Federal Preemption of State Law Relating to an Air Carrier's Services

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While opening the overhead compartment of an airplane to get to your luggage, another passenger's case of rum falls from the compartment and injures you. Can you sue in state court to recover from the airline on a negligence theory? Your ability to seek recourse in state court depends on how the court interprets the Airline Deregulation Act (Act), which preempts state law relating to an air carrier's "service." Before ruling on the merits of your hypothetical suit, the court must determine whether the state's negligence law relates to the type of services that the Act covers, which requires the court to determine the breadth of an airline's services under the Act.

Courts interpreting the preemption standard have adopted conflicting definitions of "service." One interpretation is that "service" means air services, involving only actual transportation and its frequency and scheduling. If the term is given this narrow definition, express preemption can never occur with regard to the other various

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1 The hypothetical is based on Hodges v Delta Airlines, Inc, 44 F3d 334, 335 (5th Cir 1995) (en banc).
3 49 USC § 41713(b)(1) ("Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States 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 that may provide air transportation under this subpart.").
4 See Branche v Airtran Airways, Inc, 342 F3d 1248, 1251 (11th Cir 2003) (holding that the Act did not preempt a retaliatory discharge claim); Botz v Omni Air International, 286 F3d 488, 494 (8th Cir 2002) (holding that the Act preempted a flight attendant's retaliatory discharge claim); Arapahoe County Public Airport Authority v Federal Aviation Administration, 242 F3d 1213, 1222 (10th Cir 2001) (holding that the Act preempted a public airport authority's ban on passenger service); Charas v Trans World Airlines, Inc, 160 F3d 1259, 1261 (9th Cir 1998) (en banc) (holding that the Act preempted only state laws and lawsuits that adversely affected deregulation); Smith v Comair, Inc, 134 F3d 254, 256 (4th Cir 1998) (holding that the Act preempted a breach of contract claim); Taj Mahal Travel, Inc v Delta Airlines, Inc, 164 F3d 186, 192–94 (3d Cir 1998) (holding that a defamation claim was not preempted); Travel All Over the World, Inc v Kingdom of Saudi Arabia, 73 F3d 1423, 1433–35 (7th Cir 1996) (holding that the Act did not preempt defamation and punitive damage claims); Hodges, 44 F3d at 335–36 (holding that a state tort action was not preempted).
5 See Charas, 160 F3d at 1265–66 (stating that "service" refers to "such things as the frequency and scheduling of transportation"); Taj Mahal Travel, 164 F3d at 192–94 (agreeing with the definition of "service" used in Charas).
services the airlines provide. In contrast, “service” can also include airline services beyond transportation, such as flight attendant services, overhead compartment storage, and boarding procedures. If the term is given this broad definition, the statute can preempt all of these other areas if the state regulations have the requisite connection to them. Courts have grappled with defining the term “service” in a variety of contexts, including common law tort claims, state whistleblower statutes, and anti-discrimination statutes.

Because courts have not been able to arrive at a uniform definition of “service” under the Act, the outcome of your hypothetical negligence suit against the airline will depend on the circuit in which the suit is filed. In 2000, the Supreme Court had the opportunity to decide the scope of the term “service,” but decided not to hear the case. Three justices dissented from that decision, emphasizing the importance of the legal issue and the disagreement in the circuit courts. Since that case, the disagreement has only broadened.

The courts’ interpretive inconsistencies are especially troubling because they have led to much confusion in the airline industry on a high-stakes topic. Until a workable definition of the term is applied uniformly across the country, contradictory legal obligations can be imposed on airlines depending on their location or the location of their services. The airlines will be unable to assess the effects of the Act’s preemption provision and to take it into account in organizing their affairs. This inconsistency could lead the airlines to avoid some geographic markets and favor others depending on the circuits’ defini-

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6 See Branche, 342 F3d at 1257 (adopting a broad definition of “service”); Arapahoe County Public Airport Authority, 242 F3d at 1222 (including transportation itself in the definition of “service”); Comair, 134 F3d at 256 (rejecting a definition of “service” that does not include transportation); Travel All Over the World, 73 F3d at 1433 (adopting the definition of “services” used in Hodges); Hodges, 44 F3d at 335-36 (defining “services” as the “anticipated provision of labor from one party to another”).

7 For claims involving state anti-discrimination laws, see, for example, Wellons v Northwest Airlines, Inc, 165 F3d 493, 494 (6th Cir 1999) (holding that the state law anti-discrimination statute was not preempted). For claims involving state whistleblower laws, see, for example, Branche, 342 F3d at 1261.


9 Id at 1058–59 (O’Connor dissenting, joined by Rehnquist and Thomas).

10 Compare Branche, 342 F3d at 1258 (11th Cir 2003) (holding that a state law whistleblower claim against an airline is not preempted), with Botz, 286 F3d at 494–95 (8th Cir 2002) (holding that a state law whistleblower claim against an airline is preempted).

11 See, for example, Ann Thornton Field and Frances K. Davis, Can the Legal Eagles Use the Ageless Preemption Doctrine to Keep American Aviators Soaring above the Clouds and into the Twenty-First Century?, 62 J Air L & Comm 315, 317 (1996) (noting that “[t]he vehemence with which parties have argued [] serves notice of the underlying rivalry for the, as yet, unresolved control of the aviation subject”).

12 See Northwest Airlines, 531 US at 1059 (O’Connor dissenting) (“Because airline companies operate across state lines, the divergent pre-emption rules formulated by the Courts of Appeals currently operate to expose the airlines to inconsistent state regulations.”).
tion of the term, a costly practice for both consumers and the industry.¹³ Consistency would level the playing field by making airline costs uniform across the country with regard to the scope of preemption.

In this Comment, I formulate a definition of "service" based on standard statutory interpretation and preemption principles, and on Supreme Court precedents regarding the Act's preemption provision. In Part I, I introduce the preemption provision in general terms and discuss the two Supreme Court cases on point. In Part II, I discuss the various definitions of the term that the circuit courts have used. In Part III, I critique these different definitions. Finally, in Part IV.A, I conclude that the broad, ordinary definition of the term "service"—a labor not producing a tangible commodity—should be used. This definition encompasses all services the airlines provide. However, I argue that preemption will still be limited by the Supreme Court's requirement that the state law have a more than tenuous connection to the services in question. In Part IV.B, I apply this definition to the most common situation in which this issue has arisen—negligent physical injury tort cases. I conclude that this definition will not preempt ordinary physical injury tort claims because they do not have the requisite significant connection to those services. Since this issue has arisen in such a variety of settings, this definition will provide clarity to consumers and the airline industry.

I. HISTORICAL BACKGROUND OF THE AIRLINE DEREGULATION ACT'S PREEMPTION PROVISION

A. The Airline Deregulation Act's Preemption Provision

Prior to 1978, the federal government heavily regulated the airline industry.¹⁴ State regulation was allowed to coexist with federal regulation because of the Federal Aviation Act's "savings" clause.¹⁵ However, in 1978 Congress decided that airline competition would better promote efficiency in the industry¹⁶ and deregulated it with the

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¹³ The costs of air transportation in some circuits might be artificially higher than the costs of air transportation in other circuits solely because the circuit's preemption analysis could create higher prices and less demand in those circuits with a narrow definition.


¹⁵ See Federal Aviation Act § 1106, 72 Stat at 798 ("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."). For the current version, see 49 USC § 40120(c) ("A remedy under this part is in addition to remedies provided by law.").

¹⁶ See Airline Deregulation Act § 102(a)(4), 92 Stat at 1706, codified at 49 USC § 40101(a)(6) (instructing the regulatory agency to place "maximum reliance on competitive market forces and on actual and potential competition" for air transportation). For possible justifications of this competitive approach, see Joseph D. Kearney and Thomas W. Merrill, The Great
Airline Deregulation Act of 1978. In order to prevent state regulation from interfering with federal deregulation and subverting competition, the Act contained an express preemption provision. The provision originally provided, in relevant part, that “no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.” The Act has been slightly modified over time, but its operative provisions remain in force today.

B. Supreme Court Interpretation of the Preemption Provision

The Supreme Court has twice had the opportunity to interpret the Act’s preemption provision. First, in Morales v Trans World Airlines, Inc., the Court interpreted the “relating to” language of the provision. The Texas attorney general alleged that TWA violated the state’s Air Travel Industry Enforcement Guidelines by not disclosing all surcharges in its advertised prices. TWA sought a declaratory judgment that the Act preempted the guidelines.

In analyzing the express preemption provision, the Court first noted that the ordinary meaning of “relating to” has a broad scope so that the provision should preempt “[s]tate enforcement actions having a connection with, or reference to, airline ‘rates, routes, or services.'”

Transformation of Regulated Industries Law, 98 Colum L Rev 1323, 1399 (1998) (“There has been a broad consensus among economists since the early 1970s, if not before, that the original paradigm of active government regulation makes no sense as applied to industries without any natural monopoly features—such as trucking and airlines.”).

92 Stat 1705, codified at 49 USC § 40101 et seq.

Airline Deregulation Act of 1978 § 105(a)(1), 92 Stat at 1708, codified as amended at 49 USC § 41713(b)(1). On the issue of whether Congress should make these express preemption provisions, or whether it should leave it to the courts to define preemption based on implicit preemption principles, see Susan J. Stabile, Preemption of State Law by Federal Law: A Task for Congress or the Courts?, 40 Vill L Rev 1, 78–79 (1995) (noting that Congress should not use express preemption clauses because it cannot draft satisfactory clauses and the courts cannot adequately fix the problems created by them).

