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## Navigating the Turbulence: The First Circuit Clarifies the Preemptive Scope of the Airline Deregulation Act in *Brown v. Unived Airlines*

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# NAVIGATING THE TURBULENCE: THE FIRST CIRCUIT CLARIFIES THE PREEMPTIVE SCOPE OF THE AIRLINE DEREGULATION ACT IN *BROWN v. UNITED AIRLINES*

**Abstract:** On July 9, 2013, in *Brown v. United Airlines, Inc.*, the U.S. Court of Appeals for the First Circuit held that the Airline Deregulation Act (“ADA”) preempted skycaps’ common law tortious interference and unjust enrichment claims. In so holding, the First Circuit articulated a two-pronged test in an attempt to provide clarity to the relationship between the savings clause and the preemption clause of the ADA. This Comment argues that the First Circuit’s two-pronged test is faithful to U.S. Supreme Court jurisprudence and should serve as a model for other federal appeals courts until the Supreme Court provides additional guidance.

## INTRODUCTION

In 2008, two separate putative class actions were brought against US Airways and United Airlines on behalf of skycaps,<sup>1</sup> alleging common law claims of unjust enrichment and tortious interference.<sup>2</sup> The skycaps alleged that the implementation of new two-dollar bag fee policies by both airlines dramatically reduced their earnings.<sup>3</sup> Both airlines contended that the Airline Deregulation Act (“ADA”) of 1978 preempted the skycaps’ claims.<sup>4</sup> The preemption clause in the ADA prohibits a state from enacting or enforcing a law, regulation, or other provision having the full force and effect of law if it is related to the price, route, or service of an air carrier.<sup>5</sup> After consolidating the two cases as to the issue of ADA preemption, the U.S. District

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<sup>1</sup> *Brown v. United Airlines, Inc. (Brown II)*, 720 F.3d 60, 62 (1st Cir.), *petition for cert. filed*, 82 U.S.L.W. 3242 (U.S. Oct. 7, 2013) (No. 13-444). “Skycaps” is a term of art used to describe porters who provide curbside service at airports. *Id.*

<sup>2</sup> *Mitchell v. US Airways, Inc.*, 858 F. Supp. 2d 137, 140–41 (D. Mass. 2012), *aff’d sub nom. Brown II*, 729 F.3d 60; *Brown v. United Air Lines, Inc. (Brown I)*, 656 F. Supp. 2d 244, 247 (D. Mass. 2009).

<sup>3</sup> *Mitchell*, 858 F. Supp. 2d at 140; *Brown I*, 656 F. Supp. 2d at 247. The skycaps further alleged that the airlines intentionally and improperly misled passengers to think the charge was a mandatory tip for the skycaps. *Mitchell*, 858 F. Supp. 2d at 148; *Brown I*, 656 F. Supp. 2d at 248.

<sup>4</sup> *See Mitchell*, 858 F. Supp. 2d at 148; *Brown I*, 656 F. Supp. 2d at 249; 49 U.S.C. § 141713(b)(1) (2006) (providing for the preemption of, inter alia, certain state laws and regulations).

<sup>5</sup> 49 U.S.C. § 41713(b).

Court for the District of Massachusetts granted the airlines' motions for summary judgment.<sup>6</sup> On appeal, in 2013, in *Brown v. United Airlines, Inc.* (*Brown II*), the U.S. Court of Appeals for the First Circuit held that the ADA preempted the skycaps' common law claims.<sup>7</sup>

In reaching its decision, the First Circuit articulated a two-pronged analysis of the ADA's preemption clause and its relationship to the savings clause of the Federal Aviation Act ("FAA") of 1958.<sup>8</sup> Under this two-pronged test, the ADA preempts plaintiffs' claims if: (1) the claims are based on a state law or provision, and (2) the claims are sufficiently related to prices, routes, or services provided by the air carrier.<sup>9</sup> By articulating the two-pronged analysis in *Brown II*, the First Circuit set forth a clear mode of analysis for lower courts to follow.<sup>10</sup> Other courts have found the ADA preemption clause analysis elusive, leading to disagreement in its application.<sup>11</sup> Specifically, the courts have differed as to how expansively the term "services" should be defined, resulting in an array of decisions not always uniform in their treatment of the ADA.<sup>12</sup>

This Comment argues that the First Circuit's two-pronged test developed in *Brown II* is faithful to U.S. Supreme Court jurisprudence, provides clarity to the preemptive scope of the ADA, and prevents the reregulation of

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<sup>6</sup> *Mitchell*, 858 F. Supp. 2d. at 252; see *Brown II*, 720 F.3d at 62.

<sup>7</sup> *Brown II*, 720 F.3d at 66.

