Remaining Human: How the Airline Deregulation Act Shields Commercial Air Carriers From Legal Liability for Mishandling Human Remains

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INHUMANE: HOW THE AIRLINE Deregulation ACT SHIELDS COMMERCIAL AIR CARRIERS FROM LEGAL LIABILITY FOR MISHANDLING HUMAN REMAINS

Abigail A. Lahvis*

ABSTRACT

The Airline Deregulation Act of 1978 (ADA) deregulated the domestic airline industry. Specifically, the ADA ended the dual administrative system, which allowed the states to regulate intra-state airfare and permitted the federal government’s Civil Aeronautics Board (CAB) to regulate interstate airfare. The Act also included a broad preemption clause to prevent the states from reimposing economic regulations on air travel. The preemption clause prohibits a “State . . . [from] enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.”

The Supreme Court has interpreted the ADA’s preemption clause expansively and concluded that only state law claims with a “tenuous, remote, or peripheral” relationship to an airline’s services survive preemption. Yet, the Supreme Court has never defined the key word: Service. Today, federal circuit courts disagree on the definition of “service,” and a majority have adopted the Fifth Circuit’s definition articulated in Hodges v. Delta Airlines, Inc.

Applying the Supreme Court’s expansive view of the ADA’s preemption clause, the Fifth Circuit defined the term “service” as all bargained-for air carrier services, including “ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.” The Fifth Circuit’s definition preempts almost all conceivable state law claims...
despite the Supreme Court excepting claims with a “tenuous, remote, or peripheral” relationship to an airline’s services from preemption. Consequently, the aviation industry largely evades state law.

This Comment argues that courts should interpret the ADA’s preemption clause more narrowly to allow more state law claims to survive preemption, particularly claims arising from an airline’s mishandling, delaying, or misplacing of a loved one’s remains. As the COVID-19 pandemic claims lives and frustrates air travel, a perfect storm threatens to mishandle, delay, or misplace a loved one’s remains. Grieving mothers, fathers, husbands, and wives are left without a legal remedy because the ADA shields the airline industry from liability concerning “baggage handling” and the “transportation itself.” Courts should interpret the ADA’s preemption clause more narrowly based on the ADA’s clear purpose, the plain meaning of the ADA’s text, stare decisis, and the law’s treatment of other entities that mishandle human remains.

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   A. THE ACT’S PURPOSE: ECONOMIC Deregulation
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ONCE UPON A TIME, the aviation industry wanted government regulation. The Civil Aeronautics Act of 1938 consolidated aviation regulation in a single federal agency and authorized regulation of commercial air transportation to promote growth and maintain low airfares. Shortly after that Act’s passage, World War II increased the government’s aviation regulation. Additional regulations included increasing a pilot’s monthly maximum hours, developing public airports, and authorizing navigation of foreign aircraft in the United States. Myriad revisions to the Civil Aeronautics Act of 1938 eventually led to a new Act: the Federal Aviation Act of 1958. This Act created an independent regulatory agency called the Civil Aeronautics Board (CAB), which regulated the use of navigable air space, prescribed air traffic rules, and conducted research and development activities for the aviation industry. Government regulation reached an apex in the 1970s, alarming legislators about the anticompetitive effects of government control over prices, routes, and services on air carriers.

The Airline Deregulation Act of 1978 (ADA) deregulated the domestic airline industry. Specifically, the Act rejected the pre-
vious dual administrative system, which allowed the states to regulate intrastate airfare and the federal government’s CAB to regulate interstate airfare. The Act included a broad preemption clause to prevent the states from reimposing economic regulations on air travel. The preemption clause prohibited a “State . . . [from] enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.” Additionally, the Act preserved the “savings” clause that originated in the Civil Aeronautics Act of 1938 and endured in the Federal Aviation Act of 1958—“Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute . . . .” Some courts interpret the Act’s preemption clause “more broadly” than a mere “limitation on state economic regulation of airlines,” rendering the savings clause meaningless and shielding airlines from state law claims touching almost all aspects of air transport.

The Supreme Court expansively defined the scope of the ADA’s preemption clause in a trilogy of cases. Only those state law claims with a “tenuous, remote, or peripheral” relationship to an airline’s services survive preemption. Yet, the Supreme Court has never defined the key word: service. Federal circuit courts disagree on the definition of “service,” with a majority

12 Id. § 105(b)(1), (c).
13 Id. § 105(a)(1).
14 Id.
17 Dempsey, supra note 15, at 438.
19 Morales, 504 U.S. at 390.
20 See Hodges v. Delta Airlines, Inc., 4 F.3d 350, 353 (5th Cir. 1993) (“Morales informs but does not squarely resolve this case.”), aff’d en banc, 44 F.3d 334, 336 (5th Cir. 1995).
21 Compare Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (“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”), with Taj Mahal Travel, Inc. v. Delta Airlines Inc., 164 F.3d 186, 194 (3d Cir. 1998) (adopting the Ninth Circuit’s definition of “service” because it “offers a more promising solution” for resolving the definition of services).
adopting the Fifth Circuit’s definition articulated in *Hodges v. Delta Airlines, Inc.*

Applying the Supreme Court’s expansive view of the ADA’s preemption clause, the Fifth Circuit defined the term “service” as all bargained-for air carrier services, including “ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.” The Fifth Circuit’s definition preempts almost all conceivable state law claims despite the Supreme Court excepting state law claims with a “tenuous, remote, or peripheral” relationship to an airline’s services from preemption. Consequently, the aviation industry largely evades state laws—even those protecting the revered right to a decent burial.

The tragedy of the COVID-19 pandemic plagues Americans. To date, more than 1 million Americans have died of COVID-19. The Center for Disease Control’s (CDC’s) data indicate that 385,443 Americans died due to COVID-19 in 2020, and 446,197 Americans did so in 2021. COVID-19 also overwhelmed the aviation industry, hitting commercial airlines espe-

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22 See *Hodges*, 4 F.3d at 354 (defining “service” to include elements of bargain such as “ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself”); *see also* *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 94 (1st Cir. 2013) (same); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (same); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1435 (7th Cir. 1996) (same); *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1222 (10th Cir. 2001) (same); *Koutsouradis v. Delta Airlines, Inc.*, 427 F.3d 1399, 1343 (11th Cir. 2005) (same).

23 *Hodges*, 4 F.3d at 354.

24 *Morales*, 504 U.S. at 390.

25 *See* Craig Konnoth, *Privatization’s Preemptive Effects*, 134 H ARV. L. R EV. 1937, 1945 (2021) (arguing that private entities are displacing state law unnoticed through four different approaches, one of which is the contractual preemption approach where “the federal government preempts state regulation in an area of law, and, instead of regulating in itself, formally or informally allows the rules of interaction in the space to be determined by private contract.”).


cially hard. Global airline revenues fell 55% in 2020, commercial aircraft manufacturers incurred $12 billion in losses, and the number of passengers fell by 2.703 billion. Where COVID-19’s effects—death and uncertain air travel—intersect, a void of justice exists. Commercial airlines are probably not liable for mishandling a loved one’s remains. This Comment highlights this injustice and argues that an overly broad interpretation of the ADA’s preemption clause perpetuates this injustice.

Part II describes the impractical, imprecise laws governing death and applies them to the COVID-19 tragedy. Section II.A establishes the legal foundation for the right to a decent burial and inventories the legal claims that arise when an entity interferes with the right. State property, tort, and contract laws govern the right to a decent burial and the causes of action available to enforce it. Section II.B explains the perfect storm created by the COVID-19 pandemic: Unprecedented death relies on frustrated air travel for a final flight home.