See Act of July 5, 1994, Pub L No 103-272, 108 Stat 745, 745, codified at 49 USC § 101 et seq (2000) (noting it was an act “[t]o revise, codify, and enact without substantive change certain general and permanent laws, related to transportation”). See also American Airlines, Inc v Wolens, 513 US 219, 223 n 1 (1995) (“Congress intended the revision to make no substantive change.”). For the text of the modified preemption provision, see note 3. Since there are no substantive differences between the provisions, I refer to them interchangeably, depending on how the decisions at issue used the words.

504 US 374 (1992) (holding that guidelines regarding airline fair advertising were expressly preempted by the Act).

Id at 379. The applicable standard stated that “[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare.” Id at 405 (reproducing the National Association of Attorneys General, Air Travel Industry Enforcement Guidelines § 2.5 (1998)).

Id at 384.
The Act’s savings clause could not trump this express language because of the canon of construction that the specific governs the general. Further, the Court held that it was irrelevant whether the state law was enacted specifically for the airline industry or was a general enactment for many industries. However, the Court limited the preemption provision by holding that “some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner” to be preempted. Notably, the Court concluded that state prostitution and gambling laws would not be preempted when applied to the airlines. However, because the state statute in this case was clearly related to rates, the Court did not elaborate on how to draw the line between sufficiently “related to” and “too tenuous.” Instead, the Court simply concluded that the state guidelines on advertising were preempted because they patently made a reference to airline rates.

In American Airlines, Inc v Wolens, the Supreme Court interpreted the “enact or enforce any law” language in the preemption

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23 Id at 384-85 (noting that the clause was “a relic of the pre-ADA/no preemption regime”).
24 Morales, 504 US at 386 (noting that it would be irrational to create a preemption loophole allowing states to impair a federal scheme through a “particularized application of a general statute”).
26 Morales, 504 US at 390.
27 Id (noting that the Court did not decide the issue of whether state regulations against obscene depictions in advertisements related to rates, and that this connection was far more tenuous).
28 Id at 388 (noting also that the guidelines had “the forbidden significant effect upon fares”). For discussion of Morales, see Daniel H. Rosenthal, Note, Legal Turbulence: The Court’s Misconstrual of the Airline Deregulation Act’s Preemption Clause and the Effect on Passengers’ Rights, 51 Duke L J 1857, 1871-73 (2002) (arguing that the Act’s preemption provision was interpreted too broadly based on a “strict constructionist” approach, and that it should be narrowed, as the preemption provision of the Employee Retirement Income Security Act (ERISA) has been); Jack E. K Lars, Roger P. McIntyre, and Ernest B. Uhr, The Policy Conflict between State and Federal Government Efforts to Regulate Airline Advertising, 29 Creighton L Rev 647, 669-70 (1996) (noting that Morales has had a broad impact beyond just advertising with regard to preemption and the airlines); Eric W. Maclure, Note, Morales v Trans World Airlines, Inc.: Federal Preemption Clips States’ Wings on Regulation of Air Fare Advertising, 71 NC L Rev 905, 926-27 (1993) (arguing that Morales was wrongly decided because it placed too much emphasis on the text and not enough emphasis on legislative history in determining congressional intent). The ERISA preemption provision is quite similar. It preempts any state law that relates to an employee benefit plan. See 29 USC § 1144(a) (2000). Many courts look to the scope of the ERISA preemption provision to help analyze the Act’s preemption provision. See, for example, Abubrisson v Delta Air Lines, Inc, 128 F3d 77, 82-83 (2d Cir 1997). Notably, after Morales and Wolens, the ERISA preemption provision was interpreted in a more functional way. See, for example, New York State Conference of Blue Cross & Blue Shield Plans v Travelers Insurance Co, 514 US 645, 656 (1995) (“We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”).
Members of American Airlines' frequent flyer program brought a class action suit alleging that retroactive changes in the value of accumulated credits were both a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and a breach of contract. The Court first held that the allegation about the violation of the Illinois law was preempted because it related to rates, similar to the law in Morales. A state statute that generally prohibited deceptive trade practices was preempted because the state had enacted a law that regulated airline price advertising. However, state enforcement of private contracts was not preempted by the Act because the state was only holding parties to their agreements. Thus, taking both Morales and Wolens together, for preemption to occur, "[a] state must 'enact or enforce' a law that [ ] 'relates to' airline rates, routes or services, either by expressly referring to them or by having a significant economic effect upon them."

II. THE CIRCUIT COURTS' VARIOUS INTERPRETATIONS OF THE TERM "SERVICE"

The Supreme Court has never interpreted the word "service" in the Act's preemption provision. However, in Wolens it did state that "services" included "access to flights and class-of-service upgrades." Circuit courts have offered a variety of rationales to reach different decisions on the term's proper definition. In this Part, I will set out the various approaches. I begin with the broadest and most preemptive definition. Courts adopting this definition typically conclude that the term "service" encompasses all bargained for exchanges between the airline and the customer—including transportation and scheduling, boarding procedures, and the amenities of travel such as flight attendant service, baggage handling, and the provision of overhead compartment space. Some courts adopting this broad definition impose exceptions to it, for example, by arguing that safety services are not

30 Id at 222.
31 Id at 224–25.
32 Id at 227–28.
33 See id at 228–33. For conflicting views on Wolens's holding, compare Matthew Azoulay, Note, American Airlines, Inc. v. Wolens: The Supreme Court's Reregulation of the Airline Industry, 5 Widener J Pub L 405, 429–32 (1996) (arguing that since the "relating to" language should be interpreted broadly, the "enact or enforce any law" language should also be interpreted broadly and probably should include breach of contract claims as well), with Sue Haverkos, Case Note, Crash and Burn—The Airlines' Preemption Defense Goes Down in Flames, 64 U Cin L Rev 1141, 1162 (1996) (arguing that Wolens's holding with regard to the breach of contract claim was "consistent with both the language and the policies of the [Act]").
34 Travel All Over the World, Inc v The Kingdom of Saudi Arabia, 73 F3d 1423, 1432 (7th Cir 1996) (discussing the preemption scope with regard to a defamation allegation).
35 513 US at 226.
preempted but economic services are. Finally, I conclude with the narrowest and least preemptive definition of “service.” Courts adopting this definition hold that “service” includes only “air services”—the transportation between two points and the scheduling of that transportation.

A. “Service” to Mean All Aspects of Bargained for Exchange

In Hodges v Delta Airlines, Inc, the Fifth Circuit, in an en banc decision, launched the debate over the term “services” by interpreting the word broadly. The court adopted the following definition:

“Services” generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as “services” and broadly to protect from state regulation.

If this definition is used without exception, the Act would have broad preemptive effect: state laws would be preempted if they had a significant effect on any airline service, including boarding procedures and amenities provided by airlines, such as flight attendant service or overhead compartment space.

Several courts have used this broad definition. For example, the Seventh Circuit, explicitly adopting the Fifth Circuit definition, held that intentional tort claims involving fraud were preempted if they re-

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36 44 F3d 334 (5th Cir 1995) (en banc).
37 Id at 336, quoting Hodges v Delta Airlines, Inc, 4 F3d 350, 354 (5th Cir 1993) (original panel decision). The Fifth Circuit limited this definition by making exceptions to it, which are discussed in Part II.B. However, three other circuit courts have explicitly or implicitly used the Hodges definition without exceptions. See Arapahoe County Public Airport Authority v Federal Aviation Administration, 242 F3d 1213, 1222 (10th Cir 2001) (citing to the Hodges definition in support of its preemption analysis); Smith v Comair, Inc, 134 F3d 254, 259 (4th Cir 1998) (citing to Hodges and noting that “[u]ndoubtedly, boarding procedures are a service rendered by an airline”); Travel All Over the World, Inc v The Kingdom of Saudi Arabia, 73 F3d 1423, 1433 (7th Cir 1996) (explicitly accepting the Hodges approach). Finally, one other circuit appears to use a similarly broad definition of “services” without citing to Hodges. See Botz v Omni Air International, 286 F3d 488, 494-95 (8th Cir 2002) (noting that the term should be interpreted broadly on a plain language approach).
lated to ticketing and transportation. Indeed, the court held that all claims expressly referring to airline services would be preempted. Two other circuits have also implicitly accepted the Fifth Circuit's broad definition. The Fourth Circuit held boarding procedures were services, and thus preempted. The Tenth Circuit held that actual transportation was a service, but by citing to the Hodges definition, implicitly adopted a broad definition of "service" including more than just transportation.

The Eighth Circuit has used a similarly broad definition. In Botz v Omni Air International, the court addressed whether a state whistleblower claim was preempted under the Act. The plaintiff was terminated for refusing to accept an assignment that she regarded as violating the Federal Aviation Regulations limitation on how long a flight attendant could stay on duty. The court did not explicitly define the term "service," but noted that like "related to," the term "price, route, or service" has a broad scope. The court found it especially noteworthy that there were no qualifying terms in front of any of these words, such as "air service" instead of "service." The court held that the statute was preempted because it affected airline services, using the term's broad scope as a justification. If flight attendants could refuse to do their jobs without retaliation, airlines could not complete their flights.