<sup>8</sup> *Id.* at 63. The FAA's savings clause allowed state laws to coexist with federal airline regulation. See Federal Aviation Act of 1958, Pub. L. 85-726, § 1106, 72 Stat. 731, 798 (current version at 49 U.S.C. § 40120(c) (2006)). The Act's language has been modified over time, but its operative provisions remain in force today. See 49 U.S.C. § 40120(c).

<sup>9</sup> *Brown II*, 720 F.3d at 63.

<sup>10</sup> See *id.* at 62; see also Eric E. Murphy, *Federal Preemption of State Law Relating to an Air Carrier's Services*, 71 U. CHI. L. REV. 1197, 1228 (2004) (arguing that a broad definition of services, and an analysis that focuses on the connection between state action and airline services, will provide clarity to consumers and airlines).

<sup>11</sup> See *DiFiore v. Am. Airlines, Inc. (DiFiore II)*, 646 F.3d 81, 87, 89 (1st Cir. 2011) (noting that there is no easily-applied test for ADA preemption analysis); *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 192 (3d Cir. 1998) (explaining that federal appeals courts have struggled with the relationship between the ADA and common law claims); *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 85 (2d Cir. 1997) (noting that ADA preemption jurisprudence has left courts with an elusive test); *Spinrad v. Comair, Inc.*, 825 F. Supp. 2d 397, 407 (E.D.N.Y. 2011) (same).

<sup>12</sup> See, e.g., 49 U.S.C. § 41713(b) (2006); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257, 1264 (11th Cir. 2003) (interpreting "services" broadly, but holding that claims based on state whistleblower law is not preempted); *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc) (defining "services" as generally referring to point-to-point transport of passengers); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (holding that "services" includes terms such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself). For an examination of the discrepancies in federal appeals court interpretations of "services," see Murphy, *supra* note 10, at 1206-17.

the airline industry through state common law.<sup>13</sup> Part I outlines the development of the ADA's preemption clause and introduces the First Circuit's two-pronged analysis articulated in *Brown II*.<sup>14</sup> Part II examines how other circuit courts have interpreted the ADA's preemption clause.<sup>15</sup> Finally, Part III argues that the two-pronged analysis provides clarity for courts and the airline industry as to which common law claims fall under the ADA's preemptive scope.<sup>16</sup> As a result, Part III urges other federal courts to adopt *Brown II*'s two-pronged analysis when analyzing the ADA.<sup>17</sup>

## I. THE FLIGHT PATH: AIRLINE DEREGULATION AND THE FIRST CIRCUIT'S APPLICATION OF THE ADA TO COMMON LAW

The ADA is part of a multi-faceted airline regulatory scheme.<sup>18</sup> Although the ADA amended the FAA, the FAA's savings clause was retained.<sup>19</sup> Thus, the ADA's preemptive scope turns on the interplay between the competing interests of deregulating the airline industry and preserving states' traditional police powers.<sup>20</sup> At issue is how best to reconcile the broad scope of the ADA's preemption clause with the savings clause retained from the FAA.<sup>21</sup> These competing clauses highlight Congress's intent to prevent states from replacing federal airline regulations with regulations of their

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<sup>13</sup> See *infra* notes 84–101 and accompanying text.

<sup>14</sup> See *infra* notes 18–63 and accompanying text.

<sup>15</sup> See *infra* notes 64–83 and accompanying text.

<sup>16</sup> See *infra* notes 84–101 and accompanying text.

<sup>17</sup> See *infra* notes 84–101 and accompanying text.

<sup>18</sup> *Brown II*, 720 F.3d at 62; see Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

<sup>19</sup> See 92 Stat. at 1705 (indicating that the FAA amends the FAA); Federal Aviation Act of 1958, Pub. L. 85-726, § 1106, 72 Stat. 731, 798 (current version at 49 U.S.C. § 40120(c) (2006) (“A remedy in this part is in addition to any other remedies provided by law.”)).

<sup>20</sup> See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222, 232–33 (1995) (holding that the savings and preemption clauses, when read together, prevent states from imposing their own airline regulations, while preserving states' power to enforce private agreements); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 379, 388 (1992) (observing that it is doubtful Congress would undermine the sweeping preemption clause with a general savings clause); Donald J. Frenette, *Avoiding Preemption Under the Airline Deregulation Act*, 17 MISS. C. L. REV. 171, 182 (1996) (arguing that courts have struggled to reconcile the inherent conflict that exists between these two clauses). The ADA's preemption clause has sparked disagreement among the federal courts. *Compare* *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 37 (1st Cir. 2007) (holding that only self-imposed undertakings fall outside of the ADA preemption clause), *with* *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1264 (9th Cir. 1998) (holding that all common law contract claims fall outside the ADA preemption).