Part III explains how the federal laws—governing the airline industry—and the state laws—governing death—interact. Section III.A outlines the Supreme Court’s cases interpreting the ADA. Section III.B then clarifies how the Fifth Circuit resolved the legal questions left unanswered by the Supreme Court in a way that limits the viability of a plaintiff’s state law claims.

Part IV argues that federal courts should narrowly interpret the ADA to allow more state law claims—specifically state law claims arising from the mishandling of human remains—to survive preemption. Section IV.A suggests that Congress did not intend the ADA to preempt most state law claims. Congress only intended to shield the airline industry from state economic regulations affecting air travel. Section IV.B then addresses the discrepancies between the plain meaning of “service” and, subsequently, “baggage handling” versus the Fifth Circuit’s defi-

30 Id.
31 Id.
nition. Section IV.C applies stare decisis factors to Hodges and concludes that the Fifth Circuit should overrule its precedent. The Fifth Circuit’s hair-splitting between an airline’s “services” and “operation and maintenance” promotes uncertainty and anomalous results among the district courts. Section IV.D juxtaposes commercial air carriers’ and other entities’ legal liability for mishandling human remains. Delaying the interment of a loved one’s remains is always “repugnant to the sentiment of humanity,”33 regardless of the entity perpetuating the delay. Part V concludes.

II. BACKGROUND

A. STATE LAW: IMPOSING LIABILITY FOR CONDUCT AFFECTING A HUMAN BODY DIRECTLY

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on Earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling[s] love and memory. Beyond it may reach hope. It must be laid away. And the law-that rule of action which touches all human things-must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber[,] and pig iron.34

1. Property Law: The Right to a Decent Burial

American common law recognizes the right to a decent burial.35 To understand the right’s legal foundation and the legal claims that arise when an entity interferes with the right, this Comment briefly discusses the right’s common law origins.

American common law derives primarily from English common law;36 however, some exceptions exist. The Church of England dictated burial rules and adjudicated disputes regarding

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35 See, e.g., Nelson, 540 S.W.3d at 545.
human remains in the 18th century.\textsuperscript{37} English legal scholars understood matters of death to fall under the exclusive jurisdiction of the Church of England. Lord Edward Coke wrote that a "\textit{cadaver} . . . is \textit{nullius in bonis}," the property of no one.\textsuperscript{38} Sir William Blackstone also addressed the property status of human remains:

\begin{quote}
[T]hough the heir has a property in the monuments and cutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral.\textsuperscript{39}
\end{quote}

No legal property right existed in human remains under English common law. The only legal rights attached to corpses rested with the "parson," or priest in the Church of England, who could pursue legal remedies for trespass in ecclesiastical courts.\textsuperscript{40} Because English common law on burial rights reflected ecclesiastical laws not adopted in America, American common law differed.\textsuperscript{41}

American common law established a "quasi-property right" in a corpse for a decedent's next of kin.\textsuperscript{42} Courts did not establish


\textsuperscript{38} \textsc{Edward Coke}, \textit{The Third Part of the Institutes of the Laws of England} 203 (London, 4th ed. 1669).


\textsuperscript{40} \textit{Id.} at 10.

\textsuperscript{41} U.S. CONST. amend. I (forbidding the government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof"); \textit{see also Larson v. Chase}, 50 N.W. 238, 238–39 (Minn. 1891).

\textsuperscript{42} \textit{See Walter F. Kuzenski, Property in Dead Bodies}, 9 Marq. L. Rev. 17, 17 (1924); \textit{see also Burnett v. Surratt}, 67 S.W.2d 1041, 1042 (Tex. App.—Dallas 1934, writ ref'd) ("There is no property in a dead man’s body, in the usually recognized sense of the word, yet it may be considered as a sort of quasi property, in which certain persons have rights therein, and have duties to perform."); \textit{superseded by statute}, Tex. Health & Safety Code Ann. § 711.002, as recognized in SCI Tex. Funeral Servs., Inc. v. Nelson, 540 S.W.3d 539 (Tex. 2018).
an absolute property right in a corpse because the legal principles underpinning property ownership inadequately defined the relationship between a next of kin and a decedent’s body. Property law uses the “bundle of rights” or “bundle of sticks” metaphor to describe the legal rights attached to property ownership. The “bundle of rights” includes the right to possess or occupy, the right to use or exploit, the right to exclude, the right to transfer, and the right to modify or destroy the land. A decedent’s next of kin does not possess the same legal rights. For example, the Texas Penal Code prohibits any knowing or intentional offer to buy, sell, acquire, receive, sell, or otherwise transfer “any human organ for valuable consideration.” The Texas Penal Code also prohibits the knowing offensive treatment of, vandalism of, or damage to a corpse that has been permanently laid to rest. The awkward application of well-established property rights to human remains resulted in a common law quasi-property right.

The quasi-property right established different legal rights, including the rights of holding and protecting the body until it is processed for burial, cremation[, or other lawful disposition; selecting the place and manner of disposition, and carrying out the burial or other last rites; and the right to the undisturbed repose of the remains in a grave, crypt, niche, urn, or elsewhere sanctioned by law.

Interfering with a next of kin’s quasi-property right is an actionable wrong enforced by state tort and contract laws. State law also determines the next of kin who can exercise the quasi-property right. This Comment focuses primarily on Texas law.

State law determines the next of kin who can exercise the quasi-property right based on a priority list of the decedent’s

45 TEX. PENAL CODE ANN. § 48.02(b).
46 TEX. PENAL CODE ANN. § 42.08(a)(5).
49 See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 711.002(a).
The Texas Health and Safety Code prioritizes the decedent’s surviving spouse, who maintains the principal right to control the disposition of the decedent’s remains.51 If no surviving spouse exists, the right belongs to the next in line. The Code then prioritizes the decedent’s surviving adult children, parents, and adult siblings.52 The law seems easy to enforce (methodically following the priority list); however, the difficulties that troubled the decedent in life do not die with their death.

The decedent’s spouse or next of kin can forfeit the quasi-property right or be deprived of the right by other means. For example, a surviving spouse convicted of family violence against the decedent53 or divorced before death forfeits the principal right.54 A surviving parent who does not maintain legal custody over the decedent during their lifetime forfeits the right.55 Any legally or biologically related family member may be deprived of the right by the government if the decedent’s remains are unidentifiable or commingled,56 or the decedent’s will, prepaid funeral contract, or signed and acknowledged written instrument provides otherwise.57 The decedent’s spouse or next of kin needs to possess the quasi-property right before enforcing it in tort or contract law.

2. Tort Law: Enforcing the Right to a Decent Burial

Tort law provides an action for mishandling human remains without a contract.58 The Restatement Second of Torts provides, “One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability

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50 Id. § 711.002(a)(1).
51 Id. § 711.02(a)(2).
52 Id. § 711.02(a)(3)-(5).
53 Id. § 711.002(k)(1).
54 Id. § 711.002(c).
56 See WTC Fams. for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 537 (S.D.N.Y. 2008) (holding New York City is not obligated to seek input from the families of 9/11 victims as to where any unidentified human remains should be located—the City is only obligated to disclose where the remains will be located because the quasi property right only extends to the next of kin for identifiable, recoverable bodies).
to a member of the family of the deceased who is entitled to the disposition of the body." An independent legal duty to not negligently mishandle a corpse exists when one takes care, custody, or control of a loved one’s remains.

The Restatement’s Comments emphasize that the “property” right “serve[s] as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor.” One cannot generally recover for emotional distress damages for property destruction; however, tort law awards damages for mishandling human remains, losing a corpse, or interfering with the right to bury. Tort law allows plaintiffs to receive compensation for mental distress and physical harm resulting from intentional, reckless, or negligent interference with the body or burial.

