service," the courts differed as to whether the ADA preempted airline negligence claims.[31] In 1992, however, the Supreme Court offered some guidance, although hardly definitive, about whether the ADA's preemption provision applied to state tort law claims.

III. SUPREME COURT PRECEDENT: IN SEARCH OF A DEFINITION OF "SERVICE"

Since the ADA's birth in 1978, the United States Supreme Court has attempted to define the ADA's preemptive scope on two occasions.[32] First, in 1992, the Court in *Morales v. Trans World Airlines, Inc.*[33] focused on the "relates to" language to determine whether state enforcement of airline advertising fell within the scope of the ADA.[34] Then, in 1995, the Court again revisited the ADA preemption provision in *American Airlines, Inc.*

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[29] *See Taj Mahal Travel*, 164 F.3d at 192.

[30] *See id.*

[31] *See* Anderson v. USAIR, Inc., 619 F. Supp. 1191, 1198 (D.C. D.C. 1985) (finding that the "legislative history is clear that this Act . . . preempted any state laws relating to air carrier services," which includes the regulation of air carrier seating policies). *Compare* Chukwu v. Board of Dir's. British Airways, 889 F. Supp. 12, 14 (D. Mass. 1995) (finding slander claim preempted) *with* Fenn v. American Airlines, Inc., 839 F. Supp. 1218, 1223 (S.D. Miss. 1993) (finding slander claim not preempted).

[32] Prior to the ADA of 1978, the Supreme Court had one other occasion to examine preemption under the 1958 Act. *See* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). The *Burbank* Court found that the 1958 Act's federal noise control regulations preempted concurrent state noise control regulations on Supremacy Clause grounds as opposed to any express preemption provision in the Act. *See id.* at 633-35; *see also* U.S CONST. art. VI.

[33] 504 U.S. 374 (1992).

[34] *See id.* at 378.

v. Wolens.[35] This time, the Court focused on the meaning of "enact" as used in § 1305(a)(1).[36]

Although the Court's majority opinions did not specifically address the preemption provision's effect on state tort law claims in either case, several Justices' concurring opinions did. For this reason, a closer examination of the opinions in *Morales* and *Wolens* is warranted.

A. MORALES V. TRANS WORLD AIRLINES, INC.

In 1987, the National Association of Attorneys General (NAAG) created guidelines that outlined specific standards governing airline advertising, the awarding of frequent-flyer miles, and the payment of compensation to passengers who gave up their seats on overbooked flights.[37] Over objection by the airlines and the Department of Transportation, seven attorney generals sought to enforce the standards, first by way of written memoranda to the airlines, then by way of a formal notice of intent to sue for noncompliance.[38] The airlines sued in federal district court, alleging that the state guidelines related to rates, routes, or services, and were therefore preempted by the ADA.[39]

Accordingly, the *Morales* Court set out to determine whether the ADA preempted state deceptive advertising laws and guide-

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[35] 513 U.S. 219 (1995).

[36] *See id.* at 226. Section 1305(a)(1) was amended in 1994 and recodified without substantial change as 49 U.S.C. § 41713(b), the current ADA preemption provision. The minor changes that Congress made included substituting the word "price" in place of "rates" and changing "routes" to "route" in the 1994 version. *Compare* 49 U.S.C. app. § 1305(a)(1) (1988) *with* 49 U.S.C. § 41713(b) (1994).

[37] *See Morales*, 504 U.S., at 379. The Introduction section of the guidelines specifically stated that the guidelines intended to "explain" existing state laws governing these topics rather than "create" any new laws. *See id.*

[38] *See id.* at 379-80. Although a number of state attorney generals had joined in the memorandum sent to TWA seeking compliance, it was eventually the November 14, 1998, notice of intent to sue letter, drafted by the Assistant Attorney General of Texas, that precipitated TWA's suit. *See id.* at 380.

[39] *See id.* (seeking largely a declaratory judgment that the ADA preempted the states enforcement of the NAAG Guidelines). Finding that TWA's preemption would likely be successful, the district court entered an injunction against Texas, enjoining the Attorney General from enforcing the guidelines. *See id.* When the Fifth Circuit Court of Appeals affirmed the District Court, the District Court permanently enjoined the states from enforcing the NAAG Guidelines, which again the Fifth Circuit affirmed. The Supreme Court granted certiorari and considered briefs from both sides, including briefs from thirty-one State Attorney Generals. *See id.* at 375-77, 380.

lines applied to the airlines.[40] Focusing on the meaning of "relating to," the Court interpreted these words broadly to mean "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."[41] The majority concluded that the guidelines clearly "relate to" airline rates and added that state regulation on airline advertising had the "forbidden significant effect" on rates, routes, or service, and thus were expressly preempted by the ADA.[42] Accordingly, the *Morales* majority held that state restrictions on airline fare advertising constituted exactly the type of regulation that Congress intended to preempt.[43]

Although the Court did not have before it an opportunity to interpret the meaning of "services," or to otherwise define the scope of ADA preemption as it relates to common law torts, the Court did specifically limit its holding by stating that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect."[44] Thus, even though the *Morales* decision did not define the scope of "service," the "too tenuous, remote, or peripheral a manner" exception to preemption offered many courts the needed persuasive language to permit state tort actions to proceed.[45]

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[40] *See id.* at 383. The Court expounded that preemption may be either express or implied, depending on whether Congress explicitly states so or whether it can be gleaned from the purpose of the statute. *See id.* Either way, statutory intent based on the ordinary meaning of Congress's language forms the basis for determining legislative purpose. *See id.*; *see also In re* Air Crash at Charlotte, N.C. on July 2, 1994, 982 F. Supp. 1056, 1058-59 (D. S.C. 1996) (discussing express and implied preemption).

[41] *Morales*, 504 U.S. at 383 (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)).

[42] *Id.* at 388 (stating that "every one of the guidelines . . . bears a 'reference to' airfares").

[43] *See id.* at 390.

[44] *Id.* (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21 (1983)). As it did in Shaw, the Court again refrained from further discussing the "too tenuous, remote, or peripheral" standard. *See id.* (stating that "we express no views about where it would be appropriate to draw the line").