<sup>21</sup> See Frenette, *supra* note 20, at 182. Although the two provisions are not directly linked, courts have analyzed the FAA's saving clause when determining the ADA's preemptive scope. See, e.g., *Wolens*, 513 U.S. at 232; *Brown II*, 720 F.3d at 62; *Charas*, 160 F.3d at 1265.

own while also respecting traditional state police powers.<sup>22</sup> Section A discusses the legislative history and Supreme Court interpretation of the preemptive scope of the ADA.<sup>23</sup> Section B examines the First Circuit's decision in *Brown II* and the two-pronged analysis that the court articulated.<sup>24</sup>

### A. Congressional Deregulation of the Airline Industry

In 1978, Congress enacted the ADA for the purpose of deregulating the airline industry to promote maximum reliance on market forces.<sup>25</sup> In concluding that deregulation would further the efficiency and innovation of airline services,<sup>26</sup> Congress amended the FAA,<sup>27</sup> but retained the FAA's savings clause, which allowed state law to coexist with federal regulation.<sup>28</sup> Nevertheless, to prevent states from circumventing federal deregulation by enacting regulations of their own—the ADA included a preemption provision, prohibiting states from enforcing any law “relating to rates, routes, or services” of any airline.<sup>29</sup> Under the federal preemption doctrine, this preemption provision nullifies any conflicting state laws.<sup>30</sup>

<sup>22</sup> See *Wolens*, 513 U.S. at 232.

<sup>23</sup> See *infra* notes 25–40 and accompanying text.

<sup>24</sup> See *infra* notes 41–63 and accompanying text.

<sup>25</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1705 (codified as amended at 49 U.S.C. § 40101(a)(6) (2006)) (“An Act . . . to encourage, develop, and attain an air transportation system which relies on competitive market forces . . .”). Prior to 1978, The Federal Aviation Act of 1958, the foundation of air carrier regulation, gave the Civil Aeronautics Board (“CAB”) authority to regulate interstate affairs. See Pub. L. 85-726, § 102, 72 Stat. 731, 740, amended by Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.); *Morales*, 504 U.S. at 378.

<sup>26</sup> See 49 U.S.C. § 40101(a)(6); *Wolens*, 513 U.S. at 232; *Morales*, 504 U.S. at 378.

<sup>27</sup> See 92 Stat. at 1705.

<sup>28</sup> Federal Aviation Act § 1106, 72 Stat. at 798 (current version at 49 U.S.C. § 40120(c) (2006)). Congress later abolished CAB and transferred enforcement of the remaining regulatory authority over the airline industry to the Department of Transportation (DOT). Civil Aeronautics Board Sunset Act of 1984, Pub. L. No 98-443, §§ 3–4, 98 Stat. 1703, 1703–05; *Morales*, 504 U.S. at 379 (explaining the DOT's enforcement authority over the airline industry). For a detailed examination of the CAB and the legislative history of airline regulation, see Craig M. Fallon, Note, *Constitutional Law—Federal Preemption—The Federal Aviation Act Does Not Preempt State Claim Against an Airline for Breach of Covenant of Good Faith and Fair Dealing Arising from Overbooking*, 23 RUTGERS L.J. 427, 438 (1992).

<sup>29</sup> See Federal Aviation Act § 105, 92 Stat. at 1708 (codified as amended at 49 U.S.C. § 41713(b) (2006)); *Morales*, 504 U.S. at 378 (“To ensure that the States would not undo federal deregulation . . . , the ADA included a preemption provision.”). The language of the ADA preemption clause was later adopted without substantive change by the Federal Aviation Administration Authorization Act (FAAAA) of 1994, and the terms ADA and FAAAA have therefore been viewed as interchangeable. See Federal Aviation Administration Authorization Act of 1994, Pub. L. No 103-272, § 41713, 108 Stat 745, 1143 (codified as amended at 49 U.S.C. § 14501(b)(1) (2006)); see also *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (holding that the ADA and FAAAA preemption provisions are interchangeable); *Deerskin Trading Post, Inc. v. United Postal*

Two Supreme Court cases have attempted to clarify the relationship between the ADA's preemptive scope and the retained FAA savings clause.<sup>31</sup> In 1992, in *Morales v. Trans World Airlines, Inc.*, the Court struck down state guidelines addressing airline advertisements, finding them inconsistent with the ADA's deregulatory purpose.<sup>32</sup> In doing so, the Court emphasized the sweeping nature of the preemption provision, which displaces all state laws within its sphere.<sup>33</sup> Additionally, the Court viewed the savings clause as a relic of the pre-ADA, pro-regulation regime, and therefore superseded by the preemption clause.<sup>34</sup> Nevertheless, the Court clarified that the ADA did not preempt state actions too tenuous, remote, or peripheral to have preemptive effect, but did not clarify which state actions would be too tenuously related.<sup>35</sup>