Texas tort law provides for damages to plaintiffs for emotional distress from mishandling human remains without requiring a showing of physical injury or physical manifestation of the emotional distress. Texas courts often scrutinize emotional distress damages because the injury can be temporary, trivial, and easily feigned. The courts’ concerns lessen when the emotional distress damages arise from the mishandling of human remains. First, courts allow emotional distress damages for “mere negligence without . . . aggravation” if a special likelihood of “genuine and serious mental distress” exists from “special circumstances.” The relationship between a person handling a decedent’s remains and the decedent’s next of kin creates the “special circumstances” that “guarantee . . . the claim is not spurious.” Second, an action for emotional distress is recoverable when it is “reasonably foreseeable” and thus opens the door to liability when one takes care, custody, or control of a loved

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62 Id. at case citations by jurisdiction (first citing State v. Powell, 497 So. 2d 1188, 1192 (Fla. 1986); then citing Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 441, 443 (W. Va. 1985)).
63 Id. cmts. a, f, d.
64 See, e.g., Boyles v. Kerr, 855 S.W.2d 593, 598 (Tex. 1993).
66 Id. at 461–62.
68 See id. at 987–88 (alteration in original).
one’s remains.69 A reasonable person knows or reasonably should know that those closely related to the decedent are “emotionally vulnerable.”70 Third, those who take care, custody, or control of a loved one’s remains are better situated than the plaintiff to prevent negligence and pay for the consequences when negligence occurs.71 For these reasons, Texas law does not require a physical injury or physical manifestation of emotional distress for a claim to be compensable.72

3. Contract Law: Enforcing the Right to a Decent Burial

Contract law provides an action for breach of contract relating to the care and burial of a corpse under certain circumstances.73 For example, plaintiffs recovered damages for breach of contract when a train74 and plane75 failed to timely transport a loved one’s remains, an undertaker failed to embalm and perform funeral services properly,76 and a telegraph company failed to promptly notify the decedent’s family of the decedent’s passing.77

Federal courts may find that an airline breached a contract to take care of a corpse, an implied covenant of good faith and fair dealing,78 or a contractual duty. Airlines enter “contracts of carriage” with future passengers upon each ticket sale.79 Generally, airlines may breach contracts of carriage by losing, damaging, or delaying a passenger’s checked baggage, carry-on baggage, or

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69 See Cantu, supra note 65, at 461–63.
70 See, e.g., Guth, 28 P.3d at 988 (citing Quesada v. Oak Hill Improvement Co., 261 Cal. Rptr. 769, 774 (Ct. App. 1989)).
71 See, e.g., Guth, 28 P.3d at 988.
72 See Boyles v. Kerr, 855 S.W.2d 593, 598 (Tex. 1993).
74 See Hale, 17 S.W. at 605–06; Linton, 109 S.W. at 942–43.
76 See Pat H. Foley & Co. v. Wyatt, 442 S.W.2d 904, 906–07 (Tex. App.—Houston [14th Dist.] 1969, writ ref’d n.r.e.); Clark v. Smith, 494 S.W.2d 192, 197 (Tex. App.—Dallas 1973, writ ref’d n.r.e.).
77 See W. Union Tel. Co. v. Shaw, 177 S.W.2d 52, 55 (Tex. 1944) (stating damages for telegraph company ascertained by breach of contract rules).
78 Texas contract law does not imply a covenant of good faith and fair dealing in every contract; however, it recognizes that such a duty may arise from a special relationship between the contracting parties. See, e.g., Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984).
personal property offered to the airline.\textsuperscript{80} Some contracts of carriage may include additional language explicitly relating to the shipment of a corpse. For example, airlines may contract to take “serious . . . care” when handling human remains,\textsuperscript{81} act with “sensitivity,”\textsuperscript{82} or consider a corpse the flight’s “most precious cargo.”\textsuperscript{83} Ultimately, an airline’s failure to satisfy a contract term constitutes a breach because the “airline dishonored a term the airline itself stipulated.”\textsuperscript{84}

The Supreme Court’s precedent regarding the ADA’s preemptive scope allows some state contract law claims to survive preemption. In \textit{American Airlines, Inc. v. Wolens}, the Court distinguished “self-imposed” contractual obligations from state-imposed obligations, allowing courts to enforce state contract law claims that an airline voluntarily undertakes.\textsuperscript{85} Most recently, in \textit{Northwest, Inc. v. Ginsberg}, the ADA preempted common law claims, which included a claim for breach of an implied covenant of good faith and fair dealing.\textsuperscript{86} Because the state incorporated the covenant into every contract, the state imposed the obligation of good faith and fair dealing.\textsuperscript{87} The \textit{Wolens} exception for state contract law claims allows contract-based claims to proceed under the ADA where the same tort-based theories fail.\textsuperscript{88} Part III discusses the Court’s precedents in greater detail.\textsuperscript{89}

The U.S. Department of Transportation’s (DOT’s) liability limits on property damage incurred on domestic flights may cap the success of contract-based claims arising from an airline’s mishandling of human remains. DOT limits an airline’s liability for property damage incurred on domestic flights to $3,800.\textsuperscript{90} The damage or loss must be “proven,” and the value of reimbursement is limited to “the documented original purchase
price less any applicable depreciation for prior usage.”91 This language arguably may preclude damages for mishandling or losing human remains whose value is never reflected in an original purchase price or depreciated by “prior usage.” Human remains possess an intrinsic value—not a commercial value—and cannot be bought and sold like other goods.92

B. The COVID-19 Pandemic: A Perfect Storm

The COVID-19 pandemic plagues Americans. To date, more than 1 million Americans have died of COVID-19.93 The CDC’s data indicate that 385,443 Americans died due to COVID-19 in 2020, and 446,197 Americans did so in 2021.94 Arguably, the volatility of the airline industry is the virus’s second most noticeable calamity. COVID-19 also overwhelmed the aviation industry, hitting commercial airlines especially hard.95 Global airline revenues fell 55% in 2020,96 commercial aircraft manufacturers incurred $12 billion in losses,97 and the number of passengers fell by 2.703 billion.98 Where these two effects—death and volatile/unreliable air travel—intersect, a perfect storm threatens to result in an airline mishandling, delaying, or losing a loved one’s remains en route to a final disposition. The COVID-19 pandemic thus emphasizes the need for courts to revisit and reinterpret the ADA’s preemption clause.

First, commercial airlines suffer persistent staff shortages.99 Roughly 400,000 commercial airline workers have been “fired, furloughed, or told they may lose their jobs due to [COVID-19].”100 The industry-wide pilot shortage and the pandemic’s lay-

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91 Delta, supra note 79, at 15.
92 Cf. Onyeanusi v. Pan Am. World Airways, Inc., 952 F.2d 788, 792 (3d Cir. 1992) (arguing that human remains have significant commercial value because medical schools and hospitals commonly use cadavers and because parts of the human body can be sold).
93 Ctrs. for Disease Control & Prevention, supra note 27.
94 See id.; Mizan, supra note 28.
95 Bouwer et al., supra note 29, at 6.
96 Id.
97 Id.
98 ICAO, supra note 32, at 5.
100 Jack Kelly, Airlines Lost Over 400,000 Workers—United Airlines Announced Another 14,000 Jobs May Be Lost, FORBES (Feb. 1, 2021, 10:57 AM), https://www.forbes.com/sites/jackkelly/2021/02/01/airlines-lost-over-40000-workers-
offs caused flight delays and cancellations in summer 2022. These diminished staff numbers are reduced further by regular sick leave. The Omicron variant caused U.S.-based commercial airlines to cancel over 20,000 flights and delay 2,300 flights between Christmas Eve, 2021, and the first week of January 2022. Delta—an airline that carries 3,000 to 4,000 corpses across the United States every month—canceled the most flights on Christmas. Delta canceled 309 flights, United canceled 240 flights, JetBlue canceled 123 flights, and American Airlines canceled 92 flights. On Thursday, December 23, Delta stated, “Delta teams have exhausted all options and resources – including rerouting and substitutions of aircraft and crews to cover scheduled flying.” Other airlines, including Southwest, United, and JetBlue, offered pilots and crews extra pay throughout January to fill in for sick staff. Overall, the percentage of delayed flights skyrocketed in 2022, from roughly 11.44% of flights delayed in 2021 to 20.12% of flights delayed in 2022.

