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When Airlines Profile Based on Race: Are Claims Brought against Airlines under State Anti-Discrimination Laws Preempted by the Airline Deregulation Act

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WHEN AIRLINES PROFILE BASED ON RACE: ARE CLAIMS BROUGHT AGAINST AIRLINES UNDER STATE ANTI-DISCRIMINATION LAWS PREEMPTED BY THE AIRLINE DEREGULATION ACT?

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I. THE PROBLEM OF PROFILING

THE TERM “racial profiling” justly elicits a common response of condemnation and abhorrence in the hearts and

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minds of the vast majority of Americans. To many, talk of racial profiling conjures up visions of unwarranted and undue attention paid to minorities by law enforcement officials in the context of traffic stops, crowd control, and a host of other “police stop” scenarios. However, in the wake of the September 11th tragedy and the ensuing war on terrorism, racial profiling has become an issue of importance in an entirely different context—airline security.

Vigorous debate has taken place over the role of racial profiling in identifying potential terrorists during airlines’ pre-flight passenger screening and boarding process.\(^1\) Although some commentators believe that racial profiling is a useful tool for quickly identifying potential terrorists,\(^2\) the widespread use of racial profiling in the passenger screening and boarding process would implicate far more persons than just those with malicious intentions.\(^3\) The more likely scenario is one in which a large number of innocent persons are discriminated against in order to detain a handful of legitimate suspects. Inevitably, some of those who unjustly suffer under this regime will bring litigation against the offending airlines to vindicate their rights.

The basic problem posed in this comment is whether these potential litigants have claims under state civil rights laws in light of the unsettled state of the preemption doctrine. Relatively little case law has been generated over the years addressing the issue of whether federal law preempts racial discrimination claims brought against airlines under state civil

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2 Peter Schuck makes a particularly strong argument for using racial profiling as a screening device in making snap determinations about which passengers to screen with greater scrutiny. However, he also notes that decisions to arrest and prosecute must be made “based on more individualized information.” Schuck, supra note 1.

rights laws.\textsuperscript{4} Cases that have addressed this issue have reached erratic results.\textsuperscript{5} In particular, cases interpreting the preemption provision contained within the Airline Deregulation Act (ADA) have failed to produce a predictable, unified rule.\textsuperscript{6}

This comment focuses primarily on how the ADA's preemption provision currently applies to discrimination claims brought under state civil rights laws for acts of discrimination occurring during pre-flight passenger boarding and screening services conducted by airlines.\textsuperscript{7} This examination will expose the lack of a national consensus on this issue, proving the need for more definitive guidance from the Supreme Court. This comment argues that state law claims related to airlines' screening and boarding procedures should be preempted under the ADA for both legal and policy reasons.

II. INTRODUCTION TO THE PREEMPTION DOCTRINE

At its core, the "preemption doctrine is the judicial tool by which courts define the contours of federal control of a subject when Congress has legislated pursuant to one of its enumerated powers."\textsuperscript{8} The foundation for federal preemption of state laws is found in the Supremacy Clause of the U.S. Constitution which

\begin{itemize}
\item \textsuperscript{4} See Geoffrey A. Hoffman, \textit{Racial Profiling in the Air After Sept. 11: Do Those Who Claim to Have Suffered Its Indignities Have Remedies? It Would Appear So}, N.Y. L.J., Apr. 15, 2002, § 3 (citing the paucity of authority on the issue of federal preemption of state civil rights laws in the context of racial discrimination as a reason to bring claims under state civil rights acts).
\item \textsuperscript{5} See infra Part III(C)(1), (2).
\item \textsuperscript{7} For the sake of clarity, the scope of this paper is limited to claims arising from alleged acts of discrimination committed by airlines in (a) pre-flight screening of passengers and (b) boarding procedures. Pre-flight screening of passengers under the voluntary Computer-Assisted Passenger Screening (CAPS) program is not dealt with directly, as little is known about the specific criteria used in CAPS profiling analysis. See Michael AuBuchon, Comment, \textit{Choosing How Safe Is Enough: Increased Antiterrorist Federal Activity and Its Effect on the General Public and the Airport/Airline Industry}, 64 J. AIR L. & COM. 891, 903-04 (1999). Specifically excluded are acts of discrimination committed by private and federal airport screeners unassociated with airlines. Such acts are highly unlikely to fall under the purview of the ADA.
\item \textsuperscript{8} Mary J. Davis, \textit{Unmasking the Presumption in Favor of Preemption}, 53 S.C. L. REV. 967, 968 (2002).
\end{itemize}
provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding." The U.S. Supreme Court has found that the Supremacy Clause creates a "fundamental principle . . . that Congress has the power to preempt state law."\footnote{U.S. Const. art. VI, § 1, cl. 2.}

Since 1912, the U.S. Supreme Court has organized its preemption analysis into three categories: (1) express preemption, (2) field preemption, and (3) conflict preemption.\footnote{Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).} Express preemption occurs when a federal statute explicitly provides that it overrides state law.\footnote{Susan D. Hall, \textit{Preemption Analysis After Geier v. American Honda Motor Co.}, 90 Ky. L.J. 251, 251-52 (2002).} Field preemption occurs when "Congress . . . so completely preempt[s] a particular area, that any civil complaint raising that select group of claims is necessarily federal in character."\footnote{Id. (citing Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987)).} Finally, conflict preemption occurs where "it is impossible for a private party to comply with both state and federal requirements . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\footnote{Id. (citing Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).} Taken together, field preemption and conflict preemption are often considered to be two subcategories of a broad category entitled "implied preemption."

The U.S. Supreme Court has long maintained a presumption against federal preemption of state laws.\footnote{Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("Because the states are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action.").} In order to overcome this presumption, a "clear and manifest purpose" to preempt must be communicated by Congress.\footnote{Wellons v. Northwest Airlines, Inc., 165 F.3d 493, 494 (6th Cir. 1999).} Express preemption provisions such as the one contained within the ADA constitute a clear and manifest purpose on the part of Congress to preempt state law. However, the Court has vacillated in recent years between construing such express provisions strictly\footnote{See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (finding that the "touchstone" of preemption analysis must be the intent of Congress) (citing Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).} and reading...
beyond the language of express provisions to find areas of implied preemption.\(^\text{18}\)

The ADA contains a broadly worded express preemption provision that has invited constant interpretation by the courts. Despite this active interpretation of the ADA's preemption provision, however, little work has been done to ascertain whether Congress intended for the ADA to preempt claims brought against airlines under state civil rights laws, which allege that an airline discriminated against a passenger based on race during its screening or boarding process. As will be discussed, the work that has been done does not lead to any overarching legal conclusions.