In 1995, in *American Airlines, Inc. v. Wolens*, the Court reaffirmed the broad scope of the ADA's preemption clause by striking down a state law it viewed as having the potential to intrude on airline business practices.<sup>36</sup> The Court, however, found that the ADA did not preempt a common law breach of contract claim.<sup>37</sup> In so holding, it carved out an exception to the expan-

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Serv. of Am., 972 F. Supp. 665, 669 (N.D. Ga. 1997) ("The language Congress chose in drafting the preemption provisions of the FAAAA shows that Congress intended for the preemption provisions of the FAAAA to be applied in an identical manner as the preemption provision of the ADA.").

<sup>30</sup> *Morales*, 504 U.S. at 383. The principle of federal preemption originates from the Supremacy Clause of the U.S. Constitution, which states that the laws of the United States "shall be the Supreme Law of the Land." See U.S. CONST. art. IV, cl. 2; Dustin M. Dow, Note, *The Unambiguous Supremacy Clause*, 53 B.C. L. REV. 1009, 1017 (2012) (stating that all preemption cases turn on the effect of the Supremacy Clause). The Supremacy Clause is interpreted to nullify state laws when they come into conflict with federal laws. See, e.g., *Morales*, 504 U.S. at 383; *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Although express language streamlines potential preemption issues, the scope of the preemption may still be uncertain. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (discussing the difficulty of interpreting the scope of an express preemption clause). In such instances, congressional intent has long been viewed as the principle resource in defining the scope and extent of an express preemption clause. See *Morales*, 504 U.S. at 379.

<sup>31</sup> See *Wolens*, 513 U.S. at 232–33; *Morales*, 504 U.S. at 384–85.

<sup>32</sup> 504 U.S. at 391.

<sup>33</sup> See *id.* at 383–84 (observing that the language employed by Congress, particularly the phrase "relating to," illustrates the preemption clause's broad and expansive scope).

<sup>34</sup> *Id.* at 385 (expressing doubt that Congress intended to undermine this carefully drawn statute through a general savings clause).

<sup>35</sup> See *id.* at 390. The Court did, however, suggest that laws related to prostitution or gambling are examples of stated laws too tenuously related. *Id.*

<sup>36</sup> 513 U.S. at 234 (holding that the ADA preempted the Illinois Consumer Fraud and Deceptive Practices Act when applied as a guideline to airlines' marketing programs).

<sup>37</sup> *Id.* at 228–29 (concluding that the ADA does not preempt an airline's alleged failure to uphold the terms of a frequent flyer program as part of a contract it voluntarily entered into with passengers).

sive scope of the preemption provision.<sup>38</sup> The Court reasoned that the retention of the FAA's savings clause allowed state adjudication of routine breach of contract claims that do not rely on state policies external to the agreement.<sup>39</sup> This "*Wolens* exception" protects the enforcement of self-imposed private obligations from the ADA preemption clause.<sup>40</sup>

### B. *The First Circuit's holding and two-pronged analysis in Brown II*

The First Circuit's 2013 decision in *Brown II* arose out of three different sets of putative class actions: *DiFiore v. American Airlines, Inc. (DiFiore II)*; *Mitchell v. US Airways, Inc.*; and *Brown v. United Airlines, Inc. (Brown I)*.<sup>41</sup> In 2006, in *DiFiore v. American Airlines, Inc. (DiFiore I)*, the U.S. District Court for the District of Massachusetts first considered whether the ADA substantively preempts claims connected to skycaps and curbside baggage fees.<sup>42</sup> In December 2005, American Airlines and other national air carriers instituted a two-dollar fee for curbside check-in service.<sup>43</sup> In their complaint, the skycaps alleged that this new curbside check-in fee impermissibly diminished their income, as skycaps' compensation depended largely on tips.<sup>44</sup> American Airlines moved to dismiss, claiming that the ADA preempted the skycaps' claims.<sup>45</sup> The district court granted summary judgment against all of the skycaps' claims with the exception of their claims of violation of the Massachusetts Tip Law (the "Tip Law") and tortious interference.<sup>46</sup>

The Tip Law and tortious interference claims were tried in the District of Massachusetts in the spring of 2008, resulting in a jury verdict in favor of

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<sup>38</sup> See *id.*; see also *Buck*, 476 F.3d at 34 (explaining that *Wolens* carved out an exception for parties seeking recovery solely on an airline's breach of its own, self-imposed undertakings). This exception has been referred to as the "*Wolens* exception." See *Buck*, 476 F.3d at 34; *Brown II*, 720 F.3d at 70.