Persistent staff shortages foreshadow more delayed or lost baggage. Airports in the United States do not own or operate...
their baggage-handling systems—rather, the airlines do. Each airline operates its baggage-handling system differently. Some airlines operate independently, some airlines operate with third-party assistance, and some airlines share baggage-handling responsibilities. The fractured baggage-handling system creates inefficiencies that result in damaged, delayed, or lost baggage. Airports in other parts of the world “lease” baggage-handling operations to third parties, who conduct baggage handling for all the airport’s airlines. Thus, staff shortages affect the baggage-handling system’s efficiency and accuracy more in the United States than elsewhere.

Second, COVID-19 minimized consumer choice in commercial air carriers. The aviation industry is “especially vulnerable to external shocks beyond [its] control,” including events such as 9/11, the 2008 global financial crisis, and COVID-19. Smaller, regional commercial air carriers often fold when demand shrinks while major commercial air carriers remain intact. With fewer options for air transportation, consumers grapple with major commercial air carriers that maintain litigation-tested policies, unresponsive bureaucracies, and effective intimidation tactics.

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112 See 109th Cong., supra note 110.


114 Cf. id.

115 BOUWER ET AL., supra note 29, at 6.


External shocks such as COVID-19 accelerate the consolidation of commercial air carriers into the dominant few.\textsuperscript{118} Deregulation of the aviation industry already adversely affects the number of commercial air carriers available.\textsuperscript{119} The former American Airlines Chairman once acknowledged,

The consequences [of deregulation] have been very adverse. Our airlines, once world leaders, are now laggards in every category, including fleet age, service quality and international reputation. Fewer and fewer flights are on time . . . . An even higher percentage of bags are lost or misplaced . . . . Airline service, by any standard, has become unacceptable.\textsuperscript{120}

The commercial air carrier oligopoly grows stronger with each economic downturn. Ultimately, minimized consumer choice only maximizes the remaining commercial air carriers’ ability to withstand any financial or reputational harm resulting from litigation arising from the mishandling of a loved one’s remains.

Third, commercial air carriers increased cargo shipping to subsidize passenger transportation during COVID-19. As COVID-19 clogged supply chains, demand for cargo air carriers went up 10\% through July 2020 compared to July 2019.\textsuperscript{121} Commercial air carriers responded to market needs to stave off bankruptcy.\textsuperscript{122} For example, United Airlines shipped vital medical supplies on its 777 and 787 planes; Delta Airlines converted passenger planes to cargo planes; American Airlines scheduled its first cargo-only flights since 1984.\textsuperscript{123} Commercial air carriers ac-


\textsuperscript{119} Id.


\textsuperscript{121} BOUWER ET AL., supra note 29, at 8.

\textsuperscript{122} See id.

cepted a renewed responsibility for shipping greater quantities of precious cargo. Yet, DOT limits an airline’s liability for lost, damaged, or delayed bags on a domestic flight to $3,800—regardless of the bag’s contents—and grants the airline discretion to pay more than the limit. 124

COVID-19’s numerous effects on commercial air carriers heighten the potential for grave injustice regarding an airline’s transport of a loved one’s remains. Part III explains how the Supreme Court and the Fifth Circuit’s interpretation of the ADA insulates commercial air carriers from liability for state law claims.

III. THE PREEMPTION PROBLEM: FEDERAL LAW VERSUS STATE LAW

The Constitution’s Supremacy Clause establishes the concept of preemption. 125 Article VI states, “[The] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . . .” 126 The Supremacy Clause preempts contrary or inconsistent state law; however, state law controls in the absence of directly contrary federal law. 127 As federal legislation, the ADA preempts contrary or inconsistent state aviation regulations. 128 This Comment provides a brief historical overview of U.S. aviation law to contextualize the Supreme Court’s cases defining the ADA’s preemptive scope.

A. THE SUPREME COURT’S GUIDANCE: LIMITING STATE LAW REMEDIES

Modern air transportation took off at the turn of the twentieth century when Orville Wright completed the first sustained, powered flight in 1903. 129 The need for a regulatory regime governing commercial aviation became increasingly apparent as

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124 U.S. DEP’T OF TRANSP., supra note 90.
126 U.S. CONST. art. VI, cl. 2.
127 See id.
129 A Brief History of the FAA, FAA, https://www.faa.gov/about/history/brief_history [https://perma.cc/LUQ3-2AUF].
flight technology progressed.\textsuperscript{130} Congress passed the Air Commerce Act of 1926, which vested regulatory authority in four distinct entities, including the states.\textsuperscript{131} Shortly after, Congress passed the Civil Aeronautics Act of 1938.\textsuperscript{132} Rather than dividing authority over navigable airspace, the Act vested sole government agency authority in the Civil Aeronautics Authority, which later became the CAB.\textsuperscript{133} The Act also included a “savings clause”: “Nothing 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.”\textsuperscript{134}

Congress passed the Federal Aviation Act of 1958 to create the Federal Aviation Agency, which later became the Federal Aviation Administration (FAA).\textsuperscript{135} The Federal Aviation Agency primarily functioned “to provide for the regulation” and “safe and efficient use of the airspace,” and “[t]o promot[e] . . . civil aviation.”\textsuperscript{136} Notably, the Act left the previous savings clause undisturbed: “Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute.”\textsuperscript{137} The savings clause allowed states to regulate intrastate airfares and enforce state laws against deceptive trade practices.\textsuperscript{138}

As inflation rose and oil prices skyrocketed, Congress deregulated the aviation industry to encourage “competitive market forces”; promote “efficiency, innovation, and low prices”; and provide “variety [and] quality . . . of air transportation ser-

\textsuperscript{130} John McDermott, \textit{The History of Airline (De)Regulation in the United States, Aeronautics} (June 26, 2017), https://aeronauticsonline.com/the-history-of-airline-deregulation-in-the-united-states/ [https://perma.cc/6ZQY-FFLK] (noting the first piece of aviation legislation, the Air Mail Act of 1925, did not involve commercial aviation; the Air Mail Act made air mail routes independent of the U.S. Post Office for a maximum of four years).


\textsuperscript{133} Kelly, \textit{ supra} note 131, at 876.

\textsuperscript{134} Civil Aeronautics Act of 1938, Pub. L. No. 706, § 1106, 52 Stat. 973.

\textsuperscript{135} Kelly, \textit{ supra} note 131, at 876; \textit{ see also} Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

\textsuperscript{136} Federal Aviation Act pmbl.

\textsuperscript{137} Dempsey, \textit{ supra} note 15, at 438 (quoting Federal Aviation Act § 1106).

The ADA saved the aviation industry from the inefficiencies of government regulation by rejecting the prior dual administrative system that allowed states to regulate intrastate airfare and the CAB to regulate interstate airfare. The ADA rid the states of regulatory oversight power by prohibiting any state from “enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.” The preemption clause effectively prevented states from reimposing regulations. The ADA also preserved the savings clause, reiterating that current state common law and statutory remedies shall not be “abridge[d] or alter[ed].” The Supreme Court struggled to define the preemption clause and the savings clause in a way that allowed the provisions to coexist meaningfully. The Court’s three cases grant the aviation industry considerable freedom to establish its own rule of law via private contractual agreements.