The term "service" thus could have broad preemptive effect. Any state laws relating to boarding procedures, flight attendant duties, the storage of luggage, and like provisions would be preempted. Under this definition, negligence tort claims might also be preempted since

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38 Travel All over the World, 73 F3d at 1433-35 (holding that claims alleging defamation and slander were not preempted because an airline's defamation of the plaintiff in no way involved provision of airline services, but that intentional tort claims may be preempted if they involved ticketing and transportation).

39 See Comair, 134 F3d at 259 (holding that all claims relating to boarding procedures are preempted unless the conduct is so outrageous that it is too tenuously related).

40 Arapahoe County Public Airport Authority, 242 F3d at 1222 (holding that an airport authority's moratorium on considering applications for air services is preempted). This holding is also consistent with the narrow definition; the cite to Hodges in dictum, however, suggests that the Tenth Circuit intended to include more than transportation in "service." See Sawyer v Southwest Airlines, Co, 2004 US Dist LEXIS 128, *14-15 (D Kan) (noting that the Tenth Circuit has not defined the scope of the term, but has said that "elements of air carrier service include such items as ticketing, boarding procedures, provision of food and drink and baggage handling, and transportation itself").

41 286 F3d 488 (8th Cir 2002).

42 Id at 491.

43 Id at 489. For the specific Federal Aviation Regulation, see 14 CFR § 121.467(b)(2) (2003) (requiring that a flight attendant must receive nine hours of rest per fourteen hours of duty, subject to some minor exceptions).

44 Botz, 286 F3d at 494.

45 Id at 494-95. It did note that this state law claim might be preempted under the narrow approach as well because it related to the actual transportation of the airline. However, it refused to qualify the term in any way and gave it broad preemptive effect.
they typically involve the actions of flight attendants or other provisions of services. For example, a claim involving luggage falling from an overhead compartment ostensibly would relate to the provision of baggage handling, which fits within the definition.

B. "Service" to Mean All Aspects of Bargained for Exchange, but Providing Explicit Limitations

Some courts have made exceptions to this literal and broad Fifth Circuit definition, giving it a more limited preemptive effect. These exceptions include distinguishing between a service and the operation of the plane and between economic and safety services. Indeed, the Fifth Circuit made the former distinction in Hodges. In that case, the plaintiff sued an airline for negligence after she was injured by a box that fell from the overhead compartment.\footnote{Hodges, 44 F3d at 335.} The court relied on the statutory requirement that airlines keep insurance to cover injury or property damage “resulting from the operation or maintenance of the aircraft.”\footnote{Id at 338, citing 49 USC § 41112, 14 CFR § 205.5 (2003), which came after the decision, provides the same insurance requirement.} It concluded that this statute would be superfluous if all state tort law were preempted because no one could sue to receive the insurance.\footnote{Hodges, 44 F3d at 338.} Therefore, the court held that this insurance component implied that airlines could be sued in state court for tortious acts that resulted from the operation or maintenance of an aircraft.

The Fifth Circuit gave “operation and maintenance” a broad definition to include putting luggage in overhead bins.\footnote{Id.} It based this reading solely on the Federal Aviation Act’s definition of “operation of aircraft,” which is defined as “using aircraft for the purposes of air navigation.”\footnote{Id.} The court concluded that “[o]ne uses the overhead luggage racks or the food and beverages provided in aircraft operation just as one uses the cigarette lighter or built-in cooler compartment in an automobile, and all these devices are available to support the general purpose of navigation.”\footnote{Id. The court did not rely on the definition of “maintenance of aircraft” because it is not defined in the FAA.} Thus, the personal injury tort was not preempted, even under the broad definition of “services.”\footnote{The dissent argued that the services/operation dichotomy was correct, but that storing luggage in an overhead compartment was a service offered by airlines because it did not relate to the navigation of the plane. See Hodges, 44 F3d at 343–44 (Higginbotham dissenting). For a discussion of the majority’s holding, see Kyle Volluz, Comment, The Aftermath of Morales and Wolens: A Review of the Current State of Federal Preemption of State Law Claims under the Airline Deregulation Act of 1978, 62 J Air L & Comm 1195, 1207–11 (1997) (arguing that the services versus operation/maintenance dichotomy was untenable); Donald J. Frenette, Case Note, Avoid-
Courts have also distinguished economic services from safety services. Most recently, the Eleventh Circuit in *Branche v Airtran Airways, Inc* explicitly accepted the Fifth Circuit's broad definition of "service." The court concluded that a state whistleblower statute was not preempted because the Act preempted only those services over which airlines compete. Since carriers do not compete over safety, and the plaintiff was alleging safety violations, his duties were not considered services under the Act. The Fifth Circuit also made this distinction in *Smith v America West Airlines, Inc* by distinguishing economic decisions regarding boarding procedures from safety decisions, with only the former being preempted.

Thus, the Fifth and Eleventh Circuits have limited the broad definition discussed in Part II.A. The crucial factor under these approaches is whether the state law is related to an economic service on the one hand or a safety service or the operation and maintenance of the aircraft on the other. This dichotomy is best illustrated with the preemption of claims involving boarding procedures. These claims may be preempted if they deal with economic services. Thus, if a plane is full, and the airline refuses to allow someone to board, the claim is preempted. However, claims are not preempted if the refusal to board is a safety decision, such as preventing a suspicious passenger from boarding. Further, under these approaches, most physical injury negligence claims involving the amenities of travel will survive a preemption challenge because they deal with either the safety or operation of the airplane. Thus, if luggage falls on a passenger and injures him, there is no preemption.

C. "Service" to Mean Only "Air Services"

Other circuits typically define the term "service" to mean only air services—those services that expressly involve actual transportation and scheduling of transportation, or involve an actual economic impact on competition. The Ninth Circuit introduced this approach in

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*ing Preemption under the Airline Deregulation Act: Traditional Personal Injury Claims Survive*, 17 Miss Coll L. Rev 171, 194–201 (1996) (providing great detail about the Hodges decision and arguing that another Supreme Court decision was needed to clarify the preemption in this area).

33 342 F3d 1248 (11th Cir 2003).

34 Id at 1257.

35 Id at 1258.

36 44 F3d 344 (5th Cir 1995) (en banc) (holding that the Act did not preempt state law negligence claims that passengers' safety was jeopardized by a visibly deranged hijacker).

37 Id at 346–47. With this reasoning the court was able to distinguish, instead of overrule, *O'Carroll v American Airlines, Inc*, 863 F2d 11, 12–13 (5th Cir 1989), which held that a claim for wrongful exclusion from a flight was preempted, because that case involved an economic decision on whether or not to allow a customer to board.
Charas v Trans World Airlines, Inc, \(^{58}\) expressly disagreeing with Hodges's broad definition of “services” and overruling some of its previous opinions. \(^{59}\) In Charas, the court consolidated several airline negligence cases that turned on the definition of “services.” \(^{60}\) It adopted a limited definition of “service”:

Airlines’ “rates” and “routes” generally refer to the point-to-point transport of passengers. “Rates” indicates price; “routes” refers to courses of travel. It therefore follows that “service,” when juxtaposed to “rates” and “routes,” refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, “This airline provides service from Tucson to New York twice a day.”) To interpret “service” more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended. \(^{61}\)

The Ninth Circuit concluded that Congress’s intent was only to de-regulate the economic aspects of air travel, and that the amenities of travel did not relate to these aspects. \(^{62}\) Therefore, preemption is quite narrow under the Ninth Circuit approach. \(^{63}\)

The Third Circuit discussed the various approaches to preemption and stated that the Ninth Circuit approach was best. \(^{64}\) The Third Circuit said the relevant inquiry is “whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation.” \(^{65}\) Many courts have found a similar lim-

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\(^{58}\) 160 F3d 1259 (9th Cir 1998) (en banc).

\(^{59}\) Id at 1263. The court overruled Harris v American Airlines, Inc, 55 F3d 1472, 1476–77 (9th Cir 1995), which held that claims for negligence in giving alcoholic beverages to a passenger were preempted. It also overruled Gee v Southwest Airlines, 110 F3d 1400, 1406 (9th Cir 1997), in which it had initially accepted the Hodges approach of using the dichotomy between services and operation or maintenance activities.

\(^{60}\) Charas, 160 F3d at 1261–62.

\(^{61}\) Id at 1265–66.

\(^{62}\) Id at 1264–65. For further analysis of the Charas opinion, see Christopher S. Morin, Flying the Not-So-Friendly Skies: Charas v. TWA's Definition of “Service” under the ADA's Preemption Clause Exposes Airlines to Tort Liability, 65 J Air L & Comm 497, 511–19 (2000) (discussing the Charas opinion, concluding that it was correct based on legislative history, and arguing that other courts should follow it).

\(^{63}\) For a more recent application of this narrow approach, see Duncan v Northwest Airlines, Inc, 208 F3d 1112, 1115 (9th Cir 2000) (holding that a class action suit by nonsmoking flight attendants claiming personal injuries for having to work in the smoking section of the airplane was not preempted because it did not relate to “the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided”), quoting Charas, 160 F3d at 1265–66.

\(^{64}\) See Taj Mahal Travel, Inc v Delta Airlines, Inc, 164 F3d 186, 192–94 (3d Cir 1998) (accepting the narrow definition as a better fit with congressional intent).