<sup>39</sup> See *Wolens*, 513 U.S. at 232–33 (noting that the enforcement of private agreements that airlines voluntarily enter into is too tenuously connected to significantly affect an airline's prices or services).

<sup>40</sup> *Buck*, 476 F.3d at 34; see *Wolens*, 513 U.S. at 232–33.

<sup>41</sup> Cf. *Brown II*, 720 F.3d. at 61, 64 (discussing *Mitchell* and *Brown I* and holding that *DiFiore II* resulted in the common claims of the consolidated putative class actions to be preempted by the ADA). See generally *DiFiore II*, 646 F.3d 81; *Mitchell*, 858 F. Supp. 2d 137; *Brown I*, 656 F. Supp. 2d 244.

<sup>42</sup> 688 F. Supp. 2d 17, 17 (D. Mass. 2009), *rev'd*, 646 F.3d 81.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The skycaps alleged that customers perceived the new fee as a mandatory gratuity, and therefore, the charge amounted to diverting tip revenue from employees. See *id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 25. The court reasoned that the Tip Law affected airlines in their capacity as employers, not as air carriers, and that the law thus has too peripheral a connection to be preempted. *Id.* at 23; see MASS. GEN. LAWS ch. 149, § 152A (2004).

the skycaps on both theories.<sup>47</sup> American Airlines appealed, and in 2011, in *DiFiore II*, the First Circuit reversed the district court ruling, holding that the ADA preempted the Massachusetts Tip Law.<sup>48</sup> The court did not reach the question of whether the ADA preempted the tortious interference claim because it found the claim rested critically on the Massachusetts Tip Law and was thus rejected.<sup>49</sup>

While the First Circuit considered *DiFiore II*, similar putative class actions challenging other major airlines' curbside check-in charges were filed on behalf of skycaps in the Massachusetts Federal District Court.<sup>50</sup> In 2008, in *Mitchell*, and in 2009, in *Brown I*, skycaps asserted several Massachusetts statutory and common law claims against the airlines.<sup>51</sup> After the First Circuit's ruling in *DiFiore II*, both classes conceded that the ADA preempted their state law claims; nevertheless, citing the Supreme Court's *Wolens* decision, the classes contended that their common law claims of unjust enrichment and tortious interference fell outside the ADA's broad preemptive scope.<sup>52</sup> The District of Massachusetts consolidated *Mitchell* and *Brown I* and granted both airlines' motions for summary judgment, reasoning that these common law claims would have the same prohibitive effect in application as the Massachusetts Tip Law.<sup>53</sup> The district court determined that the *Wolens* exception is limited to the enforcement of contracts and therefore could not be applied to the skycaps' unjust enrichment claim, which is an equitable remedy that would enforce external state policies.<sup>54</sup>

On appeal, the First Circuit articulated a two-pronged analysis to determine whether the ADA preempted the skycaps' common law claims.<sup>55</sup> The first prong focuses on the procedural relevance of the claim to determine whether the claim is based on a state law, regulation, or other provision that has the force and effect of law.<sup>56</sup> The second prong then focuses on

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<sup>47</sup> *DiFiore I*, 688 F. Supp. 2d at 18.

<sup>48</sup> 646 F.3d at 87, 89.

<sup>49</sup> *Id.* at 89.

<sup>50</sup> *Mitchell*, 858 F. Supp. 2d at 140, 145; *Brown I*, 656 F. Supp. 2d at 247.

<sup>51</sup> *Mitchell*, 858 F. Supp. 2d at 140, 145; *Brown I*, 656 F. Supp. 2d at 247. Note that although commenced in 2008, *Mitchell* was decided in 2012, after consolidation with *Brown I*. See *Mitchell*, 858 F. Supp. 2d at 162.

<sup>52</sup> *Mitchell*, 858 F. Supp. 2d at 154–55, 158 (illustrating the arguments posed by the parties pursuant to their consolidated action); see also *Wolens*, 513 U.S. 232–33 (holding that the ADA's preemption clause does not prevent the enforcement of private agreements that airlines enter into voluntarily).

<sup>53</sup> *Mitchell*, 858 F. Supp. 2d at 155, 157–58.

<sup>54</sup> *Id.* at 158.

<sup>55</sup> *Brown II*, 720 F.3d at 63.