[45] *See, e.g.*, Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998); Lathigra v. British Airways PLC, 41 F.3d 535, 540 (9th Cir. 1994); West v. Northwest Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1994) (finding the state law tort claim "too tenuously connected to airline regulation to trigger preemption"); Hodges v. Delta Airlines, Inc. 4 F.3d 350 (5th Cir. 1993); Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291 (11th Cir. 1993); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993); Stagl v. Delta Airlines, Inc., 849 F. Supp. 179 (E.D.N.Y. 1994); Curley v. American Airlines, Inc., 846 F. Supp. 280 (S.D.N.Y. 1994); Bayne v. Adventure Tours USA, Inc., 841 F. Supp. 206 (N.D. Tex. 1994); Fenn v. American Airlines, Inc., 839 F. Supp. 1218 (S.D. Miss. 1993); Chouest v. American Air-

B. AMERICAN AIRLINES, INC. v. WOLENS

In 1995, the Supreme Court revisited the preemption issue in *Wolens* to determine, in part, whether the ADA preempted a common law breach of contract claim arising out of a frequent flyer program.[46] This time focusing on the meaning of the words "to enact or enforce any law," the majority held that a common law breach of contract claim was not preempted.[47] The Court reasoned that the terms and conditions of frequent flyer programs that airlines offer and passengers accept are private obligations that do not rise to the level of state enactment or enforcement of any law as contemplated by § 1305(a)(1).[48] Accordingly, the majority held that the ADA's preemption provision does not apply to Wolens's breach of contract claim.[49]

Although Justice Ginsburg's majority opinion did not specifically discuss whether common law torts were pre-empted, several other Justices did. Justice Stevens opined that "[i]n my

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lines, Inc., 839 F. Supp. 412 (E.D. La. 1993); O'Hern v. Delta Airlines, Inc., 838 F. Supp. 1264 (N.D. Ill. 1993); *In re* Air Disaster, 819 F. Supp. 1352 (E.D. Mich. 1993); Butcher v. City of Houston, 813 F. Supp. 515 (S.D. Tex. 1993); Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993); Stewart v. American Airlines, Inc., 776 F. Supp. 1194 (S.D. Tex. 1991); *In re* Air Crash Disaster at Stapleton Int'l Airport, 721 F. Supp. 1185 (D. Colo. 1988).

[46] *See Wolens*, 513 U.S. at 226-27. The *Wolens* case arose out of two consolidated Illinois class action lawsuits relating to American Airlines' AAdvantage frequent flyer program. *See id.* at 224. The plaintiffs alleged that American's modification to the plan in 1988 "devalued the credits" members had already accumulated. *Id.* at 225. Seat availability limits and altered travel blackout dates were among the changes members complained of. *See id.* Accordingly, the plaintiffs alleged violation of the Illinois Consumer Fraud Act and common law breach of contract. *See id.* at 225.

[47] *See id.* at 232. The Court's decision reported here actually came after the second grant of certiorari. In the first grant, the Court vacated the Illinois Supreme Court's judgment and remanded for further consideration consistent with the then-recent *Morales* decision. *See id.* at 225-26 (citing *Wolens*, 506 U.S. 803 (1992)); *see also supra* notes 37-45 and accompanying text discussing *Morales*. On remand, the Illinois Supreme Court affirmed its decision finding that the ADA did not preempt either the Consumer Fraud Act claims or the breach of contract claims. *See Wolens*, 513 U.S. at 226. The Court's decision after the second grant of certiorari reversed the Illinois Supreme Court with respect to the Consumer Fraud Act claims (they were preempted), but affirmed the Illinois Supreme Court's judgment as to the breach of contract claim (not preempted). *See id.*

[48] *See id.* at 228-29.

[49] *See id.* at 232-33. Similar to *Morales*, however, Justice Ginsburg's majority opinion held that the ADA's preemption provision did preempt the Consumer Fraud Act claims, and reversed the Illinois Supreme Court as to those claims. *See id.* at 226.

opinion, private tort actions based on common-law negligence or fraud . . . are not pre-empted."[50] Every person, including an airline, "has a duty to exercise reasonable care" towards others under ordinary tort principles.[51] Thus, if the airlines are negligent in a way that relates to rates, routes, or services, the plaintiff should be allowed to sue in state court.[52] Recognizing that in some remote way, suits against an airline, including negligence claims, relate to rates, routes, or services, Justice Stevens concluded that "[s]urely Congress did not intend to give airlines free rein to commit negligent acts subject only to the supervision of the Department of Transportation."[53] Justice Stevens added that a presumption against preemption is particularly applicable in ADA negligence cases because Congress specifically retained the savings clause, which preserved state remedies existing at common law.[54]

Similarly, Justice O'Connor also offered some insight into preemption of state tort claims by opining that not every personal injury claim brought under state common law is preempted.[55] Endorsing the "too tenuously related" exception espoused in *Morales*, Justice O'Connor noted a number of state court claims decided after *Morales* that were not subject to ADA preemption.[56]

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[50] *Id.* at 235 (Stevens, J., concurring in part and dissenting in part).

[51] *See id.* at 236.

[52] *See Wolens*, 513 U.S. at 236.

[53] *Id.* at 237.

[54] *See id.*; *see also* 49 U.S.C. § 40120(c).

[55] *See Wolens*, 513 U.S. at 242 (O' Connor, J., dissenting in part and concurring in part). From her dissent, these exceptions to preemption would appear to be the minority rule since Justice O'Connor went on to emphasize the ADA's "broad preemptive sweep." *Id.* at 245. In similar fashion, Justice O'Connor noted Congress's explicit approval of *Morales* when revisiting the ADA's preemption provision in 1994, and said Congress agreed with the broad preemptive scope decided in *Morales*. *See id.* at 246 (citing H.R. Conf. Rep. No. 103-677, p. 83 (1994)). In part due to these reasons, Justice O'Connor believed that the ADA preempted both the Consumer Fraud Act claims *and* the breach of contract claim. *See id.* at 238 (stating "I would hold that none of respondents' actions may proceed").