III. EXPRESS PREEMPTION UNDER THE AIRLINE DeregULATION ACT

Under current law, it is unclear whether state law based claims of racial discrimination arising out of pre-flight boarding and screening procedures conducted by airlines are preempted under the express language of the ADA. The courts' response to this issue will likely be based upon the following sources of authority: (a) the general guidelines for ADA preemption generated by the Supreme Court, (b) the development of the Supreme Court's standard by the circuits, and (c) the small body of cases dealing with passenger discrimination claims against airlines. Each of these three sources of authority will be examined in turn.

Using these three sources, one court has recently found that the ADA does not preempt state law claims against an airline arising from an episode of alleged racial profiling and discrimination on the part of the airline. The reasoning of this case will be examined at length, and its implications for the future development of the law will be explored.

A. THE SUPREME COURT'S TREATMENT OF ADA PREEMPTION

The ADA was enacted in 1978 by Congress as part of an effort to encourage market competition in the airline industry.\(^\text{19}\) The ADA dramatically altered the regulation regime established by

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\(^{18}\) See Geier v. Am. Honda Motor Co., 529 U.S. 861, 874 (2000) (rejecting the "absolutist" notion that the existence of an express preemption provision forecloses the possibility of implied preemption).

the Federal Aviation Act of 1958 (FAA),\textsuperscript{20} which had given the Civil Aeronautics Board (CAB) authority to regulate interstate airfares, routes, and aircraft safety, and to prosecute certain deceptive trade practices violations.\textsuperscript{21} In its original form, the FAA did not contain an express preemption provision, but did contain an express "savings clause," which provided that the FAA did not abridge any remedies existing at common law or created via state statute.\textsuperscript{22} Under the authority granted to it by the FAA, the CAB essentially displaced the free market in determining airline fares.

The ADA was enacted by Congress in an effort to replace the CAB with free-market competition.\textsuperscript{23} The ADA eliminated much of the Department of Transportation's\textsuperscript{24} authority over airline fares and routes.\textsuperscript{25} In addition, Congress attempted to guarantee that states would not interfere with this deregulation process by including within the ADA the following strong preemption provision: "[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. . ."\textsuperscript{26}

This broadly worded preemption provision has resulted in a significant amount of litigation since its passage in 1978, generating a large and often contradictory body of case law.\textsuperscript{27} The U.S. Supreme Court has twice ruled on questions involving ADA preemption, producing opinions that have created more questions than they have answered. In its first attempt at delineating the scope of ADA preemption, the Court held that its express


\textsuperscript{21} \textit{See} Stabile, \textit{supra} note 19, at 38.

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} The ADA was enacted with the purpose of developing "an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 422 (1992) (quoting H.R. \textit{CONF. REP.} No. 95-1779, at 53 (1978)).

\textsuperscript{24} CAB's successor after it was eliminated in 1985.

\textsuperscript{25} \textit{See} Stabile, \textit{supra} note 19, at 38-39.

\textsuperscript{26} Airline Deregulation Act, 49 U.S.C.A. § 41713(b)(1) (West 2002).

\textsuperscript{27} Commentators and courts have often criticized the broad language of the ADA preemption clause as being meaningless, causing delay, and enormous transaction costs as courts struggle with its proper scope and application on a case-by-case basis. \textit{See} Doricent v. Am. Airlines, Inc., 1993 WL 437670, at *7 (D. Mass. 1993).
language indicated "a broad preemptive purpose."\textsuperscript{28} Drawing upon its line of cases dealing with ERISA preemption, the Court found that the ADA preempted "state enforcement actions having a connection with or reference to airline rates, routes, or services."\textsuperscript{29} Expanding upon this standard, the Court found that a state law can have a forbidden relationship to rates, routes, or services, even if the law is not specifically designed to affect rates, routes, or services, or if the effect is merely indirect.\textsuperscript{30} However, the Court also noted that some effects would be too "tenuous, remote, and peripheral" to have preemptive effect.\textsuperscript{31}

In its second foray into the arena of ADA preemption analysis, the Court announced that certain breach of contract claims based on state common law were not preempted by the ADA.\textsuperscript{32} In reaching this conclusion, the Court found that, when read together with the savings clause, the ADA preemption provision, "stops states from imposing their own substantive standards with respect to rates, routes, or services," but does not preclude relief to a party who proves that an airline violated a contractual term that it had stipulated.\textsuperscript{33} Ultimately, the majority characterized this decision as charting a middle course between the extremes of "total preemption" and "minimal preemption" advocated by various members of the Court.\textsuperscript{34}

B. THE CIRCUIT COURTS' VARYING INTERPRETATIONS OF "SERVICES"

These broad rules laid down by the Supreme Court have proved fertile ground for innumerable controversies about the proper scope and application of the ADA preemption clause. Among these controversies, none has proven more divisive than the disagreement about the proper definition of the word "services." The split within the circuit courts of appeal regarding the meaning of this word has become so pronounced that three

\textsuperscript{28} Morales, 504 U.S. at 383.
\textsuperscript{29} Id. at 384.
\textsuperscript{30} Id. at 386.
\textsuperscript{31} Id. at 390.
\textsuperscript{32} Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995) (holding that the ADA preemption clause did not shelter airlines from suits "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings").
\textsuperscript{33} Id. at 232.
\textsuperscript{34} Id. at 234.
Justices on the U.S. Supreme Court recently announced their belief that certiorari should be granted to resolve differences.\textsuperscript{35} The two predominant viewpoints on this issue are best laid out, respectively, in a Ninth Circuit Court of Appeals case entitled \textit{Charas v. Trans World Airlines, Inc.},\textsuperscript{36} and a Fifth Circuit Court of Appeals case entitled \textit{Hodges v. Delta Airlines, Inc.}\textsuperscript{37} \textit{Charas} dealt with a passenger's personal injury claim against an airline brought after she tripped over luggage left in an airplane aisle by a flight attendant. In finding that her common law claim was not preempted, the Ninth Circuit held that the term "services" encompasses "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," but not in-flight services such as provision of beverages, personal assistance to passengers, luggage handling, and like amenities.\textsuperscript{38} The court predicated this narrow definition upon its understanding that Congress intended only to preempt state laws and lawsuits that would adversely impact the economic deregulation of the airline industry and the concurrent promotion of market competition.\textsuperscript{39} In conclusion, the court found that Congress intended the word "services" in the ADA preemption provision to be used in the "public utility sense—i.e., the provision of air transportation to and from various markets at various times."\textsuperscript{40} In particular, the court noted that "services" does not refer to such things as the pushing of beverage carts, keeping the aisles clear of obstacles, the handling and storage of luggage, and assistance rendered to passengers.\textsuperscript{41}