\(^{65}\) Id at 194.
mented preemptive scope in dealing with state anti-discrimination statutes, as the Ninth and Third Circuits have. However, in contrast to the Charas approach, none of these courts actually defines "service"; rather, these courts rely on other grounds to find this limited preemptive effect.66

The preemptive scope of this definition is obviously narrow. It mainly covers public utility-style regulation, such as state laws forcing the airlines to transport passengers at certain times to certain locations. There is little preemptive scope beyond such far-reaching state regulation. Since flight attendant tasks and baggage handling are not "services," state laws related to either will never be explicitly preempted. Similarly, physical injury negligence torts stemming from flight attendant tasks and baggage handling will not be preempted. Claims alleging wrongful exclusion from a plane would also not be preempted if they do not relate to an economic decision.67 Thus, it appears that the word "services" would preempt wrongful exclusion claims against an airline only if it were overbooked or could not fly the passenger for some other economic reason.68

III. PROBLEMS WITH THE VARIOUS COURTS' INTERPRETATIONS OF THE TERM "SERVICE"

The circuit courts' various interpretations of "service" and their preemption analyses either fail to give predictability or conflict with Supreme Court precedent. Thus, none is wholly adequate in its definitions and implementations. Part A will discuss the problems with the broader definitions. Part B will discuss the difficulties that courts have

66 See Wellons v Northwest Airlines, Inc, 165 F3d 493, 494–96 (6th Cir 1999) (holding that the anti-discrimination statute was not preempted after noting that ERISA cases have held that the "related to" language does not stop the "normal presumption against preemption" and that the statutes are too tenuously related to "services"); Abdu-Brisson v Delta Air Lines, Inc, 128 F3d 77, 82–83 (2d Cir 1997) (holding that the anti-discrimination statute was not preempted because "related to" should be narrowed to come in line with recent ERISA opinions). See also Parise v Delta Airlines, Inc, 141 F3d 1463, 1466–67 (11th Cir 1998) (finding no preemption of the anti-discrimination statute and noting that the district court, which had found preemption, improperly relied on the defendant's proffered justifications for the termination); Newman v American Airlines, Inc, 176 F3d 1128, 1131–32 (9th Cir 1999) (applying its narrow definition of "service" to a passenger discrimination claim based on her disability, and holding that there was no preemption). For a criticism of Wellons, see Joshua Iacuone, Case Note, Wellons v. Northwest Airlines, Inc.—Defining “Service” under the Airline Deregulation Act: Why the Majority of Circuits Are Wrong, 66 J Air L & Comm 861 (2001).

67 See Rubin v United Airlines, Inc, 96 Cal App 4th 364, 375–77 (2002) (noting the difference between the Fifth and Ninth Circuit definitions and implying that it may make a difference with regard to whether boarding procedures are preempted).

68 But even these things might not be preempted in the Ninth Circuit. See West v Northwest Airlines, Inc, 995 F2d 148, 150–52 (9th Cir 1993) (holding that the Act did not preempt a passenger's claim for compensatory damages when he was bumped from a scheduled flight because of an overbooking).
had making exceptions to these broad definitions. Part C will discuss the inadequacies of the narrower definitions.

A. Broad Definitions of “Service”

The Eighth Circuit’s broad interpretation of “service” in Botz does not provide enough guidance to airlines, potential litigants, or courts. This definition is troublesome because the court simply concluded that the term should be broad, similar to the term “relating to.” However, even though the Morales Court said that “relating to” was broad, it still provided a proper definition of the term for other courts to follow. The Eighth Circuit’s interpretation does not provide similar guidance for deciding whether different state laws are related to airline “service.” Indeed, it is even unclear whether another whistleblower claim with different facts would be preempted. Thus, the Eighth Circuit approach will not help clarify an already confused area of the law.

The Fifth Circuit’s broad definition, explicitly adopted without exception by the Seventh Circuit, seems to be consistent with Supreme Court precedent and common principles of statutory interpretation. However, the courts that use a broad definition may not have paid enough attention to the limiting principles of “relating to” in Morales, which indicates that some state laws have too tenuous of a connection to “service” to be preempted. The laws at issue in Morales directly regulating rate advertisement were connected to services, but the connection between common law tort claims and “services” is more tenuous. Thus, to be preempted, these causes of action must have a more than tenuous connection with “service” (no matter how defined). Courts typically discuss the extreme cases, and conclude that these cases are too tenuous to be preempted. For instance, if a flight

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69 See Botz, 286 F3d at 494.
70 See Morales, 504 US at 384 (“State enforcement actions having a connection with, or reference to, airline ‘rates, routes, or services’ are preempted.”).
71 This problem can be seen in the opposite direction with regard to state antidiscrimination cases, which do not explicitly define the term, but automatically apply a limited approach, using the too-tenuous logic of Morales. See Wellons v Northwest Airlines, Inc, 165 F3d 493, 495–96 (6th Cir 1999) (noting only that “Northwest contends, with undeniable logic” that the selection of reservation clerks has a connection with “services” in discussing the term).
72 See, for example, Botz, 286 F3d at 494. The court noted that the whistleblower statute is preempted “when applied to the facts surrounding Botz’s discharge.” Does this mean that under different facts the same statute would not be preempted? This uncertainty is troublesome.
73 It appears also to have been implicitly adopted by the Fourth and Tenth Circuits. See notes 39–40 and accompanying text.
74 See Part IV.A.
75 See Morales, 504 US at 390.
76 Id.
77 See, for example, Smith v Comair, Inc, 134 F3d 254, 259 (4th Cir 1998) (noting that ex-
attendant were to throw beverages at customers with the intent to injure, this connection to services would be far too tenuous. However, courts do not adequately discuss the closer cases, such as a flight attendant accidentally dropping a beverage on a customer while providing that customer drinks. These cases are the ones in which it is uncertain whether the Supreme Court's limiting language applies, and thus are the ones that will be the closest calls.

B. Broad Definition Distinguishing Operation/Maintenance and/or Safety Services from Economic Services

The Fifth Circuit's initial approach in defining "services" broadly seems appropriate. However, it makes several unjustified exceptions to the generally broad definition. The court narrows the preemptive scope of the statute through these exceptions, instead of using the limitations announced by the Supreme Court in Morales. First, its services versus operation/maintenance dichotomy is unworkable in practice because the terms it seeks to differentiate are almost indistinguishable. The lack of a clear line will lead to unpredictability in future cases. Indeed, this problem arose in the Hodges opinion itself: the judges agreed on the distinction, but disagreed on whether falling baggage from an overhead compartment was related to services or operations. Similarly, the outcome of future cases will be difficult to predict.

Furthermore, this distinction will lead to arbitrary and inconsistent results. As one court has noted: "An airplane passenger who fell in an aisle would be prohibited from suing if the accident occurred when the passenger slipped on food dropped by a flight attendant, but not if the accident was caused by a sudden banking of the plane." It seems odd that tort preemption would survive in one case but not the other. But this is a necessary result of the Fifth Circuit's distinction between services and operation/maintenance.
The Fifth Circuit emphasizes that without this dichotomy, the provision of the Federal Aviation Act requiring airlines to keep insurance in case of liability for injury or damage to property would be redundant. However, this argument has two weaknesses. First, individuals seeking recovery for damaged property might be able to bring breach of contract actions; these actions would require insurance and would not be preempted under Wolens. Indeed, federal common law may apply to “the carriage contract of an air carrier.” Second, if all tort claims are deemed preempted, and federal regulation covers the whole field, injured passengers might have a federal cause of action. Such federal causes of action stemming from total preemption are rare. But if there were such a cause of action, the airlines would still need insurance in case of liability in federal courts. Both examples illustrate situations in which state common law tort causes of action would not exist, yet the airlines would still need insurance. These examples undermine the Fifth Circuit’s argument that its “service” and “operation/maintenance” distinction is necessary.

The distinction between economic and safety services adopted by the Fifth and Eleventh Circuits is also troubling. This distinction has the same problems as the approach in Hodges. The line between the two is hard to draw in practice because all aspects of an airline’s ser-
vices have both economic and safety components. Further, it has led to inconsistent results. Thus, "a suit for allowing a deranged man to board a plane does not affect economic decisions concerning boarding, but only decisions about ticket sales, training and security—somehow not economic decisions." Therefore, this claim would not be preempted. However, a suit for removing a possible drunken passenger from the plane would be preempted because it "involved an alleged breach of the airline's duty to transport the plaintiff." If the airline allows someone to board because it thinks the man is not a security threat, claims about the boarding procedure are not preempted. However, if it refuses to allow someone to board because it thinks the man is unsafe (for example, drunk), claims about the boarding procedure are preempted. This inconsistency seems difficult to defend.