[56] *See id.* at 242 (citing both appellate and district court cases, including Hodges v. Delta Airlines, Inc. 4 F.3d 350 (5th Cir. 1993); Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291 (11th Cir. 1993); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993); Stagl v. Delta Airlines, Inc., 849 F. Supp. 179 (E.D.N.Y. 1994); Curley v. American Airlines, Inc., 846 F. Supp. 280 (S.D.N.Y. 1994); Bayne v. Adventure Tours USA, Inc., 841 F. Supp. 206 (N.D. Tex. 1994); Fenn v. American Airlines, Inc., 839 F. Supp. 1218 (S.D. Miss. 1993); Chouest v. American Airlines, Inc., 839 F. Supp. 412 (E.D. La. 1993); O'Hern v. Delta Airlines, Inc., 838 F. Supp. 1264 (N.D. Ill. 1993); *In re* Air Disaster, 819 F. Supp. 1352 (E.D. Mich. 1993); Butcher v. Houston, 813 F. Supp. 515 (S.D. Tex. 1993)).

C. Application of the ADA's Preemption Provision After *Morales* and *Wolens*

Unfortunately, neither the *Morales* decision nor Justice Stevens's or Justice O'Connor's opinions in *Wolens* offered much insight into whether Congress intended the word "service" to include the types of airline activity that often result in personal injury to a passenger.[57] Rather than determining whether Congress intended the term "service" in the preemption clause to encompass the type of actions that constitute the garden variety type of airline negligence, the Supreme Court's efforts in *Morales* and *Wolens* left the question of whether the ADA preempted state tort claims unsettled.[58] At best, the Court's efforts in both cases provide a strong argument for the proposition that the preemption provision does not act as an *absolute* bar to *all* state tort claims.[59]

The lack of definitive guidance following the *Morales* and *Wolens* decisions caused the courts in subsequent cases to continue to struggle with the issue of whether the ADA should preempt state tort claims.[60] As a result, courts have reached inconsistent results on preemption issues. More importantly, without a clear definition of what "service" meant, courts continued to apply different standards to determine whether a state tort claim should be subject to preemption. Some of the standards found in the case law include (1) the "too tenuous or remote" standard; (2) the "operation vs. services" standard; (3) the "not expressly related" standard; and (4) the "forbidden significant economic effect" standard. A brief discussion of each standard follows.

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[57] *See* Gee v. Southwest Airlines, 110 F. 3d 1400, 1407 (9th Cir. 1997) (stating that "'[s]ervice' is not defined in the [ADA] itself, and the Supreme Court has not attempted to define the scope of the term").

[58] *See In re* Air Transp. Excise Tax Litigation, 37 F. Supp. 2d 1133, 1139 (D. Minn. 1999) (stating that since *Wolens* and *Morales*, circuit courts "have since struggled to draw the line that separates allowable state law claims from ADA-preempted ones").

[59] As noted earlier, even Justice O'Connor, who strongly supported a broad preemptive sweep in her *Wolens* dissent, recognized that the ADA's preemption clause "does not mean that personal injury claims against the airlines are always preempted." *Wolens*, 513 U.S. at 242 (O'Connor, J. concurring and dissenting in part); *see also supra* note 55 and accompanying text.

[60] *See Taj Mahal Travel*, 164 F.3d at 192; *In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d at 1139 (noting that the courts have "struggled to draw the line" that separates preemption from non-preemption).

1. The "Too Tenuous or Remote" Standard

Following the *Morales* decision that some claims may be related in "too tenuous, remote, or peripheral a manner"[61] to warrant preemption, a number of courts applied this distinction to determine whether a state tort claim should be preempted even though the claim would otherwise "relate to" services in a broad sense.[62] The Fourth Circuit applied this standard in *Smith v. Comair* when it determined that a passenger's claim based on the airline's refusal to allow him to board was not preempted.[63] Although the *Comair* court found that "boarding" constituted a "service," it nevertheless held that Smith's claim was not preempted because the denial of boarding was based on airline conduct that "too tenuously relates or is unnecessary to an airline's services."[64]

2. The "Operation vs. Services" Standard

In 1997, the Ninth Circuit adopted the "operation vs. services" distinction in *Gee v. Southwest Airlines.*[65] Relying on the Fifth Circuit's 1995 decision in *Hodges v. Delta Airlines, Inc.*,[66] the Ninth Circuit agreed that a distinction between "operation and maintenance" versus "negligent rendition of services" is mandated by the *Morales* and *Wolens* decisions as well as by ADA § 1371(q)(1).[67] Section 1371(q)(1) required airlines to maintain liability insurance to cover injuries "resulting from the operation or maintenance of aircraft."[68]

With this distinction in mind, the Ninth Circuit found that claims stemming from the negligent rendition of services were preempted, whereas claims stemming from the operation or

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[61] *Morales*, 504 U.S. at 390.

[62] *See, e.g., Comair*, 134 F.3d at 259; *Lathigra*, 41 F.3d at 540; West v. Northwest Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1994) (finding the state law tort claim "too tenuously connected to airline regulation to trigger preemption"); Union Iberoamericana v. American Airlines, Inc., 1994 WL 395329 (S.D. Fla. 1994); Martin v. Eastern Airlines, Inc., 630 So.2d 1206, 1208 (Fla. 4th Dist. Ct. App. 1994).

[63] *See Comair* 134 F.3d at 258-59.

[64] *Id.* at 259.

[65] 110 F.3d 1400 (9th Cir. 1997).

[66] 44 F.3d 334 (5th Cir. 1995).

[67] *See Gee*, 110 F.3d at 1406-07 (stating that "[i]t would make little sense for Congress to require insurance to pay for bodily injury claims if airlines were insulated from such claims by the ADA's preemption provision").

[68] *See id.* (citing 49 U.S.C. app. § 1371(q)(1) (codified as amended at 49 U.S.C. § 41112(a)).

maintenance of the aircraft were not.[69] Accordingly, the Ninth Circuit concluded that the ADA preempted Gee's negligence claim against the airline for negligently serving liquor to obnoxious passengers.[70] The Court reasoned that Gee's negligence claim for emotional distress "'related to' the service of alcoholic beverages to passengers and the crew's in-flight conduct towards unruly passengers."[71]

In the same opinion, however, the Ninth Circuit found that another passenger's negligence claim for personal injury suffered when luggage fell on her head from an overhead bin was not preempted.[72] Quoting the Fifth Circuit's opinion in *Hodges*, the Ninth Circuit reasoned that "'whether luggage may be placed in overhead bins and whether the flight attendants properly monitor compliance with overhead rack regulations are matters that pertain to the safe operation of flight,' and thus are not preempted."[73]

3. The "Not Expressly Related" Standard

The Court of Appeals for the Seventh Circuit offered this distinction to avoid preemption in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*.[74] Here, the court considered whether preemption applied to bar a travel agency's claim that the airlines slandered it with defamatory statements.[75] The court held that preemption did not apply because the false statements about the travel agency did not "expressly refer" to "airline rates, routes, or services."[76]

4. The "Forbidden Significant Economic Effect" Standard

Relying on language used in the *Morales* opinion, the Seventh Circuit's decision in *Travel All* also stands for the proposition that preemption does not lie absent a showing that the conduct has a significant economic effect that is forbidden under the

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[69] *See Gee*, 110 F.3d at 1406-07.