In \textit{Hodges}, the Fifth Circuit found that a passenger's personal injury claim against Delta Airlines was not preempted under the ADA because it related to the operation and maintenance of the aircraft rather than airline services. The \textit{Hodges} court took a different approach than the \textit{Charas} court, defining "services" as the "contractual features of air transportation," including such things as ticketing, \textit{boarding procedures}, provision of food and

\begin{thebibliography}{999}
\bibitem{charas} Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998).
\bibitem{hodges} Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995).
\bibitem{charas2} Id., at 1261.
\bibitem{id} Id. at 1265 (stating that "[t]he purpose of preemption is to avoid state interference with federal deregulation").
\bibitem{id2} Id. at 1266.
\bibitem{charas3} Id. The court found it necessary to limit the word services to this meaning or else risk "preemption of virtually everything an airline does."
\end{thebibliography}
drink, baggage handling, and all matters "appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline." Adding further clarity to its definition, the court noted that "'baggage handling' and 'boarding'... concern the airline's policy for permitting baggage to be carried or passengers to be permitted on board." The court distinguished these services from activities relating to the "operation and maintenance of the aircraft," which it found could give rise to non-preempted state law claims. The court defined "aircraft operations" as "the use of the aircraft for the purpose of air navigation... includ[ing] the navigation of aircraft." Under this definition, the court found that the negligent stowing of cargo in an overhead bin necessarily relates to the operation of the aircraft, and is therefore not preempted.

The Hodges court noted that an example of a claim that should be preempted is a claim for wrongful eviction by plaintiffs who were evicted from a flight because they were loud, boisterous, and intoxicated. The court held that a finding of non-preemption of such a claim "would result in significant de facto regulation of the airlines' boarding practices and, moreover, would interfere with federal law granting the airlines substantial discretion to refuse to carry passengers." The court also found that a claim brought by a passenger arising out of his being "bumped" from an overbooked flight would be preempted as being related to the airline's contract for services with its passengers. Both of these examples reach results consistent with the Hodges court's conception of an airline's boarding policy as being a service offered by an airline unrelated to the operation of the actual aircraft.

Like Charas and Hodges, the majority of cases interpreting the meaning of "services" within the ADA preemption provision involve personal injury suits based on state common law causes of

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42 Hodges, 44 F.3d at 336 (adopting the definition of "services" set forth in Hodges v. Delta Airlines, Inc., 4 F.3d 350, 354 (5th Cir. 1993)).
43 Id. at 339.
44 Id. (noting that state law torts concerning the "operation and maintenance of aircraft can be enforced consistently with and distinctly from the services that Congress deregulated").
45 Id. at 338 (quoting 49 U.S.C.A. § 1301(31) (West 1988)).
46 Id. at 340.
47 Id. at 339 (citing O'Carroll v. Am. Airlines, Inc., 863 F.2d 11 (5th Cir. 1989)).
48 Id. at 339-40 (noting disagreement with the holding in West v. Northwest Airlines, 995 F.2d 148 (9th Cir. 1993)).
action. These cases are important to an analysis of how courts will address state law based discrimination claims, however, because they delineate the preemptive scope of the ADA with respect to interactions between airlines and passengers, particularly in the arena of boarding procedures where a majority of racial profiling claims will arise. For example, if “service” encompasses boarding practices and security checks, then the ADA preemption clause very likely covers claims arising from racial profiling committed by airlines in the pre-flight passenger boarding and screening process. If “services” is read narrowly, as the courts following Charas would be apt to do, then boarding practices may well fall outside the scope of ADA preemption.49

C. PREEMPTION OF Racial DISCRIMINATION CLAIMS

Claims of racial discrimination are never easy to deal with. They are inherently subjective, and involve high degrees of emotional involvement for both the plaintiff and defendant. When discrimination claims involve acts of racial profiling, the difficulty is increased because of the conflicting views concerning the justification of the acts underlying the claim. Most difficult of all are those cases involving acts of racial profiling undertaken for a purportedly exigent social purpose such as public safety. The current airport security environment is very likely to produce this type of claim.

The federal courts as well as some state courts have addressed the issue of how best to apply ADA preemption principles to claims of racial discrimination in two different but related contexts: (1) racial discrimination against airline employees, and (2) racial discrimination against airline passengers. Although

49 Following its decision in Charas, the Ninth Circuit has continued to employ a very narrow reading of the term “services” within the ADA preemption clause. See, e.g., Duncan v. Northwest Airlines, Inc., 208 F.3d 1112 (9th Cir. 2000) (holding that an airline’s allowance of smoking on trans-Pacific flights did not constitute or relate to a service); Newman v. Am. Airlines, Inc., 176 F.3d 1128, 1131 (9th Cir. 1999) (holding that the ADA does not preempt state common law claims based on alleged discrimination against a passenger due to her physical disabilities); see also Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77, 82 (2d Cir. 1997) (finding that the better, more restrictive analysis of ADA preemption seeks to determine if a state law “interferes” with the purposes of airline deregulation under the ADA). The Northern District of California recently followed Charas and Newman to the conclusion that a passenger’s state civil rights claim arising from an airline’s alleged refusal to board him on account of his race was not preempted by the ADA. Chowdhury v. Northwest Airlines Corp., 238 F. Supp. 2d 1153, 1156 (N.D. Cal. 2002). Chowdhury is discussed infra Part III(D).
the courts are in relative harmony as to the law regarding airline employees, much less accord exists as to the law regarding airline passengers. Cases addressing the preemptive effect of the ADA on discrimination claims brought by airline employees have been more numerous in recent years than cases brought by passengers, and therefore provide an excellent starting place for examining the courts' general attitude regarding the proper application of the ADA preemption clause to state law based discrimination claims.

1. Preemption of State Law Claims Brought by Airline Employees

The circuit courts of appeal generally agree that racial discrimination claims based on state law brought by airline employees against their employer airlines are not preempted by the ADA. In reaching this conclusion, the courts have consistently employed the Supreme Court's reasoning in Morales, finding that state law claims of racial discrimination brought by airline employees bear too "tenuous, remote, or peripheral" a relation to airline rates, routes, or services to be preempted.

This result can appear somewhat counterintuitive, considering the plain language of the ADA preemption clause. After all, airline employees provide "services" to airline customers, and the selection, retention, or dismissal of an employee on racial grounds—although clearly odious as a matter of principle—seems logically related to the provision of services. A number of jurists have followed this very basic logic to the conclusion that such claims should be preempted.