In Morales v. Trans World Airlines, Inc., the Supreme Court affirmed the Fifth Circuit, holding that the ADA preempted the National Association of Attorneys General’s (NAAG’s) regulation of airline advertisements’ content and format. The Court used the ordinary meaning of the ADA’s language to distill the statute’s legislative purpose. The crux of any ADA preemption case is whether a state law claim “relat[es] to [the] rates, routes, or services of any air carrier”; thus, the Court analyzed the phrase “relating to.” First, the Court noted that Black’s Law Dictionary defines “relating to” as “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into associa-

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140 See Zink, supra note 131, at 20; McDermott, supra note 130; Morales, 504 U.S. at 378.
145 See Morales, 504 U.S. at 391.
146 Id. at 383.
147 See id.
tion with or connection with.” 148 Second, the Court’s analysis of “relating to” in Employee Retirement Income Security Act of 1974 (ERISA) litigation recognized the phrase’s “broad scope,” “expansive sweep,” and “conspicuous . . . breadth.” 151 The Court concluded that the ADA preempted state law claims with a “connection with” or “reference to” airline “rates, routes, or services.” 152

The Court dismissed the Petitioner’s arguments about narrowing the ADA’s preemptive scope. 153 Petitioner argued the Court’s reliance on ERISA litigation overlooked critical differences between the statutes. 154 For example, ERISA was a comprehensive scheme, unlike the ADA. 155 The ADA also included a general savings clause, preserving common law and statutory remedies. 156 The Court was unpersuaded. First, ERISA cases “clearly and unmistakably rely on express pre-emption principles and a construction of the phrase ‘relates to.’” 157 Second, well-established statutory-interpretation rules assert “that the specific governs the general.” 158 Because the general savings clause existed pre-preemption, the savings clause does not “supersede the specific substantive pre-emption provision.” 159 Petitioner also argued that pre-emption “is inappropriate when state and federal laws are consistent.” 160 The Court again relied on ERISA precedents—preemption displaces all state laws that fall within the statute’s sphere, even consistent state laws. 161 Only state law claims with a “tenuous, remote, or peripheral” relationship to an airline’s services survive preemption. 162 Justice Stevens’s dissent objected to the Court’s reliance on ERISA’s

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148 Id. (quoting Relating to, BLACK’S LAW DICTIONARY (5th ed. 1979)).
149 Id. at 384 (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)).
150 Id. (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987)).
151 Id. (quoting FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990)).
152 Id. at 384.
153 Id. at 384–87.
154 Id. at 384.
155 Id. at 384–85.
156 Id.
157 Id. at 384.
158 Id. at 384–85 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987)).
159 Id. at 385.
160 Id. at 386.
161 Id. at 386–87.
162 Id. at 390 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).
“virtually unique pre-emption provision” and disregard for the ADA’s language, structure, and history.163 According to Stevens, nothing in the ADA’s language, structure, or history suggested Congress intended to preempt common law tort or contract claims.164

Although the Court “expansively” and “broadly” interpreted the ADA’s preemption clause based on the definition of “relating to,”165 the Court did not discuss the phrase’s limits. A limitless number of state law claims arising from an air carrier’s activity could “connect with” that airline’s rates, routes, or services. Lower courts have found state laws “relating to” an airline’s rates, routes, or services preempted in two circumstances based on Morales: (1) where the law expressly references an air carrier’s rates, routes, or services, or (2) where the law creates a “forbidden significant effect” on an air carrier’s rates, routes, or services.166 The Court added to the confusion three years later in American Airlines, Inc. v. Wolens.

2. American Airlines, Inc. v. Wolens

Respondents filed two state law claims in Wolens: a consumer fraud claim and a breach of contract claim.167 The Court distinguished the claims.168 The consumer fraud claim served to “guide and police the marketing practices of the airlines,” which the ADA reserved for the airlines.169 Morales preempted “intrusive [state] regulation” on an airline’s business practices.170 In contrast, the breach of contract claim did not involve a state-imposed obligation—an airline’s “self-imposed undertaking[ ]” does not amount to “a State’s ‘enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law.’”171 The Wolens exception allows obligations voluntarily undertaken by the airline and enforced by state law to survive preemption; however, contract law princi-

163 Id. at 419 (Stevens, J., dissenting) (quoting Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for S. California, 463 U.S. 1, 24 n.26 (1983)).
164 Id. at 420.
165 See supra notes 146–162 and accompanying text.
166 See Murphy, supra note 128, at 1200–03, 1201 n.28.
168 Id. at 226–27.
169 Id. at 228.
170 Id. at 227–28 (citing Morales, 504 U.S. at 392).
171 Id. at 228–29. (quoting brief for United States as Amicus Curiae, id. at 9 (No. 93-1286)).
ples that “effectuate the State’s public policies, rather than the intent of the parties,” are still preempted. The state’s public policies enlarged the parties’ obligations beyond the contract’s scope. Confused lower courts enforced Morales and Wolens inconsistently.

Justice O’Connor’s concurrence acknowledged the confusion Wolens created. She asserted that Morales and Wolens illustrate the same issue and thus should result in the same outcome—preemption of all state law claims. Neither Morales’ advertising guidelines nor Wolens’s frequent-flyer contract related to airline rates and services. Neither Morales’ advertising guidelines nor Wolens’s frequent-flyer contract maintained “legal force, except insofar as a generally applicable state law (a consumer fraud law in Morales, [and] state contract law [in Wolens]) permit[ted] an aggrieved party to invoke the State’s coercive power” to force compliance. Lastly, lower courts preempt state contract law under the ADA when the subject matter “relates” to an airline’s rates, routes, or services. Justice O’Connor distinguished some state personal injury claims that may too tenuously “relate” to an airline’s rates, routes, and services to be preempted. To support her claim, Justice O’Connor cited the Fifth Circuit’s Hodges opinion, which held that an airline’s “services” and an airline’s “safety” are not coextensive and thus safety-related tort claims survive preemption. Section III.B elaborates on Hodges.

3. Northwest, Inc. v. Ginsberg

Northwest, Inc. v. Ginsberg held the ADA preempted Respondent’s breach of implied covenant of good faith and fair dealing.

172 Id. at 233 n.8 (quoting brief for United States as Amicus Curiae, id. at 28 (No. 93-1286)).
173 Id. at 233.
174 See Smith v. Comair, Inc., 134 F.3d 254, 258–59 (4th Cir. 1998) (holding that the ADA preempted the breach of contract claim because the airline raised federal defenses and adjudication of the claim required reference to law and policies external to the parties’ bargain); Delta Airlines, Inc. v. Black, 116 S.W.3d 745, 755 (Tex. 2003) (holding that the ADA preempted the breach of contract claim because, although the contract incorporated DOT regulations, the plaintiff sought “to enlarge [the airline’s] obligations” and “modify the contract terms”).
175 See Wolens, 513 U.S. at 239–41 (O’Connor, J., concurring).
176 Id. at 240.
177 Id. at 240–41.
178 Id. at 241–42.
179 Id. at 242–43.
180 Id. at 242.
The Court rejected the respondent’s argument that the ADA’s preemption clause only applied to state-enacted legislation and regulations and concluded the ADA’s preemption clause also applied to state common law rules. Common law rules have “the force and effect of law.” The Court also rejected the respondent’s argument that the ADA’s savings clause preserved common law claims based on the Court’s interpretation of the savings clause in the Boat Safety Act. Distinguishing between the Boat Safety Act and the ADA, the Court reasoned that because the ADA’s savings clause was a “relic” of pre-preemption, the clause applied generally. General remedies clauses cannot supersede specific, substantive preemption clauses.