Even more troubling, these exceptions mean that direct regulation of the airline industry by the states is not expressly preempted if it regulates something dealing with safety or the operation or maintenance of the aircraft. For example, if a state legislature passed a law that forced planes to hold a maximum of fifty passengers for safety reasons, the state law ostensibly would not be preempted by the federal statute. This is problematic given the extensive regulation of safety standards by the Federal Aviation Administration (FAA). Thus, the Fifth and Eleventh Circuit approaches are not entirely satisfactory

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88 See Continental, 920 SW2d at 284.
89 Id.
90 America West Airlines, 44 F3d at 347 (noting that a judgment for the ejected passenger would "interfere with the economic deregulation of airline services by imposing a state-law based duty to transport ticketed passengers").
91 See O’Carroll v American Airlines, Inc, 863 F2d 11, 12–13 (5th Cir 1989) (holding that a claim for wrongful exclusion was preempted because airlines had broad discretion with respect to whom they would allow on board). In O’Carroll, the court explicitly relied on the following statutory provision: "Subject to reasonable rules and regulations prescribed by the Secretary of Transportation, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." Id at 12 (emphasis added), citing 49 USC § 1511(a). This section is now codified as amended at 49 USC § 44902(b) (2000).
92 There might be a strong argument for implied preemption, but with the express preemption provision in the Act, there is a presumption that it contains the statute’s full preemptive force. See Freightliner Corp v Myrick, 514 US 280, 288 (1995) (noting that "an express definition of the pre-emptive reach of a statute ‘implies’—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters," although it does not "entirely foreclose" the possibility of implied preemption). However, if there is a conflict between the state law and the federal law, and the state law is not explicitly preempted, it might be implicitly preempted under traditional conflict preemption principles. See Geier v American Honda Motor Co, Inc, 529 US 861, 869 (2000). There might not be a conflict in this case, however, because the FAA regulations could be seen as a minimum bar to be supplanted by state law. See, for example, Public Health Trust v Lake Aircraft, Inc, 992 F2d 291, 294–95 (11th Cir 1993) (holding that an FAA regulation does not preempt a state law design defect claim because the express preemption provision did not include safety concerns, and the design defect claim had to deal with safety). But see Abdullah v American Airlines, Inc, 181 F3d 363 (3d Cir 1999).
because their exceptions to the broad definition of "service" create confusion and unpredictability where certainty is needed.

C. Narrowly Defining Services to Mean Only Air Services

The narrowest definition, espoused initially by the Ninth Circuit,\(^93\) also has various inadequacies. First, it is inconsistent with common statutory interpretation principles because it does not adhere to the ordinary definition of the term "service." Second, it does not follow Supreme Court precedents, which interpret the preemption provision broadly.\(^94\) Third, it does not follow the common canon of construction that a term should be interpreted so as not to make other terms in the statute meaningless. Fourth, the conclusion that only public utility-style regulation should be preempted effectively reads the "related to" language out of the provision. Finally, the logical conclusion of this approach would have unanticipated effects.

As the Supreme Court has often stated in statutory interpretation cases, the courts should "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."\(^95\) The dictionary that Justice Scalia referred to in \textit{Morales} defines service as "[a]n intangible commodity in the form of human effort, such as labor, skill, or advice."\(^96\) Without a doubt, flight attendants, by serving food and generally helping passengers, provide services as ordinarily defined. Providing overhead compartments for passengers' carry-on luggage for the limited time they are on the plane would also fit into this definition of service. The Ninth Circuit must have a compelling reason for not including these airline acts as "service" to customers under the statute; under an ordinary meaning of the term, they are unequivocally "services." While the court stated that it must give effect to the plain language, it did not acknowledge this meaning. Notably, the court stated that nowhere in the legislative history did it find congressional intent to have service mean flight attendant assistance and other airline amenities.\(^97\) However, since these things are services under any dictionary definition, the court must look for congressional intent to limit the meaning and not congressional intent to expand it. The Ninth Cir-

\(^93\) See text accompanying notes 58–63.
\(^94\) See text accompanying notes 20–28.
\(^96\) \textit{Black's Law Dictionary} 1372 (West 7th ed 1999) (defining service as also "[t]he act of doing something useful for a person or company for a fee"). See also Part IV.A for other definitions of the term.
\(^97\) See \textit{Charas}, 160 F3d at 1264, citing \textit{Hughes Air Corp v Public Utilities Commission}, 644 F2d 1334, 1337 (9th Cir 1981) ("We must attempt to 'ascertain and give effect to the plain meaning of the language used.'").
cuit attempted to do this when it relied on the purpose of the Act in general to promote maximum reliance on competitive markets and of the preemption provision specifically to stop state regulation that interferes with this objective. This purpose, however, does not help the Ninth Circuit's definition. Airlines compete over these non-transportation services just as they compete over prices and routes, and state regulation could hinder this aspect of competition in the industry as well. For example, an airline most likely must offer some overhead compartment space to be competitive in the industry, or it would have to lower prices. Therefore, the reliance on competitive market forces to limit the definition of "services" to non-transportation aspects seems misplaced. Consequently, as one other circuit has noted, there is "no textual justification for [this] more truncated reading of 'service.'"

A second problem with the Ninth Circuit's approach is that it is inconsistent with Supreme Court precedent. First, Morales stated that the preemption provision should be given a broad scope. The Ninth Circuit definition undermines the broad purpose of the preemption provision by limiting it to transportation only. Although the Morales Court called the general savings clause in the statute "a relic of the pre-ADA/no pre-emption regime," the Ninth Circuit justified its definition of "service" in part on the savings clause. Since the Supreme Court gave this clause no weight in interpreting "relating to," it also should be given no weight in interpreting "service."

A common canon of construction, often called the whole act rule, requires courts not to interpret a word in a statute in a way that

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99 See id at 1265 ("It is evident that Congress's 'clear and manifest purpose' in enacting the [Act] was to achieve . . . the economic deregulation of the airline industry. . . . The purpose of preemption is to avoid state interference with federal deregulation.").

100 Branche, 342 F3d at 1257 (observing that "this word generally refers to any bargained-for exchange of an intangible benefit" and that the relevant dictionary definition is a "useful labor that does not produce a tangible commodity").

101 See Morales, 504 US at 383-84 (noting that, in interpreting the preemption clause at issue in the Act, the words "relating to" "express a broad pre-emptive purpose").

102 See Charas, 160 F3d at 1266. See also Branche, 342 F3d at 1257.

103 Morales, 504 US at 384-85 (noting that as a result the canon that the specific trumps the general is "particularly pertinent" in determining the scope of preemption).

104 Charas, 160 F3d at 1265 (noting that the savings clause "read together with the preemption clause, evidences congressional intent to prohibit states from regulating the airlines while preserving state tort remedies that already existed at common law, providing that such remedies do not significantly impact federal deregulation").

105 That the specific should govern the general is a long-standing and often-used canon of statutory construction. See, for example, Crawford Fitting Co v J.T. Gibbons, Inc, 482 US 437, 445 (1987) (noting that in the absence of "clear intention" to the contrary, the specific law will not be "controlled or nullified" by the general one, regardless of order of enactment); International Paper Co v Ouellette, 479 US 481, 494 (1987) ("[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause.").

106 See William N. Eskridge, Jr., Phillip P. Frickey, and Elizabeth Garrett, Cases and Materi-
makes another word in the statute redundant or meaningless.\textsuperscript{107} For example, in \textit{Babbitt v Sweet Home Chapter of Communities for a Great Oregon},\textsuperscript{108} the Supreme Court discussed whether an agency interpretation of the Endangered Species Act was reasonable.\textsuperscript{109} The agency had interpreted the word "harm" to mean not only direct harm, but also indirect harm. The word "harm" was used next to several other words, including harass, pursue, hunt, shoot, wound, kill, trap, capture, and collect.\textsuperscript{110} The Court held that the interpretation was reasonable for a number of reasons. Most notably, it said "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of [the] other words that [the statute] uses to define 'take.'"\textsuperscript{111}

The Ninth Circuit, in interpreting "service" in a narrow way, arguably does not follow the whole act rule. The court illustrates its interpretation of "services" with the following example: "This airline provides service from Tucson to New York twice a day."\textsuperscript{112} This definition fits uncomfortably with the definition of "route," which also could have preemptive effect covering the transportation of customers between two points. For example, if a state were to regulate the number of times an airline flew between two points, this regulation could be seen as a regulation of an airline route, as the regulation deals specifically with the route; it could be preempted for that reason. This argument is supported by the broad definition of "relating to" from \textit{Morales}, and the frequency regulation could be related to the route. Thus, this definition of "service" arguably overlaps in preemptive effect with the term "route," in violation of the whole act rule.\textsuperscript{113}

\begin{footnotesize}
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\item\textsuperscript{107} See \textit{Platt v Union Pacific Railroad Co}, 99 US 48, 58 (1878) ("But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute."). For a more recent example, see \textit{United Savings Association of Texas v Timbers of Inwood Forest Associates}, 484 US 365, 371 (1988) (internal citations omitted):
\item Statutory construction [ ] is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.
\item\textsuperscript{108} 515 US 687 (1995).
\item\textsuperscript{109} Id at 708.
\item\textsuperscript{111} \textit{Babbitt}, 515 US at 697–98.
\item\textsuperscript{112} \textit{Charas}, 160 F3d at 1266.
\item\textsuperscript{113} This argument relies crucially on the regulation of the frequency of transportation being "related to" routes. If routes were completely distinct from this frequency, which very well might be the case, there would appear to be slight, but real, differences between the Ninth Circuit defi-
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One could argue that the broader definition of "services" would also violate this rule because it encompasses this narrow definition. However, the Court in Babbitt addressed this issue in defining harm: "To the extent the Secretary's definition of 'harm' may have applications that overlap with other words in the definition, that overlap reflects the broad purpose of the Act." Similarly, there may be some overlap in this preemption provision because of the broad purpose to preempt any state regulation that might have a substantial negative effect on the deregulation of any aspect of airline operations. At the very least, the broad definition gives "services" an independent meaning and does not make it superfluous.