Courts avoid this seemingly direct result, however, by interpreting the ADA preemption clause in light of the purposes of the ADA. The ADA was enacted for the twin purposes of promoting "maximum reliance upon competitive market forces," and promoting the maintenance of "safety as the highest prior-

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50 Morales, 504 U.S. at 390.
51 See Botz v. Omni Air Int'l, 286 F.3d 488, 496 (8th Cir. 2002) (identifying a distinct line of federal case law holding that discrimination claims founded on race, age, disability, and gender were not preempted due to being too tenuously related to rates, routes, and services); Thomas v. United Parcel Serv., 614 N.W.2d 707, 712-13 (Mich. Ct. App. 2000) (noting that an employee's race bears no reasonable connection or relation to airline rates, routes, or services).
52 See Wellons v. Northwest Airlines, Inc., 165 F.3d 493, 503 (6th Cir. 1999) (Kupansky, J., dissenting) (arguing that finding that employment discrimination animated by non-performance related characteristics such as race, although unjustifiable, is still part of the employment relationship between airlines and their employees, which Congress meant to federalize via the ADA).
ity in air commerce.” In the case of Belgard v. United Airlines, the Colorado Court of Appeals found that a pilot’s disability discrimination claim was preempted by the ADA because the quality of an airline’s employees directly impacts both the safety and competitive quality of the airline’s services offered to consumers. However, this result was quickly repudiated in cases dealing with discriminatory acts involving the age and race of plaintiff employees. The primary rationale relied upon by courts in reaching these conclusions was the assumed fact that an employee’s race and age have little to do with airline safety or competitive efficiency in the marketplace. This assumption that the race of airline employees has nothing to do with airline safety or marketplace competitiveness allows courts to avoid case-by-case analysis when dealing with the issue of whether racial discrimination claims brought by airline employees should be preempted by the ADA.

However, in cases where physical disability discrimination claims are at issue, courts must make case-by-case determinations as to whether the claim bears any relationship to the express aims of the ADA. Courts have ranged in their opinions from holding that the ADA preempts disability discrimination claims grounded on state civil rights laws whenever the disability in question implicates the provision of airline services, to holding that preemption will not operate in disability discrimination cases where the airline employee’s claim fails to raise “significant safety concerns.”

55 See Wellons v. Northwest Airlines, Inc., 165 F.3d 493, 495 (6th Cir. 1999) (finding that claims of racial discrimination have little to do with air safety or market efficiency); Abdu-Brisson v. Delta Airlines, 128 F.3d 77, 84 (2d Cir. 1997) (noting that claims of age discrimination have little to do with air safety or market efficiency).
56 This reality was explicitly acknowledged by the New York appellate court in Delta Airlines, Inc. v. New York State Div. of Human Rights, 652 N.Y.S.2d 253, 257-58 (N.Y. App. Div. 1996), when it noted in an age and sex discrimination case that “preemption must be determined on a case-by-case basis...”
57 See Belgard v. United Airlines, 857 P.2d 467 (Colo. App. 1993) (holding that any law that restricts an airline’s selection of employees based on physical characteristics automatically relates to services being rendered by the airline, triggering the ADA preemption clause); Fitzpatrick v. Simmons Airlines, Inc., 555 N.W.2d 479, 481 (Mich. App. 1996) (employing Belgard’s logic to find that an airline employee’s discrimination claim brought after he was terminated for violating airline’s height and weight standards was preempted by the ADA).
58 See, e.g., Aloha Islandair, Inc. v. Tseu, 128 F.3d 1301, 1303 (9th Cir. 1997). Significantly, the Ninth Circuit in Aloha Islandair explicitly recognized the logical
A good summary of the law regarding employment discrimination claims brought by airline employees grounded in state law is as follows: (1) claims of racial discrimination will not be preempted due to their tenuous relationship to airline rates, routes, and services; and (2) claims of disability discrimination may or may not be preempted based on whether the disability bears a close relationship to airline safety and raises significant safety concerns.\(^5\)

2. Preemption of State Law Claims Brought by Airline Passengers

Although cases addressing the proper application of the ADA preemption provision to racial discrimination claims brought by airline employees have been plentiful, cases addressing the application of the ADA preemption provision to racial discrimination claims brought by passengers have been relatively rare. Those that have been decided do not form a readily coherent body of case law. The reason for this lack of coherence lies primarily in the divergence of opinion among the courts as to the proper interpretation of the word "services" in the ADA preemption provision, and its relation to the ADA’s goal of promoting airline safety.

The ADA was enacted with the twin purposes of promoting market efficiency and airline safety.\(^6\) In addition to this general declaration of purpose, the ADA provides airlines with the power to exclude passengers believed to pose a safety issue, so long as the decision to exclude the passenger is not irrational or unreasonable under the facts and circumstances known to the airline at the time.\(^6\) In cases involving claims brought by pas-

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\(^5\) The Ninth Circuit has explicitly recognized that claims of sex and age discrimination brought by airline employees are, in all probability, as secure from ADA preemption as similar racial discrimination claims because of their failure to implicate safety or market efficiency concerns. *Id.*


\(^6\) 49 U.S.C.A. § 44902(b) (West 1996). See also *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (citing *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975)). Although § 44902(b) insulates airlines from liability when their actions are reasonable in light of the facts and circumstances known to them at the time, it does not preclude claims made against airlines when their decision to exclude a passenger from flight is irrationally and unreasonably formed. *Cordero*, 681 F.2d at 671.
sengers alleging acts of racial discrimination on the part of an airline, the court’s decision on whether to preempt the claim is often predicated upon the nexus between the alleged discriminatory act and both airline safety and airline services. These cases support the contention that claims arising from acts occurring during the provision of airline services in furtherance of airline safety are more likely to be preempted than discriminatory acts having no connection to either services or safety.

A good example of a case involving acts of discrimination unrelated to boarding services or airline safety is Abou-Jaoude v. British Airways. In Abou-Jaoude, a Lebanese family brought several claims against British Airways, including a claim under California’s Unruh Civil Rights Act for discrimination on account of race, alleging that they had endured rude and outrageous treatment from an airline employee at the Los Angeles International airport while assisting a family member during check-in and boarding procedures. The California Appellate Court found that the family’s claims under the Unruh Civil Rights Act were not preempted by the ADA. The court interpreted the ADA preemption provision as applying only to laws that directly attempt to regulate air carriers. Finding that the Unruh Civil Rights Act was a law of general application, the court ruled that claims brought under its auspices were not expressly preempted by the ADA. Significantly, British Airways at no time attempted to argue that its actions were justified by any safety concerns whatsoever, but rather relied upon the plain language of the ADA preemption clause—an argument the court sidestepped by reading the ADA preemption clause narrowly to apply only to state laws specifically focused on aviation.