The Court supported its holding with another discussion of the ADA’s purpose. Essentially, Congress enacted the ADA assuming market forces, not government regulation, effectively promoted an airline passenger’s “best interests.” Airlines that “mistreat[ ]” passengers suffer enough reputational harm to force change because passengers can choose a “more favorable rival” in the free market. As Section II.B discussed, the Court erroneously assumes that mistreated passengers can choose between commercial air carriers—service to regional airports and commercial air carrier numbers decline with each external shock. The Court also assumes that consumers and commercial air carriers possess equal bargaining power.

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182 Id. at 281–82.
183 Id. at 282.
184 Id. at 282–83.
185 Id. at 283.
186 Id.
187 Id.
188 Id.
189 Id. at 288.
190 Id.
192 See Pallini, supra note 116.
193 Cf. id. (reporting that in “40 of the 100 largest U.S. airports, a single airline controls a majority of the market,” and “[a]t 93 of the top 100, one or two airlines control a majority of the seats,” leaving a distinct lack of alternative choices—and thus a lack of bargaining power—for mistreated consumers).
Lower courts struggle to apply the Court’s three cases, leading to inconsistent results. For example, one court held the ADA preempted breach of contract claims arising from an airline’s decision to board a passenger; however, another court held the ADA did not preempt tort claims arising from an airline’s decision to refuse to board a passenger. One court held the ADA preempted state law claims arising from an airline losing luggage; another court held that the ADA did not preempt state law claims arising from an airline tampering with luggage. One court held the ADA preempted state law claims arising from an airline’s decision to “bump[]” passengers from an overbooked flight; another court held the ADA did not preempt state law claims arising from an airline’s removal of a passenger from a flight. The precedents regarding the ADA’s preemptive scope create inconsistencies.

B. THE FIFTH CIRCUIT’S UNDERSTANDING: HODGES v. DELTA AIRLINES, INC.

The Fifth Circuit’s seminal case broadly interpreting the ADA defines the term “service” as all bargained-for elements of air carrier service, including “ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.” The CAB’s statements implementing the ADA supported the Fifth Circuit’s definition: “[P]reemption extends to all of the economic factors that go into the provision of the quid pro quo for [a] passenger’s . . . fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, [and] bonding and corporate financing.” Additionally, the statements emphasized that the ADA’s sole concern was economic deregulation, not displacing state tort law.

The Fifth Circuit emphasized that Hodges did not insulate commercial air carriers from all state tort claims for personal

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198 See Weiss v. El Al Israel Airlines, 309 F. App’x. 483, 485 (2d Cir. 2009).
200 Hodges v. Delta Airlines, Inc., 4 F.3d 350, 354 (5th Cir. 1993), aff’d en banc, 44 F.3d 334, 336 (5th Cir. 1995).
201 Id. at 354–55 (quoting 44 Fed. Reg. 9,948, 9,951 (Feb. 15, 1979)).
202 Id. at 354.
injury. First, DOT requires commercial air carriers to maintain insurance “for bodily injury to or death of a person, or for damage to property of others, resulting from the carrier’s operation or maintenance of the aircraft.” DOT’s insurance requirement supports a distinction between an airline’s “services” and “operation or maintenance.” Second, because the ADA incorporated the savings clauses found in the Federal Aviation Act of 1958 and the Civil Aeronautics Act of 1938, the court could not “assume that Congress meant completely to undermine” the clause’s preservation of existing common law and statutory remedies. Third, tort law does not “express[ly] reference” an airline’s services; thus, the enforcement of tort duties will not have “the forbidden significant effect” on airline services.

Though Hodges supports its definition of services with language in DOT’s insurance requirement, Hodges creates a false dichotomy between an airline’s “services” and “operation or maintenance.” Hodges only provides limited guidance on the meaning of “services” by illustrating examples of preempted cases. First, the ADA does not preempt state law claims arising from the negligent operation of overhead storage bins—i.e., the fact pattern in Hodges. An airline’s operation of overhead storage bins relates to an airline’s safety, not services. Second, the ADA preempts state law claims arising from an airline’s wrongful exclusion or eviction. Enforcing such state law claims would result in “significant de facto regulation of the airlines’ boarding practices” and would interfere with federal regulations granting the airlines considerable discretion in the matter. Third, the ADA preempts state law claims arising from an airline’s decision to “bump[]” a passenger from an overbooked
flight. Hodges indicates that state law claims involving boarding procedures do not survive preemption.

A recent district court decision affirmed by the Fifth Circuit expanded other aspects of Hodges’ definition of “service,” including “baggage handling” and “the transportation” of passengers and cargo. The court held the ADA preempts a tortious interference claim arising from an airline’s refusal to ship Big Five hunting trophies (trophies of “lions, leopards, elephants, rhinoceroses, and buffalo”). The airline’s decision to cease shipments of the trophies “merely altered the scope of its services.” Relying on Hodges, the court found that “baggage handling” involves an airline’s baggage and boarding policies and thus remains within the airline’s domain. Against these precedents, this Comment argues that courts should interpret the ADA’s preemption clause more narrowly based on the plain meaning of the ADA’s purpose, the ADA’s text, stare decisis, and the law’s treatment of other entities that mishandle human remains.

IV. THE ARGUMENT IN FAVOR OF A MORE HUMANE AVIATION INDUSTRY

A. The Act’s Purpose: Economic Deregulation Only

Courts rely on two cornerstones when determining whether federal law preempts state law. First, Congress’s purpose is the “ultimate touchstone.” A statute’s purpose regarding preemption may be explicitly stated or implicitly contained in its structure. Second, “the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act” controls unless Congress “clear[ly]” and “manifest[ly]” legislated with a contrary purpose. Both cornerstones favor a narrowly interpreted preemption clause, despite the Court’s precedents.

212 See id.
213 See id.
215 Id. at 608, 613–14.
216 Id. at 613.
217 See id. (quoting Hodges, 44 F.3d at 336).
219 Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).
221 Wyeth, 555 U.S. at 565 (quoting Medtronic, Inc., 518 U.S. at 485).
Courts accurately recognize the ADA’s purpose throughout their precedents: “[P]lacing maximum reliance on competitive market forces” and improving “the variety and quality of . . . air transportation services.” The Court in Morales and Wolens cited Congress’s explicitly stated objectives. The Fifth Circuit has stated Congress enacted the ADA to preempt solely economic regulations, not tort law, and the court has acknowledged that the savings clause “preserv[ed] the clearly established federal common law [in some areas].” Ginsberg reiterated that the Act deregulated the aviation industry so the market could determine rates, routes, and services. Congress included the preemption clause to prevent states from reimposing economic regulations and undoing what the Act may accomplish. Despite the courts’ overwhelming recognition that Congress enacted the ADA and included the preemption clause to ensure economic efficiency—and not to disturb state tort and contract laws—the courts’ imprecise language expands the ADA’s preemptive scope beyond what Congress intended.

Federalism principles counsel courts to avoid interpreting federal statutes to preempt state statutes without Congress clearly and manifestly intending the result. Justice Stevens’s Morales dissented cautioned courts to cabin the ADA’s preemptive scope because the Act’s plain language only “pre-empts . . . state law[s] that relate[ ] directly to rates, routes, or services.” The ADA should not preempt traditional state regulations that “might have some indirect connection” to an airline’s rates, routes, and services without more evidence. No evidence clearly and manifestly shows that Congress intended to preempt state tort and contract law claims; only evidence to the contrary exists.