[70] *See id.*

[71] *Id.* The Ninth Circuit analogized this case to its earlier decision in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995). There, the court also preempted a passenger's tort claims stemming from alcohol being served to an inebriated, disruptive passenger because it related to "service." *See id.* at 1404.

[72] *Id.* at 1407.

[73] *Id.* (quoting *Hodges*, 44 F.3d at 339).

[74] 73 F.3d 1423 (7th Cir. 1996).

[75] *See id.* at 1433.

[76] *Id.*

purpose of the ADA.[77] Applying this distinction, the *Travel All* court opined that the false statements uttered by the airline did not have the "forbidden significant [economic] effect" on "airline rates, routes, or services" as set forth in *Morales*.[78] Accordingly, the plaintiff's claim was not preempted.[79]

As evidenced by the various ways in which the courts distinguished preemption issues, it is not surprising that the courts often reached different results despite similar factual scenarios.[80] Absent any clear guidance from the Supreme Court, and without definitive legislative history to determine the ADA's preemptive scope, it seemed inevitable that courts would continue to grapple with the preemption provision's intended reach.[81] At the heart of this dilemma was whether "related to services" meant that the ADA preempted state tort claims. Of the three choices among the words "fares, routes, or services," tort activity intuitively fell more in line with the meaning of "services."

Until 1998, no court had definitively determined what the term "services" meant under the ADA. If Congress did not intend "services" to mean such activity as flight attendant services, the stowing of baggage, and the boarding of passengers, for example, then negligence suits based on these types of activities would not be preempted. Fortunately, in 1998 the Ninth Circuit Court of Appeals recognized this issue and determined that the typical airline service-oriented activity that gave rise to the most common airline negligence claims was not the type of "service" contemplated by the ADA's preemption provision.[82] By resolv-

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[77] *See id.*

[78] *Id.* (quoting *Morales*, 504 U.S. at 388).

[79] *See id.*

[80] *See Taj Mahal Travel*, 164 F.3d at 192 (citing two defamation cases where a slander claim was preempted in one case but not in the other).

[81] Judge O'Scannlain of the Ninth Circuit stated the problem quite succinctly when he said that "[t]he fact that the majority and the dissent disagree . . . promises uncertainty and inconsistent results." *Hodges*, 44 F.3d at 340 (O'Scannlain, J., concurring). In *Gee*, Judge O'Scannlain noted again that the "majority rule will no doubt yield confusing and conflicting results in the future." 110 F.3d at 1409.

[82] The Ninth Circuit illustrated the potential inequitable results as follows:

> [U]nder the rule announced in *Gee*, a plaintiff injured when struck by a beverage cart door would be able to bring a tort action if the door swung open because a bolt was missing (because the injury arises out of the "operations and maintenance" of the aircraft), but not if the flight attendant negligently failed to latch the door properly (because the flight attendant's conduct relates to "service"). Charas v. Transworld Airlines, Inc., 160 F.3d 1263 (9th Cir. 1998).

ing this uncertainty, the Ninth Circuit may well have clarified an issue in aviation tort law that has bewildered the federal courts since the ADA's enactment.

IV. CHARAS V. TRANS WORLD AIRLINES, INC.: DEFINING "SERVICE" UNDER THE ADA

In *Charas*,[83] the Ninth Circuit Court of Appeals, sitting *en banc*,[84] *sua sponte* considered five consolidated cases to rethink its previous decisions relating to the scope of the ADA's preemption of state tort law claims.[85] A brief synopsis of each case follows.

A. CONSOLIDATED CASES REVIEWED IN CHARAS[86]

1. *Beverage v. Continental Airlines, Inc.*

Mr. Beverage claimed that a flight attendant hit and injured his shoulder while the attendant pushed a service cart down the aisle.[87] Mr. Beverage filed a state law tort claim against Continental Airlines for negligence and breach of contract.[88] The federal district court granted Continental's motion to dismiss finding that the ADA preempted Mr. Beverage's state tort claim. Mr. Beverage appealed.

2. *Jacoby v. Trans World Airlines, Inc.*

Ms. Jacoby alleged that falling luggage injured her head after the plane landed and another passenger opened an overhead bin.[89] Ms. Jacoby filed a negligence suit in state court against

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[83] 160 F.3d at 1259.

[84] In a footnote, the court stated that "[b]ecause of the need to clarify the law in this area, these cases were taken en banc after they were assigned to a three-judge panel, but prior to the panel's rendering a decision." *Id.* at 1261 n.1.

[85] *See id.* at 1259. The consolidated cases on review came from various districts, including three cases from the Northern District of California, one from the Southern District of California, and one from the District of Hawaii. *See id.* at 1260. The *en banc* panel was made up of eleven circuit judges: Chief Judge Hug, and Judges Browning, Fletcher, Brunetti, Thompson, Fernandez, Rymer, T. G. Nelson, Kleinfeld, Tashima, and Silverman. Judge Silverman wrote for the panel. *See id.* at 1261.

[86] These synopses are relevant to this discussion for several reasons. First, they serve as a factual context upon which the *Charas* court ultimately rendered its decision. Second, they serve as good illustrations of the so called "garden variety" personal injury claim that airlines frequently face.

[87] *See Charas*, 160 F.3d at 1261.