In Doricent v. American Airlines, Inc., however, the U.S. District Court for the District of Massachusetts addressed the language of the ADA preemption clause directly, finding that it did not operate to preempt a passenger’s racial discrimination claim brought under a Massachusetts civil rights law. In Doricent, an

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63 CAL. CIV. CODE §§ 51-52 (West 2002).
64 Abou-Jaoude, 281 Cal. Rptr. at 153. This interpretation is almost certainly erroneous, as laws of general applicability may have a forbidden connection with airline rates, routes, or services. See Morales, 504 U.S. at 386 (finding that a law may have a forbidden connection with rates, routes, or services, even if the law was not specifically designed to affect airline rates, routes, or services).
65 Abou-Jaoude, 281 Cal. Rptr. at 153.
67 Id. at *7.
African-American man alleged that he was subjected to physical and verbal abuse by American Airlines employees on account of his race while boarding a flight from Haiti to New York. Although the facts were hotly contested, American never argued that its actions were taken specifically for safety reasons. Rather, it argued that the alleged incident took place during the provision of boarding services and was therefore covered by the ADA preemption clause.

In reaching its conclusion that Doricent’s claim under the Massachusetts civil rights law was not preempted, the district court discerned in Morales a “significant impact” test which would allow for preemption under the ADA of state laws that have a significant effect or impact on airline rates, routes, or services. Using this test, the district court disposed of American’s argument that Doricent’s claim arose from activities “relating to” airline services, stating, “[r]acial discrimination, the intentional infliction of emotional distress, and assault and battery have nothing whatsoever to do with any legitimate or quasi-legitimate industry-wide practice of affording airline service.” Essentially, the district court rejected American’s claims for reasons unrelated to the issue of whether the alleged discriminatory acts took place during the provision of an airline service—in this case, boarding procedures. Rather, the court found that the actions giving rise to the claim were so outrageous that they should not be considered a legitimate component of normal boarding procedures. Such reasoning implicitly rejects a formal approach to the definition of “services” for the purposes of interpreting the ADA preemption clause in favor of a more deliberative analysis of what should constitute airline services.

A completely different approach was taken in a similar case by the U.S. District Court for the Northern District of Illinois in Huggar v. Northwest Airlines, Inc. In Huggar, a 21 year old black male was removed from a Northwest flight after throwing another passenger’s luggage, threatening to physically assault the passenger, and claiming that he could “buy” the passenger. Huggar brought federal discrimination claims and state tort

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68 Id. at *1.
69 Id. at *6.
70 Id. at *4-5 (citing Morales v. Trans World Airlines, Corp., 513 U.S. 374, 390 (1992)).
71 Id. at *5.
73 Id. at *1.
claims against Northwest, arguing that his ejection from the flight was racially motivated.\(^7^4\) Citing the Seventh Circuit's test enunciated in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*,\(^7^5\) the court held that for a law to be preempted by the ADA, it must (a) be a law enforced or enacted by a state, and (b) relate to airline rates, routes, or services by either "expressly referring to them or by having a significant economic effect upon them."\(^7^6\) The court then noted that the Seventh Circuit had adopted the Fifth Circuit's definition of services as a "bargained-for or anticipated provision of labor from one party to another."\(^7^7\) The court concluded its analysis by finding that Huggar's state law tort claims "related to" Northwest's service of providing airline transportation and were therefore preempted by the ADA.\(^7^8\)

The *Huggar* case diverges sharply from *Doricent* in its refusal to look beyond the type of services offered in order to consider the manner in which they were offered. To this effect, the court in *Huggar* wrote, "the critical inquiry is . . . the underlying nature of the actions taken, not the manner in which they were accomplished. Therefore, a court should not look to the subjective motivations of the employees because they are irrelevant to determining what constitutes 'services' within the meaning of the [ADA]."\(^7^9\)

The result in *Huggar* is consistent with the Fifth Circuit's definition of "services" posited in *Hodges*, considered in light of the strong federal interest in aviation safety expressed in the FAA. Huggar's actions were clearly an impediment to the safety of the other passengers, and the airline's decision to eject him from the flight had a clear connection with the "service" of boarding and seating passengers. As the following discussion will indicate, however, even when an airline has a passable safety rationale for excluding a passenger from a given flight, preemption will not occur unless the court hearing the case adopts an inter-

\(^7^4\) *Id.*

\(^7^5\) *Id.*

\(^7^6\) *Id.* at *8 (citing *Travel All Over the World, Inc.*, 73 F.3d at 1432).

\(^7^7\) *Huggar*, 1999 WL 59841, at *9 (quoting *Travel All Over the World, Inc.*, 73 F.3d at 1433 (quoting *Hodges*, 44 F.3d at 336)).

\(^7^8\) *Id.* The court drew support for its position from *Pearson v. Lake Forest Country Day Sch.*, 633 N.E.2d 1315, 1320-21 (Ill. 1994), in which the Illinois Supreme Court found that tort claims based on an airline's refusal to transport the plaintiff passenger were directly connected to airline services.

\(^7^9\) *Id.* (citations omitted).
pretation of "services" that is broad enough to encompass airline screening and boarding procedures.

D. CHOWDHURY v. NORTHWEST AIRLINES

Roughly one month after the events of September 11, 2001, Arshad Chowdhury, a U.S. citizen of Bangladeshi ancestry, was denied passage aboard a Northwest Airlines flight departing from San Francisco International Airport. Chowdhury endured a number of embarrassing detentions, searches, and delays at the behest of Northwest Airlines employees after he had already been cleared to fly by the FBI and airport security. He was eventually denied access to his flight after being told by a Northwest supervisor that his treatment stemmed from a "security issue." The "security issue" apparently arose from phonetic similarities between Chowdhury's name and a name on the FBI's list of suspected terrorists.

Chowdhury brought a number of federal and state claims against Northwest Airlines as a result of his detention and exclusion from his flight, including claims under section 51 of California's Unruh Civil Rights Act. Northwest Airlines argued that Chowdhury's state claims were preempted by the ADA. Finding the act of refusing to allow a particular passenger to board an aircraft to be unrelated to "services" within the meaning of the ADA, the United States District Court for the Northern District of California ruled that Chowdhury's claim under the Unruh Act was not preempted.

In reaching its decision, the court relied heavily upon the Ninth Circuit's interpretation of "services" in Charas and Newman. The court cited Charas for the proposition that, within the context of the ADA, Congress intended to use the word "services" in the public utility sense, referring specifically to the "provision of air transportation to and from various markets at various times." The court then noted that Newman had ap-

81 Id.
83 Id. at 1155-56.
84 Id. at 1155. ("Defendants contend that the decision whether to board a passenger falls within the definition of 'service.' Binding Ninth Circuit law forecloses defendants' argument.").
85 Id. (citing Charas v. Trans World Airlines, 160 F.3d 1259, 1266 (9th Cir. 1998)).
plied Charas's definition of "services" in refusing to preempt a claim brought by an airline passenger who had been refused permission to board a flight on account of her heart condition. The court then applied Charas and Newman to Chowdhury's claim:

If refusing to allow a passenger to board because of her disability is not a "service" within the meaning of the ADA, then refusing to allow a passenger to board because of his race is also not a "service." In both cases the challenged conduct—refusing to allow a particular passenger to board—has nothing to do with the provision of transportation to and from various markets. Accordingly, under binding Ninth Circuit law, plaintiff's state law claims are not preempted by the express preemption provision of the ADA.