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223 Id. § 40101(a)(12)(B).
225 See Hodges v. Delta Airlines, Inc., 4 F.3d 350, 354 (5th Cir. 1993), aff’d en banc, 44 F.3d 334, 336 (5th Cir. 1995).
228 Id.
230 See Morales, 504 U.S. at 421. (Stevens, J., dissenting).
231 Id.
232 See id. at 423–24.
gess preserved the savings clause from prior aviation law to protect certain existing common law and statutory remedies.\textsuperscript{233} Courts addressing the ADA’s preemptive scope minimize the savings clause’s importance and assume that the preemption clause more clearly reflects Congress’s purpose. \textit{Morales} downplayed the ADA’s savings clause from the beginning by labeling it a “relic” of aviation law before preemption.\textsuperscript{234} The unanimous \textit{Ginsberg} opinion repeated the quote.\textsuperscript{235} The Court’s attitude toward the savings clause resulted in the preemption clause eclipsing the savings clause. Legal scholars argue the ADA “supernova has . . . emasculated [the savings clause]” and far surpassed any Congressional effort to “circumscribe states’ ability to regulate intrastate airline entry and pricing.”\textsuperscript{236} The savings clause explicitly provides that “nothing contained in this chapter shall . . . abridge or alter the remedies now existing at common law or by statute.”\textsuperscript{237} Courts undermine the savings clause by using the clause’s presence in prior aviation laws as an indication that the clause is “general” and thus does not supersede the Act’s “specific” preemption clause.\textsuperscript{238} The assumption defies the statute’s explicit text by rejecting the statute’s stated purpose and rendering the savings clause meaningless.

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\textbf{B. Plain Meaning: It Is What It Is}
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The statute’s plain meaning supports the assertion that the ADA does not preempt state law claims for mishandling human remains. \textit{Hodges} defines “service” as all bargained-for elements of an air carrier service, including “ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.”\textsuperscript{239} A state law claim arising from the mishandling of human remains could only reasonably

\begin{footnotesize}
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\item \textsuperscript{233} See id. at 423.
\item \textsuperscript{234} See id. at 385 (majority opinion) (”[T]he ‘saving’ clause is a relic of the pre-ADA/no pre-emption regime.”).
\item \textsuperscript{236} Dempsey, supra note 15, at 445.
\item \textsuperscript{237} 49 U.S.C. § 1506 (1958) (emphasis added).
\item \textsuperscript{238} See \textit{Morales}, 504 U.S. at 385 (quoting \textit{Int’l Paper Co. v. Ouellette}, 479 U.S. 481, 494 (1987) (“[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving[s] clause.”)).
\item \textsuperscript{239} Hodges v. Delta Airlines, Inc., 4 F.3d 350, 354 (5th Cir. 1993), aff’d en banc, 44 F.3d 334, 336 (5th Cir. 1995).
\end{enumerate}
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be considered “baggage handling” or “transportation itself.” Based on the plain meaning of “service” and “baggage handling,” the ADA should not preempt a claim arising from the mishandling of human remains.

An airline’s “service” does not include its “transportation.” An entity can provide service and not transportation and vice versa. Merriam-Webster defines “service” as “the work performed by one that serves” or “a helpful act.” Merriam-Webster defines “transportation” as a “means of conveyance or travel.” An airline’s services require employees to “perform acts” and “serve,” while transportation refers to the “means of conveyance” itself—i.e., the airplane. Hodges acknowledges the difference between an airline’s services, like “ticketing, boarding procedures, provision of food and drink, and baggage handling,” and the “transportation itself” by using the phrase “in addition to” to add to an already enumerated list of services. Essentially, Hodges holds that the term “service” means “services” and “transportation.”

“Service” and “transportation” must mean two different things for courts to except safety-related tort claims from preemption. For example, federal courts in Texas allow state tort claims arising from airplane crashes for defective designs and in-flight injuries to proceed. These state tort claims survive preemption because the “means of conveyance”—or the transportation—was unsafe. An airline’s transportation is more analogous to an airline’s operation and maintenance, which does not “relate to” an airline’s rates, routes, or service. Claims arising from the mishandling of human remains are also not covered by an airline’s “baggage handling.”


243 Hodges, 4 F.3d at 354.


Merriam-Webster defines “baggage” as “suitcases, trunks, and personal belongings of travelers.”

First, human remains cannot be transported in suitcases or trunks. Each airline sets out extensive packaging requirements for cremated and noncremated remains. Second, property law principles preclude human remains from being considered a traveler’s “personal belongings.” The quasi-property right granted to a decedent’s next of kin does not include the right to “possess” the body. Third, a traveler’s personal belongings include items traveling with the passenger, which does not adequately describe the relationship between a decedent’s remains and a decedent’s next of kin. A decedent’s next of kin does not necessarily travel with the decedent’s remains.

C. STARE DECISIS: IN FAVOR OF A NEW PRECEDENT

Stare decisis prevents judges from abandoning legal precedent when presented with an argument previously resolved by another court of binding authority. The doctrine fosters stability by “promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity” of the judiciary. Stare decisis does not result

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250 See discussion supra Section II.A.1.

251 See Bernard, supra note 47, at 13 (observing that property rights allow next of kin to “hold[ ] and protect[ ] the body until it is processed for burial, cremation, or other lawful disposition”) (emphasis added).

252 See Personal Belongings, Merriam-Webster, https://www.merriam-webster.com/dictionary/personal%20belongings [https://perma.cc/684B-JMM6] (defining “personal belongings” as “items that belong to someone and that are small enough to be carried”).

253 Cf. Am. Airlines, supra note 248 (giving directions for “shipping” human remains, which implies that the next of kin need not travel with the remains in order to ship them).


in an “inexorable command,” however.\(^{256}\) The Supreme Court may reject stare decisis after concluding prior precedent is “unworkable” or “badly reasoned.”\(^{257}\) Stare decisis demands that the reviewing court articulate a reason “beyond mere demonstration that the overruled opinion was wrong.”\(^{258}\) Some factors determining whether the Court should overrule a prior opinion include (1) workability, (2) reliance, (3) anachronism, (4) changes in the facts, and (5) institutional legitimacy.\(^{259}\) Applying the stare decisis factors to \textit{Hodges} shows that the Fifth Circuit should overrule \textit{Hodges}.

First, workability considers whether the decision is judicially administrable and produces stable legal doctrine.\(^{260}\) The Fifth Circuit decided \textit{Smith v. America West Airlines, Inc.} the same day it decided \textit{Hodges}.\(^{261}\) \textit{Hodges} held that an airline’s operation of overhead storage relates to an airline’s safety, not an airline’s “services,” and thus the ADA does not preempt the state law claims.\(^{262}\) \textit{Smith} held that an airline’s boarding of a hijacker relates to an airline’s services, not an airline’s safety, because the claim relates to an airline’s boarding procedures.\(^{263}\) The Fifth Circuit in \textit{Smith} analyzed the issue based on “the scope of ‘services’ [the ADA] deregulated,” which included boarding procedures in both their economic and contractual dimensions.\(^{264}\) Both cases answered the question—does the ADA preempt state law claims—using different legal analyses. \textit{Hodges} analyzed the issue by distinguishing an airline’s services from an airline’s operation and maintenance.\(^{265}\) \textit{Smith} analyzed the issue by distin-

\(^{257}\) See \textit{id.} at 827 (quoting \textit{Smith v. Allwright}, 321 U.S. 649, 665 (1944)).  
\(^{259}\) See \textit{Ramos v. Louisiana}, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (identifying some stare decisis factors previously set out by the Court: “[T]he quality of the precedent’s reasoning; the precedent’s consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent”).  
\(^{261}\) See \textit{Smith v. Am. W. Airlines, Inc.}, 44 F.3d 344, 345 (5th Cir. 1995); \textit{Hodges v. Delta Airlines, Inc.}, 44 F.3d 334, 355 (5th Cir. 1995).  
\(^{262}\) \textit{Hodges}, 44 F.3d at 340.  
\(^{263}\) \textit{Smith}, 44 F.3d at 345, 347.  
\(^{264}\) \textit{Id.} at 347.  
\(^{265}\) See \textit{Hodges}, 44 F.3d at 339–40.
guishing claims with an economic dimension from claims with a noneconomic dimension. Hodges and Smith leave lower courts wondering what legal analysis to employ.