[88] *See id.*

[89] *See id.*

TWA, which the airline removed to federal district court.[90] The district court granted TWA's motion to dismiss on the ground that the ADA preempted her state tort law claim.[91]

3. Charas v. Trans World Airlines, Inc.

Charas sued TWA in federal district court, alleging state law tort claims for negligence after she allegedly fell over luggage left in the aisle by a TWA flight attendant.[92] The district court granted TWA's motion to dismiss on grounds that the ADA preempted Charas' state tort law claim.[93]

4. Gulley v. American Airlines, Inc.

Ms. Gulley, a passenger on an American Airlines commuter flight, claimed that she told American of a bone condition that made her susceptible to fractures.[94] Gulley also alleged that she advised American that she required special assistance to disembark the plane, but that American employees offered no assistance.[95] Gulley maintained that she fell and sustained injuries while exiting down the stairway equipped with only a single chain handhold.[96] Ms. Gulley sued American for common law negligence.[97] The district court granted American's motion for summary judgment, finding that the ADA preempted Gulley's negligence claim because the rendering of assistance down the stairs related to a "service."[98]

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[90] *See id.*

[91] *See id.*

[92] Ms. Charas alleged that she suffered a fractured humerus and a shoulder injury requiring joint replacement as a result of the fall. *See Charas*, 160 F.3d at 1261.

[93] *See id.*

[94] *See id.*

[95] *See id.*

[96] *See id.*

[97] *See id.* at 1261-62. Ms. Gulley also claimed that American used a plane with a stairway that was unsafe in violation of California Civil Code section 2101. *See* Gulley v. American Airlines, Inc., 176 F.3d 483, 483 (9th Cir. 1999). The lower court allowed this claim to proceed after it concluded that providing safe equipment related to "maintenance and operation" of the plane, which was not preempted by the ADA. *See Charas*, 160 F.3d at 1262. A jury subsequently handed down a defense verdict for American on this claim. *See Gulley*, 176 F.3d at 483.

[98] *See Charas*, 160 F.3d at 1262.

5. Newman v. American Airlines, Inc.

Ms. Newman claimed that when she made reservations to fly on American she informed American that she was blind, suffered from a heart condition, and required assistance in boarding the plane.[99] On her return flight, a flight attendant learned of her heart condition and reported it to the captain.[100] The captain required Ms. Newman to produce her physician's telephone number to verify that she was permitted to fly with her heart condition.[101] Ms. Newman could not remember the telephone number, and American denied her boarding privileges until she could produce the required documentation.[102] Because she had to wait for the documentation, Ms. Newman was forced to stay overnight in a motel.[103] While attempting to board a shuttle bus to take her to the motel, she fell and sustained injuries.[104] Ms. Newman sued American for various state tort law claims.[105] The district court granted American's motion for summary judgment, concluding that the ADA preempted Newman's state tort claims.[106]

B. THE *CHARAS* COURT'S DECISION

In considering the preemption issues presented by these five cases, the *Charas* court recognized that the scope of the ADA's preemption provision has been a "source of considerable dispute since its enactment."[107] The Court reflected on two of its prior decisions that attempted to interpret the scope of the ADA's preemption provision, *Harris v. American Airlines, Inc.*[108] and *Gee v. Southwest Airlines*,[109] and concluded that it had decided both cases incorrectly.[110] Accordingly, the court over-

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99 *See id.*

100 *See id.*

101 *See id.*

102 *See id.*

103 *See id.* This fact was subsequently amended to read: "Prior to obtaining the required certificate, Newman was not permitted to board and was required to stay overnight at a motel." *See* Charas v. Trans World Airlines, Inc., 169 F.3d 594, 594-95 (9th Cir. 1999) (*en banc*).

104 *See Charas*, 160 F.3d at 1262.

105 *See id.*

106 *See id.* at 1262.

107 *Id.* at 1263.

108 55 F.3d 1472 (9th Cir. 1995).

109 110 F.3d 1400 (9th Cir. 1997).

110 *Harris* stood for the proposition that under a plain reading of the preemption provision, if it "related to" "service" of any type, including service normally

ruled *Harris* and *Gee*, and concluded that in enacting the ADA, "Congress did not intend to preempt passengers run-of-the-mill personal injury claims."[111] Definitively deciding what Congress intended by the word "service," the court held that:

> Congress used the word "service" in the phrase "rates, routes, or service" in the ADA's preemption clause to refer to the 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 Act, "service" was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.[112]

In reaching its conclusion, the *Charas* court offered several sound reasons to support its new definition of "service." First, the definition was consistent with Supreme Court precedent. Second, the definition was supported by the plain language of the ADA and its legislative history. Third, the definition was consistent with other statutory provisions that Congress left untouched, including the savings clause and the liability insurance requirement for airlines.

1. Supreme Court Precedent

As noted earlier, the Supreme Court's efforts in defining the scope of the ADA's preemption provision in *Morales* and *Wolens* (although falling short of explicitly addressing preemption with respect to state tort law) clearly made a strong impression in favor of not preempting most state law tort claims.[113] The *Charas* court seized the relevant language in each Supreme Court case as persuasive authority consistent with its new definition of "service."[114] To that end, the court concluded that "[a]lthough *Morales* and *Wolens* do not directly resolve whether § 1305(a)(1) preemption encompasses state law tort claims, they

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associated with flight attendants, it was preempted. *See Harris*, 55 F.3d at 1476. The *Charas* court recognized that this proposition was contrary to Congressional intent. *See Charas*, 160 F.3d at 1263.

In *Gee*, the court adopted the "operations and maintenance" (not preempted) versus "service" (preempted) standard. *See Gee*, 110 F.3d at 1410. The *Charas* court recognized that "the rule we adopted in *Gee* was imprecise, difficult to apply, and inadequately reflective of the ADA's goal of economic deregulation." *Charas*, 160 F.3d at 1263.

[111] *Charas*, 160 F.3d at 1261.

[112] *Id.*

[113] *See id.* at 1264.

[114] *See id.* at 1264 (quoting Justices O'Connor's and Stevens' concurring opinions in *Wolens*); *see also* Supreme Court discussion *supra* Part III.

certainly suggest that such claims are not within the intended reach of preemption."[115] The *Charas* court also recognized that although the Supreme Court majority decisions in *Morales* and *Wolens* did not address preemption of state tort law personal injury claims, the concurring opinions by Justices O'Connor and Stevens in *Wolens* did.[116] Specifically, Justice O'Connor wrote:

> [M]any cases decided since *Morales* have allowed personal injury claims to proceed, even though none has said that a State is not "enforcing" its "law" when it imposes tort liability on an airline. In those cases, courts have found the particular tort claims at issue not to "relate" to airline "services," much as we suggested in *Morales* that state laws against gambling and prostitution would be too tenuously related to airline services to be preempted.[117]

Similarly, Justice Stevens opined that, in his opinion, "private tort actions based on common-law negligence . . . are not preempted."[118] Based on this language, the *Charas* court concluded that the Supreme Court certainly suggested that state law tort claims "are not within the intended reach of preemption."[119]

2. *Plain Meaning and Legislative Intent*

Applying the canons of statutory construction, the *Charas* court examined the plain language of the ADA and its legislative intent.[120] Congress's clear purpose in enacting the ADA was to achieve economic deregulation of the airlines.[121] Nowhere in the plain language of the ADA itself, or its legislative history, does it suggest that Congress intended to preempt state tort law claims.[122] Further, the court also noted that Congress could not have intended to displace state tort law claims because it specifically left two other provisions of the airline regulation statutes untouched.