The Third Circuit, in interpreting the Ninth Circuit definition, has stated that the preemption provision covers only "public utility-style regulation." However, this interpretation would read the "related to" language out of the statute. That is, the court appears to be trying to limit the broad scope of preemption of Morales by limiting the definition of "services" so that the state law can only be "related to" a small set of "services." As one circuit court put it: "Indeed, no matter how broadly we construe the term 'related to,' if the scope of that phrase's referent (the word 'services') is sufficiently constricted, the scope of pre-emption under § 41713 will nonetheless be minimal." The court should not try to avoid the plain meaning of "related to" by interpreting "service" narrowly. Further, this interpretation goes against the Supreme Court's own interpretations of the statute. For example, the general anti-fraud statute in Wolens was not a utility-like regulation of the industry, and it was still preempted. Further, Wolens expressly

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114 Babbitt, 515 US at 698 n 11 (noting that "harm" would encompass more indirect means such as destroying habitats while the other words such as "hunt" and "kill" would focus on more direct methods).

115 Taj Mahal Travel, Inc v Delta Airlines, Inc, 164 F3d 186, 194 (3d Cir 1998) (observing that it is "highly unlikely that claims caused by careening service carts and plummeting luggage were to be removed from state adjudication").

116 Branche, 342 F3d at 1257 (internal citation omitted) (concluding that the scope of the whole preemption clause must be "extremely broad").

117 The same problem can be found in some of the anti-discrimination cases, but at an even more direct level. See Abdu-Brisson v Delta Air Lines, Inc, 128 F3d 77, 82 (2d Cir 1997) (relying directly on recent ERISA preemption cases to limit the scope of the Act's preemption provision with regard to the term "related to"). But see Rodriguez de Quijas v Shearson/American Express, Inc, 490 US 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions"); United Airlines, Inc v Mesa Airlines, Inc, 219 F3d 605, 608 (7th Cir 2000) ("[I]f developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them.").

118 See United Airlines, 219 F3d at 608–09.
stated that class-of-services upgrades were considered services under the Act.⁹ It is problematic that this type of amenity does not fit into the Ninth Circuit definition of the word.

Finally, the most troubling aspect about this interpretation is its implication for the Act. One who is logically committed to this definition would have to address more troubling preemption questions. For instance, suppose a state law required thirty flight attendants on every flight. Or suppose a state law banned the use of all overhead compartments on flights in the state. These direct regulations of the airline industry would not be expressly preempted, because they would not relate to the “service” preempted under the statute.¹²⁰ It is clear that a more workable definition is needed.

IV. RECONCILING THE ACT WITH PRECEDENT AND INTERPRETATION PRINCIPLES

In this Part, I will argue for the proper definition of “service” by looking at statutory interpretation and preemption principles, as well as Supreme Court precedents. In Part A, I assert that a broad definition of “service” fits with these principles and precedents. However, as with “price” and “route,” the preemptive effect of “service” must be narrowed by the Supreme Court’s own limitations on the term “related to.” In Part B, I apply this definition of “service” to negligent physical injury torts, the claims most frequently litigated in this area, ultimately concluding that they are not preempted. In Part C, I explain how this analysis can be applied in other areas.

A. Defining “Services”

Federal preemption of state law stems from the Supremacy Clause of the Constitution.¹²¹ The Supreme Court has set forth three

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¹⁹ See Wolens, 513 US at 226 (“Plaintiffs’ claims relate to ‘rates,’ i.e., American’s charges in the form of mileage credits for free tickets and upgrades, and to ‘services,’ i.e., access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates.”).

¹²⁰ See note 99. These types of regulations might lead to one state regulating the entire industry, which would raise dormant commerce clause concerns. See, for example, Southern Pacific Co v Arizona, 325 US 761 (1945) (holding a state law limiting train lengths in the state for safety reasons unconstitutional because it burdened interstate commerce).

¹²¹ US Const Art VI, cl 2. It provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See also McCulloch v Maryland, 17 US (4 Wheat) 316 (1819) (setting forth the original exposition of preemption of state law that interferes with federal purposes).
ways in which preemption can occur, though only express preemption is relevant to this Comment. In analyzing the reach of an express preemption provision, courts must look to "[t]he purpose of Congress [as] the ultimate touchstone." Congressional preemptive intent can be ascertained by looking at the plain language of the statute, unless there is some evidence that Congress intended something other than an ordinary interpretation.

Therefore, a court analyzing the Act should start with its plain language. For example, the Morales Court used an ordinary (that is, dictionary) definition of "relating to," concluding that nothing in the legislative history indicated that Congress intended the phrase to have an alternate meaning. Similarly, preemption analysis for "service" should start with the term's ordinary definition. The relevant definition of a service is "[a]n intangible commodity in the form of human effort, such as labor, skill, or advice." Indeed, Funk & Wagnalls Standard College Dictionary, published before the Act was passed, defined service as "[a]ssistance or benefit afforded another" or "[a] useful result or product of labor that is not a tangible commodity ... as distinguished from goods." Further, Branche asserted a similar definition ("a useful labor that does not produce a tangible commodity") as the "relevant dictionary definition of 'service.'" Therefore, the plain lan-

122 See Cipollone v Liggett Group, Inc, 505 US 504, 516 (1992) (internal quotation marks and citations omitted):

Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

123 Medtronic, Inc v Lohr, 518 US 470, 485–86 (1996) ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it."). See also Lorillard Tobacco Co v Reilly, 533 US 525, 541–42 (2001) (observing that congressional intent is necessary to establish preemption in advertising, a field traditionally regulated by the states); Stabile, 40 Vill L Rev at 7 (cited in note 18) (noting that congressional intent is key to both express and implied preemption).

124 See Shaw v Delta Air Lines, Inc, 463 US 85, 97 (1983) ("We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.").

125 See Morales, 504 US at 383–86 ("Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate rates, routes, and services.'").

126 Black's Law Dictionary at 1372 (cited in note 96). This definition comes from the same source that the Morales Court used for its definition of "relating to." Morales, 504 US at 383 (adopting a definition of "relating to" from the fifth edition of Black's Law Dictionary).

127 Funk & Wagnalls Standard College Dictionary 1228 (Funk & Wagnalls 1966).

128 See Branche, 342 F3d at 1257 (using a definition from Webster's Third New International Dictionary and noting that "nothing in the text of § 41713 indicate[es] that Congress intended to deviate from this standard definition"). See also 15 The Oxford English Dictionary 34–39 (Clarendon 2d ed 1989) (listing roughly forty definitions, including "[t]he section of the economy that supplies needs of the consumer but produces no tangible goods"). It is important to note that
language of the statute suggests that "service" should be given its broad, dictionary meaning. Any airline labor that does not produce a tangible commodity should be considered an airline "service." This definition includes flight attendant service, boarding procedures, baggage handling, and the actual air service as well.

Nothing in the legislative history provides a sufficient argument for rejecting the presumption that "service" should be given its ordinary meaning. To the contrary, the legislative history suggests that Congress intended the broader definition, just as in *Morales*. The *Morales* Court noted that the initial Senate bill used the word "determining" instead of "relating to." The rejection of "determining" provided evidence that Congress wanted the Act to preempt more than state statutes specifically directed toward airlines' "rates, routes, or services."

With regard to the term "services," the Senate Report preemption provision originally read that "[n]o State shall enact any law, establish any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgate economic regulations for, any air carrier certificated or exempted by the Board under the provisions of this title." In contrast, the House Report provision stated that the House bill would prevent inconsistent regulations prohibiting a state from regulating an airline's "routes, rates or services." It is of note that the bill laid out in the Senate Report did not even mention the term services; the term was added by the House. If the Act contained similar wording to the bill in the Senate Report, it would strengthen the argument that the preemption provision should be limited. However, the preemption provision in the Act more closely parallels the House Report. Notably, this report does not contain many of the words present in the Senate Report, including those that indicate that it was intended only for economic regulations. Thus, as in *Morales*, it

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130 See *Morales*, 504 US at 385 n 2 ("[T]he rejected Senate bill did contain language that would have produced precisely the result the dissent desires.").
132 Airline Deregulation Act of 1978, HR Rep No 95-1211, 95th Cong, 2d Sess 15-16 (1978), reprinted in 1978 USCCAN 3751-52 (noting that the then-existing law's lack of a preemption provision created "uncertainties and conflicts, including situations in which carriers [had] been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers . . . or intrastate passengers").
can be assumed that the more limited scope was rejected; otherwise, the limited wording would have been used. Therefore, the legislative history does not rebut the presumption that the broad meaning should be used. In fact, the legislative history may further the case for the dictionary meaning.

The Act’s structure and administrative interpretation also illustrate that the ordinary meaning should be used. The word “service” is ubiquitous throughout the Act, and at times is used in inconsistent ways, which makes it more difficult for a court to find just one meaning. However, the Act generally refers to “services” and to “air services.” “Air services” would appear to be the actual transportation from A to B, whereas “services” would include this transportation, but also other things, such as flight attendant assistance or beverage services. For instance, in Section 102(a), the Act provides that the Civil Aeronautics Board should consider a number of factors in making its regulatory decisions including “[t]he encouragement of air service at major urban areas through secondary or satellite airports” and “[t]he avoidance of . . . unreasonable industry concentration” or “other conditions that would tend to allow one or more air carriers to unreasonably increase prices, reduce services, or exclude competition in air transportation.” This Part illustrates the difference between the two terms.