At no point in its preemption analysis did the court even consider the relevance of any safety concerns that Northwest may have had regarding Chowdhury.

Chowdhury emphasizes the dispositive role that the court's interpretation of the word "services" plays in guiding preemption analysis—particularly in cases involving claims made by passengers arising from an airline's refusal to board them for reasons associated with the passengers' race or ethnicity. If, as the Ninth Circuit believes, boarding procedures are outside the scope of airline "services" for purposes of the ADA, then such refusals will never generate preemptable claims. If, however, a court adopts a definition of "services" more in line with the Fifth Circuit's interpretation, then claims based upon such refusals may well be preempted under the ADA. For reasons of both law and public policy, this second outcome is the most favorable.

IV. BALANCING SAFETY AND CIVIL RIGHTS IN THE AIR

The very nature of the threat facing America post 9-11 demands that trade-offs be made in order to enhance airline security. Unfortunately, a certain amount of civil rights may be sacrificed to strengthen security in the air. The Justice Department conceded as much earlier this year with its release of controversial new security guidelines allowing the use of race as a factor in anti-terrorist and national security investigations. Although private airlines are not a part of the federal government,
their role in preserving security in the air is no less important than the role played by airport screeners and the FBI.

While airlines should not be allowed to wantonly discriminate against passengers based on race or any other identifying characteristic, they should be given consistent legal guidance as to what is actionable conduct and what is not actionable conduct within the context of security precautions taken during passenger boarding procedures. Without consistent guidance, airlines will likely take more or less aggressive security measures based upon the particular law of the jurisdiction in which they are operating. All parties involved—whether airline employees, non-suspect passengers, or innocent passengers who may well bear the misfortune of being singled out based on some defining characteristic—deserve better. For both legal and policy reasons, preemption of state claims arising from security precautions taken during boarding procedures is the means by which predictability in this area might be achieved.

A.LEGAL CONSIDERATIONS

Airlines have been plagued with uncertainty surrounding the meaning of “services” within the ADA preemption provision since the time of its inception. The effects of this uncertainty may be exacerbated by the demands that are currently being placed upon airlines to guarantee the security of their passengers in light of the ever-present threat of terrorist activity. Given the fact that airlines will increasingly be called upon to make snap decisions during the boarding process regarding potentially suspicious passengers, based upon a broad matrix of characteristics including, but not limited to, ethnicity and race, the application of the ADA to boarding procedures must be clarified.

The Fourth Circuit Court of Appeals provided a roadmap for achieving this clarification in Smith v. Comair, Inc.89 In Comair, the Fourth Circuit grappled with the question of whether James Smith’s breach of contract and intentional tort claims were preempted by the ADA when he had been excluded from the second leg of his flight due to the airline’s own failure to comply with FAA security regulations requiring all passengers to show photo identification upon initial boarding.90

90 Id. at 256.
The Fourth Circuit held that Smith's claims were preempted because they had a forbidden relation to the "service" of airline boarding practices. In reaching this conclusion, the court made some important observations. For example, the court noted that when Congress deregulated the airline industry in 1978, it retained, essentially intact, what is now 49 U.S.C. section 44902(b), granting airlines broad discretion to exclude passengers whose presence is reasonably believed to be inimical to airline safety. The court found this power appropriate given the "formidable safety and security concerns" posed by air travel in modern society. Turning to Smith's claim, the court found that allowing him to challenge the airline's boarding procedures under a general breach of contract claim for failure to transport would "allow the fifty states to regulate an area of unique federal concern—airlines' boarding practices." The court then proclaimed, "[A]irlines must be accorded broad discretion in making boarding decisions related to safety. Allowing Smith's claim to proceed would frustrate this important federal objective." The court declared that, based on this reasoning, Smith's contract claim was preempted under the ADA.

The Fourth Circuit's decision in Comair is significant for several reasons. First, it assumes without argument that airline-boarding practices come within the scope of the ADA preemption provision as an airline service. This interpretation of "services" directly conflicts with the Ninth Circuit's interpretation of "services" in Charas and is in harmony with the Fifth Circuit's interpretation of "services" in Hodges. In addition to utilizing the Fifth Circuit's interpretation of "services," the Fourth Circuit further refined the connection between "services" and boarding procedures. The Fourth Circuit found that claims "premised on" an airline's refusal to permit a passenger to board are preempted. The court also noted, however, that claims based on

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91 More specifically, in ruling that ADA preemption was proper, the court looked to the fact that Comair had invoked federal defenses to Smith's contract claim, and therefore, the claim could only be adjudicated by reference to federal law external to the parties' bargain. Id. at 258-59.
92 Id. at 257-58.
93 Id. at 258.
94 Id. at 258-59.
95 Id. at 259 (emphasis added).
96 The Fourth Circuit cites Hodges as persuasive authority for the proposition that boarding practices fall within the ambit of "services" as the word is used within the ADA. Id. at 258-59.
97 Id. at 259.
conduct distinct from an airline’s determination not to grant permission to board are not preempted because they bear too tenuous and remote a relationship to boarding practices.\textsuperscript{98}

The Fourth Circuit’s \textit{Comair} decision also explicitly recognized that the federal government’s strong concern in airline safety constitutes a decisive reason to include boarding practices within the ambit of airline “services” for purposes of the ADA. The court found that section 44902(b) “recognizes airlines’ boarding practices as a specific area of federal concern.”\textsuperscript{99} Reading section 44902(b) together with the ADA’s preemption provision, the court proclaimed, “Federal law—in conjunction with its broad preemption of state-law claims related to airlines’ services—appropriately grants airlines latitude in making decisions necessary to safeguard passengers from potential security threats.”\textsuperscript{100}

Although the Fourth Circuit’s interpretation of “services” in \textit{Comair} extended the scope of the ADA preemption provision to include claims arising from airline boarding procedures in certain cases,\textsuperscript{101} the court refused to adopt a per se rule that preemption applies to all claims related to boarding procedures. The court recognized that claims stemming from “outrageous conduct” on the part of an airline toward a passenger would not be preempted if they bore too tenuous a relationship to airline services. The court noted that an example would be where “an airline held a passenger without a safety or security justification.”\textsuperscript{102} Therefore, claims arising from acts of wanton racial dis-

\textsuperscript{98} Id.

\textsuperscript{99} Id. at 258.