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[115] *Charas*, 160 F.3d at 1264 (emphasis added).

[116] *See id.* at 1264 (citing American Airlines v. Wolens, 513 U.S. 219 (1995)).

[117] *Id.* at 1264 (quoting *Wolens*, 513 U.S. at 242). In a footnote, the *Charas* panel emphasized the impact of Justice O'Connor's opinion by noting that even in light of the Supreme Court Majority's "criticism of her "total preemption" approach, the majority implicitly agreed with Justice O'Connor's conclusion that personal injury claims are not preempted by the ADA." *Charas*, 160 F.3d at 1264 n.4 (citing *Wolens*, 513 U.S. at 234 n.9).

[118] *Charas*, 160 F.3d at 1264 (quoting Wolens, 513 U.S. at 235-36).

[119] *Charas*, 160 F.3d at 1264.

[120] *See id.* at 1264-65.

[121] *See id.*

[122] *See id.*

First, 49 U.S.C. § 41112 requires airlines to maintain liability insurance that covers "amounts for which . . . air carriers may become liable for bodily injuries to or the death of any person."[123] Obviously, if Congress intended the ADA to preempt all state tort law claims, there would be no need for the airlines to carry such insurance.[124] Second, Congress also left untouched the savings clause set forth in section 1506.[125] Under this provision, "[n]othing contained in [the ADA] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[126]

3. *Charas's Definition of "Service" Excludes State Tort Claims from the ADA's Preemptive Reach*

Based on Supreme Court precedent interpreting the ADA, the Act's clear purpose and legislative intent, and the context in which the term "service" was used in the Act,[127] the *Charas* court ultimately arrived at a definition of "services." The court held that "'service' . . . refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (This airline provides service from Tucson to New York twice a day.)"[128] Finding that Congress did not intend to define "service" more broadly, the *Charas* court concluded that "service" in the ADA context does not mean "the pushing of beverage carts, keeping the aisles clear of stumbling blocks, the safe handling and storage of luggage, assistance to passengers in need, or like functions."[129]

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[123] *See id.* (citing 49 U.S.C. app. § 1371(q) (codified as amended at 49 U.S.C. § 41112(a)) (1994)). The current provision provides that the insurance "must be sufficient to pay . . . for bodily injury to, or death of, an individual or for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft under the certificate." § 4112(a).

[124] *See Charas*, 160 F.3d at 1265.

[125] *See id.* (citing 49 U.S.C. app. § 1506 (recodified as 49 U.S.C. § 40120)).

[126] *Id.* The current version provides that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c) (1994).

[127] *See Charas*, 160 F.3d at 1265 (stating the principles of statutory construction require us to consider the term "service" within its context).

[128] *Id.* at 1265-66.

[129] *Id.* at 1266. Following the *en banc* panel's Opinion, American Airlines filed a petition for rehearing due to factual mistakes in the Opinion. *See Charas*, 169 F.3d at 594. On February 23, 1999, after making a small amendment to the facts of the *Newman* case, the panel voted to deny American's petition. *See id.*

V. DID *CHARAS* ARRIVE AT THE CORRECT DEFINITION?

Holding the court's definition of "services" up against several documents of legislative history evidences that the *Charas* court derived the correct definition. Specifically, two separate House Reports indicate that Congress intended the term "service" or "services" in much the same manner as the *Charas* court ultimately defined it. In the first House Report, the term "service" is used repeatedly in connection with the fares that airlines charge.[130] The following excerpts illustrate the House's useage:

—"The pre-1975 regulatory system was discouraging experiments with low-fare *service* which could have benefitted the industry and the public."[131]

—"The [Civil Aeronautics] Board's previous [fare] policies discouraged the interstate airlines from providing similar *service.*"[132]

Later, the report discusses the federal preemption provision bill (ADA) and how it will change pre-preemption regulation. Again, the word "service" is used in a context consistent with the *Charas* court's definition:

The Bill (ADA) also eliminates Federal jurisdiction over certain *service* which is essentially intrastate in nature. Under existing law [(i.e. pre-ADA)], the Civil Aeronautics Board ("CAB") has jurisdiction over air *service* between two cities in a state if the aircraft passes over places outside the State. H.R. 12611 provides that *service* between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside of the State.[133]

In a second House Conference Report, the Joint Explanatory Statement of the Committee of Conference explained that the purpose of amending the Federal Aviation Act of 1958 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.*"[134] The Conference goes on to adopt the House's amendment, which refers to "ser-

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[130] *See* H.R. REP. NO. 95-1211, at 2-3, (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737. The Senate Bill was passed in lieu of the House Bill after the Senate Bill amended its language to contain much of the text of the House Bill. *See id.* at 1.

[131] *Id.* at 3 (emphasis added).

[132] *Id.* (emphasis added).

[133] *Id.* at 1 (emphasis added).

[134] H.R. CONF. REP. NO. 95-1779, at 53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3773 (emphasis added).

vice" in terms of fares and airline transportation originating from a certain point and ending at an ultimate destination.[135]

It appears from excerpts of the legislative history that the *Charas* court correctly defined "services" in context with "rates" and "routes." This conclusion is further supported by the number of other courts that have noted that nowhere in the legislative history does Congress ever discuss "service" or "services" in the context of referring to food, drink, flight attendant assistance, or any other passenger service-related "safety" aspect of air transportation.[136] On the contrary, the word "service" within the legislative history appears to be used in a manner consistent with the ADA's purpose, which was to free the airlines from state and federal regulation to enable them to provide whatever service (i.e. air transportation) they deemed appropriate under current market forces. To interpret the meaning of "service" differently would serve only to expand its definition beyond its contextual meaning and construe it in a manner inconsistent with the stated purpose of the ADA.