The administrative agencies also distinguish between “air services” and “services.” First, the Civil Aeronautics Board initially interpreted the preemption provision to cover more than just air service, and the Code of Federal Regulations continues to make this distinc-

133 See, for example, Hodges, 44 F3d at 337. The Hodges court noted that all-cargo air service “referred at the time of passage of the [Act] to the point-to-point transportation of passengers, cargo or mail, and it encompassed the business of transportation as well as the schedules and type of contract (common carriage or charter).” Id. The definition “all-cargo air service” was changed in the 1994 Act to “all-cargo air transportation.” Compare 49 USC § 1301(11) (1988), with 49 USC § 40102(a)(10) (2000). Thus, “air transportation” has taken the place of “air services,” but “services” remains in many areas, including the preemption provision. See, for example, 49 USC § 40101(a)(4) (allowing the Secretary of Transportation to consider “the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices”) (emphasis added).

134 49 USC § 1302(a) (1988). It is of note that the current wording of the first quoted passage of the statute now uses “air transportation” instead of “air services.” See 49 USC § 40101(a)(8) (2000). However, “services” is still used for the second quoted passage. See 49 USC § 40101(a)(10). Indeed, as illustrated in note 133, “air transportation” has replaced “air services” in many parts of the statute. This change provides support for the argument that “services” means something more than just transportation, and that “air services” just means transportation. Otherwise, both terms would have been changed to “transportation.”

135 See 44 Fed Reg 9940, 9950–51 (1979) (noting that states may not interfere with the services that carriers offer,” which include “segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage”). See also Hodges, 44 F3d at 337 (noting that the FAA continues to identify service with more than just air transportation).
tion. For example, one section is titled "Carriers proposing to provide essential air service," whereas another requires that "quality of service" reports, including "mishandled-baggage reports," be sent to the Department of Transportation. Clearly, the use of "air services" in the Act and the Code of Federal Regulations has a more limited meaning than the use of "services." If the Act had used the terms "rates," "routes," and "air services," this more limited definition of the term might be plausible. But since it mentioned only "services," it arguably meant more than just air services.

Thus, the broad meaning—labor that does not provide a tangible commodity—should govern. This broad reading is the relevant, ordinary definition of the term found in most dictionaries. Further, legislative history does not illustrate congressional intent to limit this meaning, and may even support it. Also, both the structure of the act and the administrative agencies' interpretation of it provide support for this meaning.

However, a decision that the term should be defined broadly does not end the analysis. A broad definition will not lead to the preemption of all state law claims related to "service." Most notably, as the Supreme Court has stated, "some state actions may affect [airline services] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." The Court in Morales went on to note that the facts of that case did not present a borderline question on preemption. But, whether physical injury tort claims should be preempted does provide such a borderline question.

B. Applying the Definition to Physical Injury Torts

Many common law tort claims against airlines have been brought. Most courts find that physical injury torts are not pre-

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136 14 CFR § 204.4 (2003). "Essential air service" is defined as "that air transportation which the Department has found to be essential." 14 CFR § 204.2(f) (2003).

137 14 CFR § 234.1, 234.6 (2003). "Mishandled-baggage report" is defined as "a report filed with a carrier by or on behalf of a passenger that claims loss, delay, damage or pilferage of bag-gage." 14 CFR § 234.2 (2003).


139 Morales, 504 US at 390 (expressing no opinion on where "to draw the line" for what affects rates, routes, and services in too tenuous of a way).

140 Other borderline questions include whether other types of state regulations, including state whistleblower statutes and state anti-discrimination statutes, should be preempted. Compare Branche, 342 F3d at 1257, with Botz, 286 F3d at 494 (both discussing the issue of preemption in the context of state whistleblower statutes). See also Wellons v Northwest Airlines, Inc, 165 F3d 493, 494 (6th Cir 1999) (considering whether a state statutory race discrimination claim is preempted by the Act).

141 See generally Ann K. Wooster, Construction and Application of § 105 Airline Deregulation Act (49 USC § 41713), Pertaining to Preemption of Authority over Prices, Routes, and Services, 149 ALR Fed 299 (2003) (providing a long list of various torts and the courts' differing
empted. Since a wide variety of tort claims are brought against airlines, a claim-by-claim approach (that is, physical injury, negligent exclusion, etc.) is required. In this Part, I look at the most common tort claims: physical injury claims stemming from airline negligence.

The initial step is to determine if the claim relates to a "service" by referring to it or having a connection with it. Most physical injury torts will be connected to services in some way. For example, there is a connection when a flight attendant bumps the beverage cart into a customer or when falling luggage injures a customer. The provision of beverages and overhead storage space are both services under the ordinary definition of the term. The claims do not expressly refer to services, however, because injuring customers is not a service of the airlines. Therefore, the claims must have a substantial connection with or effect on services to be preempted. As mentioned above, if the claims only have a tenuous relationship with the underlying "service," they will not be preempted.

The most important question under this analysis, then, is whether the effect of physical injury claims upon the airline "service" is too tenuous to justify preemption. A number of factors are important in analyzing this question. First, there is a presumption that states' police powers are not preempted without clear indication that Congress intended to do so. The states' common law is one of their traditional police powers. Next, as with contract law, there is no evidence of congressional intent to push all physical injury tort claims into the federal courts; no other independent provision implicitly suggests

\[\text{holdings on what is preempted).}\]


143 See Travel All Over the World, Inc v The Kingdom of Saudi Arabia, 73 F3d 1423, 1433 (7th Cir 1996) ("Morales does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the [Act]. Instead we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes, or services.").

144 Similarly, defaming a travel agency is not an airline service either. See id at 1433 ("Certainly, Saudia's false statements regarding Travel All's services were not part of any contractual arrangement that Saudia had with Travel All or its clients.").

145 See Rice v Santa Fe Elevator Corp, 331 US 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

146 See Medtronic, 518 US at 485–86 (1996) (plurality) (treating a tort claim as falling under the traditional police power of the states). See also Geier v American Honda Motor Company, 529 US 861, 894 (2000) (Stevens dissenting) (noting that tort remedies "are within the scope of the States' historic police powers"); Hillsborough County v Automated Medical Laboratories, Inc, 471 US 707, 719 (1985) (noting that "the regulation of health and safety matters is primarily, and historically, a matter of local concern.").

147 See Wolens, 513 US at 232 ("Nor is it plausible that Congress meant to channel into fed-
such a result would be appropriate. Further, eliminating a cause of action for some torts might sacrifice the efficiency justification of the Act by allowing the airlines to avoid paying the full costs of their activity, and as a result provide too much air transportation.\footnote{Indeed, \textit{Wolens} provided another type of efficiency justification to explain why breach of contract claims should not be preempted.} Finally, the United States did not think it had the responsibility to monitor all contracts, and it would probably take the same approach to physical injury tort claims.

These ideas were especially important to the Court in \textit{Medtronic, Inc v Lohr},\footnote{See Wolens, 513 US at 230 ("Market efficiency requires effective means to enforce private agreements.").} in which it interpreted an express provision that preempted any state requirement related to the safety or effectiveness of a medical device.\footnote{See \textit{Wolens}, 513 US at 230 ("Market efficiency requires effective means to enforce private agreements.").} The Court concluded that common law tort duties

\footnote{See \textit{Wolens}, 513 US at 230 ("Market efficiency requires effective means to enforce private agreements.").}
would rarely, if ever, be preempted because they were not the type of requirements to which the provision referred. Indeed, the Court focused specifically on redressability: "It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.' Thus, at the outset there is a strong presumption against preemption of common law physical injury torts.

Keeping in mind these background factors pointing against preemption, physical injury torts arguably have only a tenuous connection with airline "services." First, at least three present Supreme Court justices would likely agree that the connection to "service" is tenuous. Even the Wolens dissent, calling for the broadest preemptive scope, noted that physical injury tort cases would not be preempted. Justice O'Connor argued that even if the breach of contract claim in that case was preempted, it did "not mean that personal injury claims against airlines are always pre-empted." She continued that physical injury tort suits would probably be too tenuously related to services, "much as [the Court] suggested in Morales that state laws against gambling and prostitution would be too tenuously related to airline services to be pre-empted." Just because a state law is somehow related to a "service" does not make it per se preempted. As Justice Stevens observed: "every judgment against an airline will have some effect on rates, routes, or services, at least at the margin. In response to adverse judgments, airlines may have to raise rates, or curtail routes or services, to make up for lost income." The Court's limiting language in Morales is thus crucial in the decision, and ultimately the preemption line should be drawn before reaching these claims.

This conclusion is further supported by looking at the possible economic effects of state physical injury negligence law on airline "service." Federal law already demands a similar reasonable care

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155 See Medtronic, 518 US at 501-02 (majority) (observing that general requirements of manufacturers to use due care to avoid foreseeable dangers and to warn of potential risks are "general obligations," which are not a threat to federal requirements).
156 Id at 487, quoting Silkwood v Kerr-McGee Corp, 464 US 238, 251 (1984). The Court further stated that "it would take language much plainer than the text [of the Medical Device Amendments of 1976] to convince us that Congress intended that result." Id.
157 Wolens, 513 US at 242 (O'Connor dissenting, joined in part by Thomas).
158 Id. The dissent did note that courts had found the claims not to relate to "services" of an airline, but mentioned there was most likely a tenuous relationship as found in Morales. See id. The latter statement illustrates that there is a relationship, but that it is not large enough for preemption. In contrast, the former position concludes that there is no relationship because the claim dealt with operations and not services.
159 Wolens, 513 US at 236 n 2 (Stevens concurring in part, dissenting in part).
160 Morales, 504 US at 388-89 (noting that even if there were no direct reference to rates, routes, or services, preemption could occur if state law has a "forbidden significant effect" upon them).
standard through its regulations. With regard to passenger injuries, Congress has given the FAA several policy considerations in issuing safety regulations, and, as noted earlier, many of these revolve around efficiency.\(^{161}\) Efficiency in the safety context requires cost-effective precautions.\(^{162}\) Under this prerogative, the FAA already regulates many airline services.\(^{163}\) For instance, one regulation requires flight attendants to undergo extensive training, and airlines to make sure flight attendants can do the jobs that they will be assigned.\(^{164}\) Other regulations state that airlines cannot have baggage in the passenger area of an airplane unless it meets several safety requirements.\(^{165}\) Thus, these federal regulations are supposed to be close to cost effective precautions.