\textsuperscript{100} Id.

\textsuperscript{101} The court took care to note that a determination of whether a claim has a connection with or reference to an airline’s prices, routes, or services, is dependent upon the “facts underlying the specific claim.” \textit{Id.} at 259.

\textsuperscript{102} Id. The court cited \textit{Chrissafis v. Cont’l Airlines, Inc.}, 940 F. Supp. 1292 (N.D. Ill. 1996) as an example of a case in which a claim was found not to be preempted by the ADA due to its tenuous relationship with airline services. In \textit{Chrissafis}, the court distinguished false imprisonment claims based on an airline’s refusal to transport, and false imprisonment claims based on an airline’s providing inaccurate information to law enforcement officials, causing arrest. The court found that the former claim should be preempted while the latter claim should not. \textit{Chrissafis}, 940 F. Supp. at 1298-99. The court noted that where “the crux of the claim was the airline’s refusal to transport,” the claim related to services and was therefore preempted. \textit{Id.} at 1298. Claims arising from actions that fail to “reasonably further the provision of an airline service,” however, bear too tenuous a relation to airline services to be preempted. \textit{Id.} at 1299.
crimination, bearing no real connection to the provision of the airline service of boarding, would not be preempted.

Under the reasoning of Comair, claims brought against airlines under state civil rights laws would be preempted by the ADA if they were premised upon or arose out of an airline's determination not to allow the plaintiff to board an aircraft for reasons related to safety. However, claims premised upon acts of wanton discrimination, unrelated to boarding procedures or having no relation to safety concerns, would most likely not be preempted under Comair. This distinction would allow for the use of race or ethnicity by airlines as a factor in conducting investigations for the purpose of preventing "threats to national security and catastrophic events," placing preemption law in line with the Department of Justice's new guidelines.103

Some courts may be unwilling to find that race or ethnicity constitute factors that may acceptably be used by airlines when making decisions about which passengers to deny access to flights for reasons of air safety. The Doricent court laid the groundwork for such a finding when it declared that racial discrimination has nothing to do with legitimate airline services.104 Under this reasoning, state law claims against airlines grounded upon alleged acts of racial discrimination occurring during the boarding process could be adjudged too tenuously and remotely related to services to be preempted under the ADA. Such reasoning is meritorious for its refusal to condone the use of race or ethnicity as a factor in taking actions that may well cast aspersions on the character and motivations of perfectly innocent persons. However, recent events may conspire against its adoption and in favor of an interpretation of "services" more in line with Comair.

B. WHAT'S IN THE NEWS: HOW CURRENT EVENTS AFFECT THE ANALYSIS

Many commentators have argued that the horrific events of September 11, 2001 "changed everything."105 Although slightly overstated, this claim has merit with respect to both the federal government's approach to regulating airline safety and the aca-

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103 See supra note 3.
104 Doricent, 1993 WL 437670, at *5; see supra Part III(C)(2) (providing an in-depth discussion on Doricent).
105 E.g., David A. Harris, Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?, 17 CRIM. JUST. 36 (Summer 2002).
ademic and public debate over the meaning and appropriateness of racial profiling. If prior periods of national emergency have demonstrated anything, they have shown that courts often will take such extrinsic circumstances into account—for better or worse—when dealing with legal issues touching on both race and national security in times of novel and extreme danger to the American people.106

In the months immediately following the September 11 terrorist attacks, Congress passed and the President signed a bill entitled the "Aviation and Transportation Security Act."107 Among the Act's key provisions were those calling for the hardening of the flight deck cabin door against intruders,108 deployment of air marshals aboard certain flights,109 and broad federal regulatory authority over airport security screening operations.110 During debate on the bill, the Senate passed a version calling for the complete federalization of the airport security screening process. This proposal was later modified under pressure from Republican congressional leadership to allow gradual reversion to the use of private screening companies, albeit under pervasive federal regulatory supervision.111

The net effect of this pervasive regulation of the aviation industry by the federal government, and the resulting loss of privacy to the average airport traveler, has led one commentator to declare that "airports are Fascist."112 A less debatable and more useful conclusion to draw from the above facts is that the aviation industry has increasingly become a matter of great federal concern. In particular, aviation safety is clearly a field that Congress is determined to occupy as fully and completely as possible. This reality has significant consequences for ADA preemption analysis in cases where acts taken in furtherance of airline safety collide with a passenger's right to be free from unwarranted racial discrimination. In cases where an airline utilizes race or ethnicity as a factor in making a determination to

106 See Braber, supra note 1, at 453 (noting "wartime and national security interests...have often overridden constitutional protection, even though the equal protection doctrine imposes strong prejudice against racial discrimination).  
110 Id. § 101(a), 115 Stat. at 597-98 (codified at 49 U.S.C.A. § 114(c)).  
112 Id. at 477.
exclude a passenger from a flight out of concern for its safety, courts will have ample reason in light of the increasing federal concern with aircraft safety to preempt victim passengers' state law claims as "related to" services, while allowing their federal discrimination claims to proceed.

By applying the ADA preemption clause in this way, courts would accomplish two important goals: (1) require passengers whose rights have been violated to obtain relief via federal anti-discrimination statutes such as 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, and, potentially, newly enacted 42 U.S.C. § 40127, and (2) promote uniformity and predictability in the development of case law dealing with security-related incidents of racial profiling. Passengers would not be left without remedy for invasions of their civil rights, and airlines would be free to aggressively protect passenger safety within the confines of a well-defined body of rules developed over time as courts interpret and apply the ADA preemption provision to claims arising under a limited number of federal statutes.

A second recent development in American society that may influence courts in their interpretation and application of the ADA preemption clause to acts of racial profiling is the renewed debate over the meaning and acceptability of racial profiling as a means to combat terrorism. Prior to the events of September 11th, racial profiling was universally regarded as anathema to all things right and good in American law and culture. However, following September 11th, public opinion has shifted to the point where a majority of Americans agree with subjecting people of Middle Eastern decent to more intensive law enforcement scrutiny. Basing legal decision-making on this shift in public opinion alone in order to promote national security would be

114 42 U.S.C.A. § 2000(d) (West 1994) (prohibiting discrimination by recipients of federal funding on account of race or national origin).
115 42 U.S.C.A. § 40127 (West 2002). Although the courts have yet to interpret this statute in a comprehensive way, at least one commentator has suggested that courts should look to analogous case law interpreting § 40127's predecessor statute, 49 U.S.C. § 1374(b), as providing litigants with a private cause of action. See Hoffman, supra note 4.
116 The Fourth Circuit recognized this point in Comair, writing that, if courts allowed de facto state regulation of airline boarding practices by refusing to preempt state law claims relating to safety practices, "[a]irlines might hesitate to refuse passage in cases of potential danger for fear of state law . . . actions claiming refusal to transport." Comair, 134 F.3d at 259.
117 Gross & Livingston, supra note 1, at 1413-14.
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completely inexcusable both morally and as a matter of constitutional law.118