Second, the reliance factor considers whether people reasonably relied on the decision. Proponents of an expansive preemption clause may argue that any reinterpretation of the clause undermines commercial investments in the aviation industry. For example, the $6.6 billion merger of Frontier and Spirit Airlines, poised to create a massive, low-fare airline, may be undermined by a court decision that makes it easier to sue a commercial air carrier for state law claims. All commercial investments carry some reliance risk—even if the risk stems from the market and not the law.

Third, the anachronism factor considers whether subsequent legal developments undermine the decision. One district court established the three-pronged Rombom test to determine whether the ADA preempted state law claims. The test first considers whether the activity in dispute constitutes an airline “service.” If the activity constitutes a service, the court then considers whether the claim affects an airline’s services “directly” or “tenuously.” If the activity directly affects an airline’s services, the court considers whether the “underlying tortious conduct was reasonably necessary” to provide the service.

Some lower federal courts, including lower courts within the Fifth Circuit, apply Rombom. Other lower federal courts within the Fifth Circuit apply a two-part inquiry to determine whether

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269 See Ramos, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).
271 Id.
272 Id. at 222 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 389–90 (1992)).
273 Id.
the ADA preempts a state law claim. The inquiry considers whether a state law claim relates to “rates, routes, or services” and whether the plaintiff’s recovery would constitute “an enactment or enforcement of a state law, regulation, standard, or other substantive provision.” Lower federal courts’ application of other legal tests undermines Hodges.

The fourth factor considers whether the facts informing the decision have changed. The Fifth Circuit decided Hodges almost thirty years ago, and states imposed economic regulations on an airline’s rates, routes, or services almost forty-five years ago. As time passes, the fear that states may reimpose previous regulations lessens. Second, as discussed in Section II.B, the COVID-19 pandemic had an unprecedented impact on the aviation industry. As cancellations, flight delays, and lost baggage abound, courts should consider reeling in the ADA’s preemption clause to make it easier for passengers to sue airlines for justice’s sake.

Fifth, the institutional legitimacy factor considers whether there are special reasons to be concerned about the court’s standing if its decision is overruled. The Texas Supreme Court questioned Hodges’ reasoning:

We do not read those cases [Morales and Wolens] to suggest that a tort claim related to airline services is not preempted if it is related to aircraft operations or maintenance. Morales’ construction of “relating to . . .” could scarcely be broader. We do not think the [Supreme Court] would have failed to mention an exception to this construction large enough to encompass claims relating to aircraft operations and maintenance.

Reasonable justices and judges in state and federal courts must arrive at the same conclusions when presented with similar

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276 Id.


278 Hodges v. Delta Airlines, Inc., 44 F.3d 334, 335, 337 (5th Cir. 1995) (noting that the ADA was concerned with “dimant[ing] federal economic regulation” and “prevent[ing] the states from frustrating the goals of deregulation”); see also discussion supra Sections III.A, IV.A.

279 See discussion supra Section II.B.


facts to preserve the judiciary’s institutional legitimacy. The Fifth Circuit’s institutional legitimacy would likely improve if it overruled Hodges—at least in the eyes of the Texas Supreme Court—since overruling would clarify this area of law.

D. SUCCESS ELSEWHERE: A HALL PASS FOR COMMERCIAL AIR CARRIERS

“[D]elay in the interment of dead bodies unnecessarily is repugnant to the sentiment of humanity and should not be permitted . . . .”

Courts enforce claims arising from the mishandling of human remains against other entities. Hospitals may be held liable for the negligent handling, transportation, and disposition of human remains. For example, Texas provides mental anguish damages to close family members for the mishandling of human remains. Further, St. Elizabeth Hospital v. Garrard establishes that a plaintiff states a valid claim by asserting a hospital negligently disposes of the plaintiff’s stillborn infant’s body in an unmarked grave without the plaintiff’s knowledge or consent.

Funeral directors are liable for mishandling human remains, including for misconduct related to “[r]etrieving the body and transporting the body to the funeral home.” A special relationship exists when an entity assumes responsibility for disposing of remains. The relationship between an entity disposing of a decedent’s remains and a decedent’s next of kin creates a legal duty that exists regardless of contractual privity. A funeral home owes individuals an “independent legal duty . . . to not mishandle a corpse” and thus to not interfere with an individual’s right to bury a loved one. Public policy also supports holding funeral directors to a higher standard of care because “psychologi-

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282 See Ramos, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (discussing the importance of stare decisis).
284 See, e.g., Nelson, 540 S.W.3d at 540–41.
285 Id.
288 See discussion supra Section II.A.2.
289 Radar Funeral Home, Inc. v. Chavira, 553 S.W.3d. 10, 17 (Tex. App.—El Paso 2018, no pet.); see also Nelson, 540 S.W.3d at 546; Boyles, 855 S.W.2d at 596.
cal devastation [is] likely to result from any mistake which upsets the expectations of the decedent’s bereaved family. 290

Commercial air carriers are the only entity insulated from liability arising from mishandling human remains. For example, a Texas state court found a funeral director liable for delivering the wrong body after transporting the remains across the state; 291 however, Pan Am (a domestic airline that no longer exists) 292 avoided liability based on similar facts. 293 Pan Am presented the next of kin with the wrong remains before delivering the actual relative’s remains in a damaged and partially decomposed state a week later. 294 The Warsaw Convention governed the case because the Pan Am flight was international, not domestic. The Warsaw Convention contains a similar preemption clause to the ADA that preempted the plaintiffs’ state law claims arising from Pan Am’s negligence. American Airlines also avoided liability for damaging and ransacking a decedent’s casket under the Warsaw Convention. 295

One lower federal court in Texas recognized the inconsistency in how the law treats entities that mishandle human remains. 296 The court relied on Texas precedents establishing a cause of action for the negligent or wrongful mishandling of human remains. 297 In particular, the court drew from a Texas case that found a rail company liable for the eight-hour delay in transporting human remains. 298 Because the airline delayed the transportation of the decedent by willful acts or omissions, the plaintiffs recovered against the airline regardless of the Warsaw Convention’s liability limits. 299 Under the contract of carriage, the airline breached a duty because the airline and its agents did not deliver the casket promptly. 300 Neither the entity nor the distance of the flight should determine whether a decedent’s

291 See Radar Funeral Home, 553 S.W.3d. at 17.
294 Id. at 790.
297 See id. at 480.
298 Id. (citing Lancaster v. Mebane, 247 S.W.2d 926 (Tex. App.—Texarkana 1924, writ ref’d)).
299 Id. at 479.
300 Id. at 481.
next of kin can recover for mishandling human remains. The underlying conduct is still egregious, and the likelihood of psychological devastation from the misconduct is still high.

V. CONCLUSION

The COVID-19 pandemic deeply affected the world. The pandemic claimed more than a million American lives and devastated the domestic aviation industry.\textsuperscript{301} As the country experiences more loss and domestic commercial air carrier service becomes more unreliable, a perfect storm threatens the mishandling, delay, or misplacement of a loved one’s remains—without a legal remedy available to grieving mothers, fathers, husbands, or wives. Courts should interpret the ADA’s preemption clause more narrowly based on the ADA’s purpose, the ADA’s text, stare decisis, and the law’s treatment of other entities that mishandle human remains.

\textsuperscript{301} See discussion supra Section II.B.