As the *Charas* court correctly explained, Congress, by enacting the ADA, intended to encourage competition; "[i]t did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct."[137] Although not addressed by the court in *Charas*, this explanation of Congress's intent also squares with the well-settled principle that common carriers owe a heightened duty of care to their passengers.[138] This duty has been described as one in which common carriers "are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under the . . . circumstances."[139] To interpret Congress's intent as one requiring preemption would clearly render this height-

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[135] *See id.*

[136] *See, e.g.*, Riviera v. Delta Airlines, Inc., No. CIV.A. 96-1130, 1997 WL 634500 (E.D. Pa. Sept. 26, 1997); Dudley v. Business Express, Inc., 882 F. Supp. 199, 206 (D.N.H. 1994).

[137] *Charas*, 160 F.3d at 1266.

[138] *See* Andrews v. United Airlines, Inc., 24 F.3d 39, 41 (9th Cir. 1994); USAIR, Inc. v. United States Dept. of the Navy, 14 F.3d 1410, 1413 (9th Cir. 1993); Kantonides v. KLM Royal Dutch Airlines, 802 F. Supp. 1203, 1213 (D.N.J. 1992) (stating that the common carrier must use the "utmost caution characteristic of very careful prudent men"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 208-09 & nn.9-10 (5th ed. 1984); *see also* 49 U.S.C. § 44701 (providing that "the duty of an air carrier [is] to provide service with the highest possible degree of safety").

[139] USAIR, Inc. v. United States Dept. of the Navy, 14 F.3d 1410, 1413 (9th Cir. 1993).

ened duty requirement meaningless. As noted by the *Charas* court, nothing in the legislative history indicates Congress intended such a harsh, immunizing result when it enacted the ADA.[140]

Despite the apparent correctness of *Charas*'s definition of "service," however, at least one question still remains: will other courts adopt and apply *Charas*'s definition of "service," or will courts continue to apply the other various and sundry, albeit less definitive, preemption analyses in order to determine whether the ADA preempts future state tort law claims?

VI. THE FUTURE IMPACT OF *CHARAS*

Although it's too soon to tell what long-term impact the *Charas* decision will have on courts outside the Ninth Circuit, early indications suggest that other courts already agree with *Charas*'s definition of services. In the short time since the *Charas* decision, several federal courts have already cited *Charas* in a way that indicates some early agreement with this "new" definition of "service."[141]

In *Somes v. United Airlines, Inc.*,[142] Mrs. Somes sued United under the Massachusetts wrongful death statute after her husband suffered a heart attack and died while in flight from Boston to San Francisco.[143] Mrs. Somes alleged that United failed to equip its aircraft with medical equipment, including a defibrillator that could have saved her husband.[144] United moved to dismiss on grounds that the ADA's preemption clause barred the suit because it "related to" airline "services."[145] The district court denied United's motion.[146]

Recognizing that the statute itself does not define "services," and that neither the Supreme Court nor the ADA's legislative

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[140] *See Charas*, 160 F. 3d at 1266. *But see* Anderson v. USAIR, Inc., 619 F. Supp. 1191, 1198 (D.C. Cir. 1985) (stating that "the common law of common carriers was not revived" with the enactment of the ADA's preemption provision).

[141] *See generally* Somes v. United Airlines, Inc., 33 F. Supp. 2d 78, 81 (D. Mass. 1994); Landet v. Air France, 182 F.3d 926, 926 (9th Cir. 1999); Insurance Co. of N. Am. v. Federal Express Corp., 189 F.3d 914, 925 (9th Cir. 1999); Taj Mahal Travel 164 F.3d at 193; *In re* Air Transp. Excise Tax Litig., 37 F. Supp. 2d 1133, 1139-40 (D. Minn. 1999); Lewis v. Continental Airlines, Inc., 40 F. Supp. 2d 406, 410-12 (S.D. Tex. 1999).

[142] 33 F. Supp. 2d at 78.

[143] *See id.* at 80.

[144] *See id.*

[145] *See id.* at 82.

[146] *See id.* at 83.

history explicitly addressed the meaning of "services," the court looked to the recent *Charas* decision for guidance.[147] Relying in part on *Charas*, the court found that the provision of medical services equipment is not within the meaning of "services" as intended by Congress.[148] Applying the *Charas* definition of "services," the court reasoned that "[e]mergency medical equipment is not typically provided in the normal course of transporting passengers to and from their destinations, and accordingly does not fall within the Ninth Circuit's interpretation of airline 'services.'"[149]

In a less clear application of the *Charas* court's definition of "services," the court in *Taj Mahal Travel*[150] cited *Charas* as persuasive authority in a state law preemption case.[151] Taj Mahal, a travel agency, sued Delta for defamation after Delta gave letters to passengers stating that tickets they purchased from Taj Mahal were considered stolen.[152] Taj Mahal asserted that the letter damaged its business reputation and caused it to lose patrons.[153] Accordingly, Taj Mahal sued Delta, alleging state defamation and civil RICO claims.[154] Delta eventually removed the case to federal court, where the district court found that the ADA's preemption clause preempted Taj Mahal's claims.[155] Taj Mahal appealed.

The Third Circuit held on appeal that the ADA did not preempt Taj Mahal's defamation claim. Referring to the definition of "services" set forth in *Charas*, the court stated that "[t]he approach espoused by the Court of Appeals for the Ninth Circuit in *Charas* offers a more promising solution."[156] The *Charas* decision is consistent with the Supreme Court's decision in *Wolens*, which in turn requires an inquiry into whether a common law tort claim frustrates deregulation by interfering with market competition.[157] Agreeing with the analysis set forth in *Charas*,

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147 *See id.*

148 *See* 33 F. Supp. 2d at 83-84.

149 *Id.* at 83 (citing *Charas*, 160 F.3d at 1261).

150 164 F.3d 186 (3d. Cir. 1998).

151 *See id.* at 194 (stating "we do not find it conceptually helpful to distinguish 'operation or maintenance of aircraft' from 'service.' The approach espoused . . . in *Charas* offers a more promising solution.").

152 *See id.* at 188.

153 *See id.*

154 *See id.*

155 *See id.* at 188-89.

156 164 F.3d at 194.