<sup>56</sup> *Id.* at 65.



the substantive relevance of the claim and asks whether the claim is sufficiently related to a price, route, or service of an air carrier.<sup>57</sup>

Finding affirmative answers to both the substantive and procedural prongs, the First Circuit held that the ADA preempted the skycaps' claims.<sup>58</sup> Under the procedural first prong, the court focused on the phrase "other provision" in the ADA's preemption clause and determined that common law claims have the force and effect of law.<sup>59</sup> The court reasoned that, similar to positive law, common law could force the airline industry to alter its business practices.<sup>60</sup> Regarding the substantive second prong, the court determined that the baggage fees were related to a price, route, or service.<sup>61</sup> The court reaffirmed *DiFiore II*'s finding that curbside checking of baggage is itself part of the "service" referred to in the ADA's preemption clause.<sup>62</sup> The court also followed *DiFiore II* in holding that an airline's "price" includes charges for such ancillary services in addition to the flight itself.<sup>63</sup>

## II. CAUGHT IN THE JETWASH: THE ADA'S PREEMPTIVE SCOPE

The 1995 Supreme Court decision in *American Airlines, Inc. v. Wolens* left courts in disagreement regarding how to properly balance the broad scope of the ADA preemption clause with the *Wolens* exception and the retained FAA savings clause.<sup>64</sup> Courts disagreed as to whether the *Wolens* exception pertained simply to private contract enforcement or to all common law claims too tenuous to impact airline prices.<sup>65</sup> Central to this disagreement were the courts' differing definitions of "services" and "other provi-

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<sup>57</sup> *Id.* The two prongs are premised on the text of the ADA preemption provision. See 49 U.S.C. § 41713(b) (2006).

<sup>58</sup> *Brown II*, 720 F.3d at 71.

<sup>59</sup> See 49 U.S.C. § 41713(b); *Brown II*, 720 F.3d at 64–65.

<sup>60</sup> *Brown II*, 720 F.3d at 65.

<sup>61</sup> See *id.* at 64.

<sup>62</sup> *Id.*; see 49 U.S.C. § 41713(b); *DiFiore II*, 646 F.3d at 87.

<sup>63</sup> *Brown II*, 720 F.3d at 64; see 49 U.S.C. § 41713(b); *DiFiore II*, 646 F.3d at 87.

<sup>64</sup> See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222, 232–33 (1995); *DiFiore II*, 646 F.3d 81, 86 (1st Cir. 2011) (noting that *Morales* and *Wolens* provide no easily applied test); *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 750 (Tex. 2003) (noting that, in the wake of *Wolens*, courts have struggled to determine when the ADA preempts state law claims).

<sup>65</sup> Compare *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 191 (3d Cir. 1998) (reasoning that *Wolens* shows that *Morales* is not open ended), with *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1264 (9th Cir. 1998) (holding that *Wolens* held that the ADA did not preempt common law contract claims and implicitly suggested that private tort claims also avoid preemption), and *Deerskin Trading Post, Inc. v. United Postal Serv. of Am.*, 972 F. Supp. 665, 670 (N.D. Ga. 1997) (holding that *Wolens* instructs courts to read the ADA preemption broadly, thus preempting state tort law related to an airline's service). The First Circuit interprets the *Wolens* exception as limited to the enforcement of an airlines' self-imposed undertakings. See *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 37 (1st Cir. 2007).

sions” in the ADA.<sup>66</sup> As a result, unanswered questions remain, and federal court decisions continue to yield inconsistent results.<sup>67</sup> Section A discusses the various modes of analysis developed by federal appeals courts.<sup>68</sup> Section B then examines how these various tests have created further confusion.<sup>69</sup>

### A. Divergent Approaches to ADA Preemption

Prior to the First Circuit’s decision in *Brown II*, federal appeals courts analyzing the ADA preemption issue followed two modes of analysis.<sup>70</sup> The first approach, adopted by the U.S. Courts of Appeals for the Fifth and Seventh Circuits, focuses on the economic impact of the state action.<sup>71</sup> This approach interprets “services” broadly and finds that the ADA preempts state regulations and common law that have a significant economic impact upon air carriers.<sup>72</sup> Only state actions without potential economic impact on

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<sup>66</sup> Compare *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003) (holding that a broader reading of “services” is a preferable reading of the preemption clause), with *Charas*, 160 F.3d at 1261 (defining “services” as generally referring to point-to-point transport of passengers), and *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (concluding “services” to include terms such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself). Compare *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 604, 607 (7th Cir. 2000) (concluding that state common law claims fall under the “other provision” phrase of the ADA preemption clause), with *Spinrad v. Comair, Inc.*, 825 F. Supp. 2d 397, 412 (E.D.N.Y. 2011) (finding that Congress did not intend “other provision” to encompass the common law).