The state common law negligence standard has also been seen by many as providing for cost effective precautions with regard to physical injuries.\(^{166}\) Thus, at least one court has noted that “[t]he common law of negligence does not hold the airlines to a different standard of care from that provided by the Federal Aviation Act and related regulations.”\(^{167}\) In theory, the effect of state negligence physical injury tort law on airlines' services would not be significant if there were proper federal enforcement, because it is the FAA's job to regulate these areas so as to provide efficient incentives with or without state liability. However, many of these FAA regulations do not provide a private

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\(^{161}\) See 49 USC § 40101(d)(4) (noting that control over the use of navigable airways and operations in airspace should be regulated in the interest of safety and efficiency). When safety and efficiency are introduced together, the law appears to require cost-effective safety precautions.


\(^{164}\) See 14 CFR § 121.421(b) (2003) (“Initial and transition ground training for flight attendants must include a competence check to determine ability to perform assigned duties and responsibilities.”).

\(^{165}\) See 14 CFR § 121.285 (setting forth requirements for approved cargo bins); 14 CFR § 121.589(c) (2003) (requiring that all baggage be stowed before the plane can take off).

\(^{166}\) See Posner, *Economic Analysis of Law* § 6.1 at 167–70 (cited in note 162) (noting that although the cost-effective precaution formula developed by Learned Hand is relatively recent, “the method it capsulizes has been used to determine negligence ever since negligence was first adopted as the standard to govern accident cases”).

\(^{167}\) *Margolis*, 811 F Supp at 321 (noting that “nowhere in the legislative history or in the evolution of the statute is there any suggestion that the preemption provision . . . was intended to preclude common law negligence actions”). See also *In re Air Disaster*, 819 F Supp 1352, 1362–64 (ED Mich 1993) (noting the same).
cause of action, and the federal government probably has limited resources to adequately ensure proper enforcement of its standard of care. These factors make it naive to assume that the FAA will be able to maintain an adequate standard of care that would be a substitute for state tort law.

However, in *Geier v American Honda Motor Co, Inc*, the Supreme Court noted that its "pre-emption cases ordinarily assume compliance with the state-law duty in question." Geier had argued that tort liability would likely not have a large effect on the federal scheme because the relevant state legal obligations would not be enforced or the defendants would just pay fines instead of changing their behavior. Since the state law would not be enforced, it would not upset the federal scheme. It is just a small step to take for the Court to assume the opposite in its preemption analysis, namely, that airlines will comply with FAA regulations. If this compliance is assumed, when the tort standards of care are added to regulation, the physical injury negligence claims basically provide for legal remedies for injury.

In conclusion, these specific state negligent physical injury claims will arguably have too tenuous a relationship with airline "service" to be preempted. Traditional presumptions on preemption, Supreme Court precedents, and FAA regulations all point in this direction. Therefore, a passenger could sue in state court for injuries caused by falling luggage or flight attendants in their provision of services. These

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168 See Margolis, 811 F Supp at 324–25 (noting that the only recourse in the federal regulations is an administrative complaint). See also *Anderson v USAir, Inc*, 818 F.2d 49, 55–56 (D.C Cir 1987) (noting the same and that the Department of Transportation and FAA are entitled to bring suit against airlines).


170 Id at 882.


172 This Comment does not reach the separate issue whether the relationship of tort remedies to airline prices is too tenuous for preemption to apply. However, state taxes, which arguably have a much more direct impact on airline prices than do tort remedies, are explicitly not preempted. See 49 USC § 40116(e) (allowing states to collect property and similar taxes).

173 Even if there is federal preemption of the negligence standard of care, it does not necessarily mean that there is preemption for physical tort legal remedies. See *Silkwood*, 464 US 238, in which the Supreme Court allowed state remedies for nuclear accident injuries, even though it had previously decided that federal regulation occupied the entire field, and the states could not implement their own standards of care. See also *Abdullah v American Airlines, Inc*, 181 F.3d 363 (3d Cir 1999) (holding that, with regard to airline preemption, state safety standards of care were implicitly preempted by the Federal Aviation Act, but that state remedies could still exist); *Bieneman v Chicago*, 864 F.2d 463, 472 (7th Cir 1988) ("Notwithstanding the argument (indeed the truism) that an award of hefty compensatory and punitive damages is a method of regulating safety, the Court [in *Silkwood*] concluded that federal law does not preempt common law remedies concerning nuclear safety."). Thus, even if states cannot impose a standard of care on airlines, they still may be able to provide compensation to injured victims of the airlines.
physical injury claims are too tenuously related to the underlying ser-

vices for preemption to apply.

C. General Application

The process that I use for analyzing whether physical injury torts
are preempted should be used in all of the areas in which the preemp-
tion provision is applied. For example, the term "service" has been in-
terpreted in many other common law tort cases, such as negligent ex-
clusion from a plane or intentional torts, and in state whistleblower
law and state anti-discrimination law cases. First, a court must ask
whether the law in question makes reference to services of the air-
lines. If not, the court must analyze whether the law has a connection
with or effect upon services. If there is some connection or effect, the
court must analyze whether this relationship is substantial (in which
case preemption should occur) or only limited and tenuous (in which
case preemption is improper). In determining the substantiality of the
effect, a court should look to background presumptions and canons of
construction, other sections of the Act, other statutes, and opinions of
the agencies regulating the airlines. Of course, the outcome may very
well be different in contexts other than physical injury torts when all
this other information is analyzed.174 For example, in negligent exclu-
sion claims, the Act provides broad discretion for airlines over allow-
ing people to board, subject to FAA regulation.175 Thus, the state
causes of action might have a much more substantial effect on the way
the airlines operate in this area than with regard to physical injury
torts, in which there are already many federal safety requirements in
place. Also, the background presumption against preemption is weak-
ened in many of these areas as compared with physical injury torts.
For instance, the concern Justice Stevens had in Medtronic about judi-
cial redress176 is absent in many of them because there are already fed-
eral causes of action.177

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174 On whether state anti-discrimination statutes should be preempted, see Ryan L.
Bangert, Comment, When Airlines Profile Based on Race: Are Claims Brought against Airlines
under State Anti-discrimination Laws Preempted by the Airline Deregulation Act?, 68 J Air L &
Comm 791, 817-18 (2003) (concluding that these laws should be preempted if the airlines are us-
ing good faith efforts to protect safety without explicitly defining the term services).

175 See 49 USC § 44902(b) ("Subject to regulations of the Administrator, an air carrier, in-
trastate air carrier, or foreign air carrier may refuse to transport a passenger or property the car-
rier decides is, or might be, inimical to safety.").

176 See text accompanying note 156.

177 For examples of statutes creating relevant federal causes of action, see Wendell H. Ford
Aviation Investment and Reform Act for the 21st Century § 519(a), Pub L No 106-181, 114 Stat
for airline employees); 42 USC § 2000e-2(a) (2000) (prohibiting discrimination in employment
generally on the basis of an "individual's race, color, religion, sex, or national origin"); 29 USC
§ 623(a) (2000) (prohibiting discrimination against employees on the basis of age); 42 USC
Most importantly, this application is consistent with Supreme Court precedent and avoids the slippery slope logic of the Ninth and Fifth Circuits. There is a difference between prescribing what services one can undertake and providing a remedy when these services lead to injury. Thus, a state regulation calling for no overhead compartments on planes would refer to services directly, just as the generalized anti-fraud regulation in Wolens related to rates. The connection would be much more substantial than with tort remedies, and neither would be too tenuous. In contrast, personal injury torts, just like generalized laws on gambling and prostitution, do not have a substantial connection to the "service" of airlines. As such they are not preempted.

CONCLUSION

Congress wanted to deregulate the airline industry because competition is more efficient than regulation. Its preemption provision prohibits states from regulating certain airline operations, including any airline service. The circuit courts’ confusion over the proper definition of the term “service” has lead to inconsistency and unsound results. In this Comment, I proposed that the broad definition of “service” is the proper definition of the term because it is consistent with ordinary preemption principles and Supreme Court precedent. This broad definition of “service”—any labor not producing a tangible commodity—includes flight attendant service, the provision of overhead baggage space, and other amenities of the flight. However, the connection between the state law and the service must be more than tenuous for preemption to apply. Thus, a law regulating any airline service is preempted if the connection with the service is significant. This definition and analysis will provide clarity to consumers and the airlines, and promote the efficient provision of all aspects of airline transportation—a most laudable congressional goal.

§ 12112 (2000) (prohibiting discrimination against a qualified individual because of that individual’s disability).


179 See Morales, 504 US at 390.