The change, however, has not been limited to public opinion. Legal scholars have, for the first time in years, begun questioning the basic nature of racial profiling itself. In a helpful article published on National Review Online, Roger Clegg suggests that the term "racial profiling" refers to three different law-enforcement activities:

First, it can refer to making a guess about the characteristics of the person who has committed a particular, notorious crime. Second, it can also refer to making a guess about the characteristics of people who are likely to commit nonspecific offenses. And, third, it can refer to the identified characteristics of a person or persons who committed a particular crime.119

Writing in the Columbia Law Review, Samuel Gross and Debra Livingston argue that the third type of profiling described above is not profiling at all, but rather legitimate information upon which to base efficient police activity.120 According to Gross and Livingston, racial profiling occurs only when police activity directed at an individual is predicated upon the belief that that person's "racial or ethnic group [is] more likely than the population at large to commit the sort of crime the officer is investigating."121 This definition of racial profiling is consistent with the first two types of activities described by Clegg.

Defining racial profiling as merely "making a guess" about the race or ethnicity of persons who are likely to commit non-specific offenses creates serious difficulties in classifying much of the race-specific law enforcement activity that has taken place since September 11th. In the context of airline security, paying heightened attention to, and possibly even removing from flights, persons of Middle Eastern descent based in part on their race or ethnicity appears to be nothing more than making a guess about the racial characteristics of persons who may commit a non-specific future offense—classic racial profiling under the Gross-Livingston analysis.

118 See Huong Vu, Us Against Them: The Path to National Security is Paved by Racism, 50 Drake L. Rev. 661, 691-93 (2002) (arguing that American history is rife with incidents where the Government used national security concerns to scapegoat and discriminate against ethnic and racial minorities).


120 Gross & Livingston, supra note 1, at 1415.

121 Id.
However, as Roger Clegg points out, these same activities could be interpreted as being measures taken against a specific terror network that has committed specific crimes in the past, and has a highly specific religious and political agenda with strong Middle Eastern roots—activities fitting into his third "specific crime" category. The difficulty in accurately characterizing actions of the sort described above is compounded by the fact that (a) even if 90% of all terrorists meet the profile of being a Muslim, Middle-Eastern male, well over 99.9% of all such persons that may be subjected to higher scrutiny are perfectly innocent; and (b) terrorism is the definitive "a-symmetrical threat," because one terrorist acting alone can cause tremendous destruction and death.

The asymmetrical nature of the threat posed by terrorism was likely one of the factors that drove the promulgation of the Department of Justice's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. The Guidance roundly condemns the use of racial profiling in the vast majority of law enforcement activities, stating: "Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society." However, the Guidance does provide for the use of race or ethnicity by federal officers when "investigating or preventing threats to national security." With respect to such threats, the Guidance states:

The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the

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122 See Clegg, supra note 119.
123 See Gross & Livingston, supra note 1, at 1423.
124 The asymmetrical nature of the problem of terrorism in the skies is summed up well by Peter Schuck: "If [a screener] stops everyone . . . all of the people (except one, perhaps) will turn out to be perfectly innocent. On the other hand, if she fails to stop the one person among them who is in fact a terrorist, she causes a social calamity of incalculable proportions." Schuck, supra note 1.
125 See Guidance, supra note 3.
126 Id.
127 Id.
Constitution. Similarly, because enforcement of the laws protecting the Nation's borders may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards.\footnote{Id. (citing United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975)) (emphasis added).}

This language appears to represent a position on the part of the Justice Department that, within the current security environment, racial profiling in limited circumstances may serve the compelling state interest of promoting national—and airline—security. Undoubtedly, the \textit{Guidance} will only serve to further complicate the issue of whether \textit{airlines} as well as airport screeners may take race into account when making boarding decisions.

The net result of the difficulty in properly assessing the nature of racial profiling in the current security environment upon the courts’ application of the ADA preemption clause to cases involving the use of race in airline security checks is unclear. Faced with the urgent need for airlines to “get it right” with respect to ferreting out potential terrorists coupled with the federal government’s increased role in regulating airline security, courts may follow the \textit{Huggar} court in being less willing to “look behind” the service of airline boarding procedures in order to consider their motivating purpose, opting instead for a more literal reading of the ADA preemption clause.\footnote{See supra note 80.} Otherwise, courts will be faced with the impossible task of determining, in light of current events, just what actions are so “tenuously and remotely” related to airline services and safety concerns as to avoid preemption under the ADA.

\section{V. THE ROAD AHEAD: CONCLUDING COMMENTS}

This comment has attempted to analyze a narrow issue within a very broad legal and social context. The question of whether state law claims brought by passengers alleging racial discrimination by airlines will be preempted under the ADA when the discriminatory acts take place during pre-flight passenger screening and boarding procedures is located at the interstices of numerous legal and social battlegrounds. From a legal perspective, the answer to this question will be shaped by how the courts reconcile a proper abhorrence for racial discrimination with the federal government’s pervasive regulation of airline
safety and the specific—but by no means clear—language of the ADA. From a social perspective, courts must take into consideration evolving definitions of and attitudes toward racial profiling when determining whether the actions of airlines relate in any meaningful way to the provision of services.

The difficult issues surrounding the proper role that race and ethnicity should play in the current security environment will remain for courts to grapple with in the coming years. Although racial profiling has duly earned its ugly reputation in American society, the use of race as one factor in making threat assessments about airline passengers does not fit neatly into any of the classic scenarios. As September 11, 2001 clearly demonstrated, airlines are front line players in the effort to deal with a very real and dangerous threat. Courts should seek ways to allow airlines to aggressively confront this threat while simultaneously protecting the most basic rights of all Americans.

Preempting state law claims of racial discrimination arising from an airline’s good faith efforts to protect passenger safety is one way that courts could do so. By preempting claims arising from legitimate, good-faith efforts by airlines to weed out potential terrorists, courts can (1) provide airlines with greater clarity about what uses of race are and are not acceptable in pre-flight screening and boarding procedures by limiting litigation to claims founded on a discreet set of federal statutes, allowing them to pursue safety measures more aggressively, and (2) safeguard the rights of passengers who are victimized by improper uses of racial profiling using federal remedies. Clearly, courts must grapple with what a legitimate use of racial profiling might be in the airline safety context—if there truly is such a thing. Preemption offers courts a tool with which to shape the solution in a uniform and consistent way that protects the safety of airline passengers while jealously guarding the rights of all Americans to be free from invidious racial discrimination.