<sup>67</sup> See *Taj Mahal Travel*, 164 F.3d at 192 (explaining that federal courts have struggled with the relationship between the ADA and common law claims); see also Matthew J. Kelly, Comment, *Federal Preemption by the Airline Deregulation Act of 1978: How Do State Tort Claims Fare?*, 49 CATH. U. L. REV. 873, 901–02 (2000) (concluding that until the Supreme Court defines crucial terms of the ADA preemption clause, courts will continue to yield inconsistent results); Frenette, *supra* note 20, at 198 (arguing that federal courts interpret the preemption provision to accommodate the case at hand).

<sup>68</sup> See *infra* notes 70–77 and accompanying text.

<sup>69</sup> See *infra* notes 78–83 and accompanying text.

<sup>70</sup> Compare *Mesa Airlines*, 219 F.3d at 609 (holding that a claim is preempted if the application would have a significant impact on an airline’s rates or services), with *Taj Mahal Travel*, 164 F.3d at 192 (holding that a state law is preempted by the ADA only if it frustrates congressional intent or imposes a utility-like regulation).

<sup>71</sup> See *Onoh v. Nw. Airlines, Inc.*, 613 F.3d 596, 600 (5th Cir. 2010); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996).

<sup>72</sup> *Onoh*, 613 F.3d at 599, 600 (holding “service” to include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling); *Travel All Over the World*, 73 F.3d at 1432 (adopting the Fifth Circuit’s broad definition of “services,” and holding that services include an airline’s refusal to transport those who booked their tickets through a travel agency); see 49 U.S.C. § 41713(b) (2006). Under this approach, the ADA can preempt state rules and common law even if the rules do not expressly refer to air carriers’ rates, routes, and services. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992).

airlines survive preemption.<sup>73</sup> Courts following this approach view the *Wolens* exception to only apply to self-imposed obligations that do not enlarge state law.<sup>74</sup>

The second approach, adopted by the U.S. Courts of Appeals for the Third and Ninth Circuits, focuses primarily on whether the alleged claim frustrates the congressional intent of economic deregulation of the airline industry.<sup>75</sup> Under this approach, the term “services” is interpreted narrowly, applying only to actions that expressly involve transportation or scheduling.<sup>76</sup> Additionally, courts following this approach explain that the *Wolens* exception applies to any common law claim that does not adversely impact the forces of competition within the airline industry.<sup>77</sup>

### B. Inconsistency Within the Divergent Approaches

Although these approaches appear relatively similar, their application has created inconsistent results with regard to ADA preemption.<sup>78</sup> Applying the first approach, the Northern District of Illinois found an unjust enrichment claim preempted in the 2013 case *Lagen v. United Continental Holdings, Inc.* because the claim would have a significant economic effect on

<sup>73</sup> See *Mesa Airlines*, 219 F.3d at 609. The Fifth Circuit adopted this test in the 2010 case *Onoh v. Northwest Airlines, Inc.*, rejecting the plaintiff passenger’s breach of contract and tort claims as preempted by the ADA. 613 F.3d at 600. The Seventh Circuit applied this test in the 1996 case *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, rejecting a travel agency’s breach of contract and tortious interference claims against a defendant airline. See 73 F.3d at 1432.

<sup>74</sup> *Onoh* 613 F.3d at 600; *Travel All Over the World*, 73 F.3d at 1434. For example, the ADA does not preempt a breach of contract claim based on an airline’s failure to satisfy its self-imposed obligation to provide plaintiff passengers with ground transportation to a connecting flight. See *Seals v. Delta Air Lines, Inc.*, 924 F. Supp. 854, 859 (E.D. Tenn. 1996).

<sup>75</sup> *Taj Mahal Travel*, 164 F.3d at 195; *Charas*, 160 F.3d at 1265–66.

<sup>76</sup> *Taj Mahal Travel*, 164 F.3d at 195; *Charas*, 160 F.3d at 1265–66; see 49 U.S.C. § 41713(b); Murphy *supra* note 10, at 1206–07 (arguing that the Ninth and Third Circuits narrowly define “services”). In 1998, the Ninth Circuit held in *Charas v. Trans World Airlines, Inc.*, that the ADA does not preempt common law tort claims that do not frustrate Congress’s intent to prevent the economic regulation of airlines. 160 F.3d at 1261. In the same year, the Third Circuit held in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, that the ADA did not preempt common law defamation claims against an airline, as the claims did not frustrate congressional intent or regulate the airlines. 164 F.3d at 195.

<sup>77</sup> See *Ginsberg v. Nw., Inc.*, 695 F.3d 873, 881 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2387 (2013). These courts have also interpreted the *Wolens* exception to support holding that common law tort claims are not preempted by the ADA. See *Taj Mahal Travel*, 164 F.3d at 195.