157 *See id.*

the court concluded that "focusing on the competitive forces of the market, rather than on a strained and unsatisfactory distinction between 'services' and 'operations,' leads to a more accurate assessment of Congressional intent."[158]

The *Taj Mahal* court never concluded, however, that "ticketing" fell outside the definition of "services" as set forth in *Charas*. Instead, the Court reverted back to *Morales*'s "too tenuous" distinction and concluded that Taj Mahal's suit "is simply 'too tenuous, remote, or peripheral' to be subject to preemption, even though Delta's statements refer to ticketing, [which is] arguably a 'service.'"[159]

For other federal courts that have not yet decided a "services" related issue arising out of an ADA preemption claim, the *Charas* decision may provide persuasive authority for the courts to reach a much simpler, clearer decision. Rather than relying on the "too tenuous," "expressly preempted," or "significant economic effect" standards to determine preemption, courts can now answer a much simpler question of whether the conduct falls within the definition of "service" as intended by Congress.[160] An example from the Eleventh Circuit illustrates how courts in the future may benefit from *Charas*.

In *Parise v. Delta Airlines*,[161] a 1998 Eleventh Circuit decision rendered only months before *Charas*, the court was presented with a fact scenario that fell well outside *Charas*'s subsequent definition of "services." Mr. Parise, a Delta Airlines customer service representative, sued Delta after it terminated him for having a heated argument with a supervisor.[162] Mr. Parise alleged that Delta discriminated against him on the basis of age, and sued under Florida's Civil Rights Act.[163] Delta removed the case to federal court on diversity grounds and asserted that the ADA preempted Mr. Parise's claim.[164] The district court agreed and dismissed the suit after concluding that Parise's claim "re-

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158 *Id.*

159 *Id.* at 195.

160 But as we saw in *Taj Mahal*, *supra*, even the courts that recognize Charas's definition may still be reluctant to decide a case solely on definitional grounds. *See, e.g., Taj Mahal*, 164 F.3d at 195 (using the *Morales* "too tenuous" distinction after characterizing ticketing as "arguably a 'service,'" despite implicitly agreeing with *Charas*'s definition earlier in its opinion).

161 141 F.3d 1463 (11th Cir. 1998).

162 *See id.* at 1464.

163 *See id.*

164 *See id.* at 1464-65.

lated to services."[165] The district court found that Mr. Parise's violent outburst related to the "service" of safety that Delta has a duty to provide.[166]

Without the benefit of *Charas*'s definition of "services," the Eleventh Circuit considered whether the ADA preempted Parise's claim under existing authority and standards, including the "expressly referring to" or "significant economic effect" standards.[167] Applying these standards, the Eleventh Circuit correctly decided that the ADA did not preempt Parise's claim and reversed the district court's finding of preemption.[168]

Although the court reached the correct result, its decision would have been simpler if it could have examined the issue under *Charas*'s definition of "service." That is, the court could have merely asked whether Parise's claim "related to" such things as the "provision of air transportation to and from various markets at various times."[169] Under this narrower definition of "services," the Eleventh Circuit could have more readily determined that Parise's claim fell well outside this definition and therefore outside the ADA's preemptive scope. Had the Eleventh Circuit been privy to this new definition, it may have arrived at the same conclusion without resorting to the more obscure standards used before *Charas*.

One must also wonder whether Delta's preemption argument could have been correctly decided at the district court level if the court had the benefit of the *Charas* decision. Indeed, with authority like *Charas*, we may see fewer and fewer district courts incorrectly deciding preemption issues.[170] Because some commentators have predicted that the wake of *Charas* will produce much more litigation arising out of airline negligence,[171] it seems fortuitous that the district courts will have the persuasive authority to correctly decide "service" related ADA preemption issues in the first instance. In short, *Charas* offers the courts a

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[165] *See id.* at 1465.

[166] *See id.*

[167] *See* 141 F.3d at 1465-66.

[168] *See id.* at 1467-68.

[169] *Charas*, 160 F.3d at 1266.

[170] The *Taj Mahal* court specifically pointed out the problem among district courts. *See Taj Mahal Travel*, 164 F.3d at 192. The court noted that "[c]ases in the District Courts are more numerous [than the appellate courts] and follow a similar pattern of inconsistency, including divergent results in defamation claims." *Id.* at 192 n.4.

[171] *See* Jennifer M. Kirby, *Airline Deregulation Act Does not Preempt Routine Personal Injury Claims*, TRIAL, at 21, 98 (Mar. 1999).

much more "user-friendly" definition to apply. Moreover, because *Charas* endeavored to ground its definition of "service" in existing Supreme Court precedent, relevant legislative intent, and sound principles of statutory construction, the district courts are ensured that a decision consistent with *Charas* will not be reversed on appeal. Accordingly, it would seem that the *Charas* decision provides future courts with many sound jurisprudential reasons for deciding passenger service-related ADA preemption issues consistent with the decision and its definition of "services."

VII. CONCLUSION

At a time when aviation tort law was unsettled about the scope of the ADA's preemption provision, the Ninth Circuit, in *Charas*, set forth a much needed definition of what Congress intended "services" to mean under the ADA. With sound legal reasoning, the court correctly concluded that "services" refers to the "frequency and scheduling of transportation, and to the selection of markets as to or from which transportation is provided."[172] Congress did not intend "services" to extend to the airline's provision of beverages, food, passenger assistance, and the like. In the words of Judge Silverman: "To interpret 'service' more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended."[173]

Although it is too soon to tell the extent to which other courts will embrace the *Charas* definition of "services," it seems both probable and prudent for the courts to do so. Not only is *Charas* legally sound, but it also offers a more economical and efficient standard for courts to decide service-related ADA preemption issues. At a time when district courts are deciding preemption issues incorrectly and inconsistently, and circuit courts are bound by more obscure standards to assess preemption of garden-variety personal injury claims, the *Charas* decision is welcome authority. Moreover, because some believe that the *Charas* decision will breed new life into scores of personal injury lawsuits against the airlines, the courts may find that the time has come to adopt a more user-friendly definition to counter an increasing caseload. Additionally, if the preemption argument

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[172] *Charas*, 160 F.3d at 1265.

[173] *Id.* at 1266.

was no longer in the airline's defense arsenal, court dockets may benefit from increased out-of-court settlements. In short, the *Charas* decision fills a void from which other courts can benefit. Whether they will or not remains to be seen.

Panel Discussion


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