<sup>78</sup> Compare *Ginsberg*, 695 F.3d at 878–79 (applying the second approach and holding that the ADA did not preempt common law claims of implied breach of covenant of good faith and fair dealing), and *Thompson v. US Airways, Inc.*, 717 F. Supp. 2d 468, 478 (E.D. Pa. 2010) (applying the second approach and holding that the ADA did not preempt skycaps’ claim for unjust enrichment), with *Lagen v. United Cont’l Holdings, Inc.*, 920 F. Supp. 2d 912, 918 (N.D. Ill. 2013) (applying the first approach and holding that the ADA preempted the plaintiff’s claims of unjust enrichment and breach of implied covenant of good faith and fair dealing).

airline services.<sup>79</sup> Conversely, courts following the second approach have found that the ADA does not preempt similar claims of tortious interference, unjust enrichment, and good faith and fair dealing, as these claims do not endanger the deregulation of the airline industry.<sup>80</sup> For example, in 2012, the Ninth Circuit held in *Ginsberg v. Northwest, Inc.* that the ADA did not preempt a frequent flyer program member's claims of implied covenant of good faith and fair dealing.<sup>81</sup> The court determined that Congress intended to only preempt state laws with a direct effect on airline pricing.<sup>82</sup> Consequently, these two approaches provide courts with an elusive test that requires a time consuming case-by-case analysis to determine whether a given state law cause of action is preempted.<sup>83</sup>

### III. CLEAR SKIES AHEAD: THE TWO-PRONGED APPROACH ARTICULATED IN *BROWN II* FURTHERS AIRLINE DEREGULATION POLICY

The two-pronged analysis of the ADA preemption provision articulated in *Brown II* best effectuates the deregulatory policies underlying the ADA.<sup>84</sup> In doing so, the two-pronged approach faithfully applies Supreme Court precedent, provides greater clarity regarding the ADA's preemptive scope, and assists the airline industry in implementing new programs with-

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<sup>79</sup> See 920 F. Supp. 2d at 918; see also *Deerskin*, 972 F. Supp. at 669 (holding that the ADA preempted the plaintiff's claim of unjust enrichment because imposing such an obligation would create a state-imposed price or pricing practice).

<sup>80</sup> See *Ginsberg*, 695 F.3d at 878–79; *Thompson*, 717 F. Supp. 2d at 478.

<sup>81</sup> 695 F.3d at 878–79.

<sup>82</sup> *Id.* at 877, 880. In the 2010 U.S. District Court for the Eastern District of Pennsylvania case *Thompson v. US Airways, Inc.*, the court similarly held that the ADA did not preempt the skycaps' claims of tortious interference and unjust enrichment against an airline. See 717 F. Supp. 2d at 478.

<sup>83</sup> See *Travel All Over the World*, 73 F.3d at 1432 (explaining that preemption of common law requires a case-by-case analysis); *Spinrad*, 825 F. Supp. 2d at 407 (finding that limited analysis has left courts unclear as to whether the ADA preemption provision applies to common law negligence claims); see also Frenette, *supra* note 20, at 198 (arguing that federal courts interpret the preemption provision to accommodate the case at hand).

<sup>84</sup> *Compare* *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (noting that in passing the ADA, Congress determined that maximum reliance on competitive market forces would best further efficiency, innovation, and low prices of air transportation services), and *Abdu-Brisson v. Delta Airlines Inc.*, 128 F.3d 77, 85 (2d Cir. 1997) (expressing that a more bright line approach to ADA preemption analysis would be beneficial to the courts in developing consistent findings), with *Brown II*, 720 F.3d 60, 66 (1st. Cir.), *petition for cert. filed*, 82 U.S.L.W. 3242 (U.S. Oct. 7, 2013) (No. 13-444) (clarifying that a broad scope of common law claims are subject to ADA preemption, mitigating potential back-door state regulation). See also *infra* notes 94–96 and accompanying text (explaining why the two-pronged test furthers the deregulatory policies of the ADA).

out fear of back-door state regulations.<sup>85</sup> As long as both prongs of the *Brown II* test are applied faithfully, the airline industry is protected from back-door state regulation while states retain the ability to enforce the airlines' self-imposed private agreements.<sup>86</sup> Consequently, this standard will give the airline industry the confidence to implement innovative policies nationwide without fear of varying degrees of liability arising from common law claims.<sup>87</sup>

The two-pronged test articulated by the First Circuit encompasses common law claims as having the force and effect of law, and thus is aligned with recent Supreme Court jurisprudence.<sup>88</sup> The Supreme Court repeatedly interpreted the ADA preemption provision broadly, and the First Circuit's expansive definition of the ADA phrase "other provision" is faithful to this broad interpretation.<sup>89</sup> Moreover, the Court-created *Woolens* exception was not designed to save all common law claims from the ADA

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<sup>85</sup> See *Brown II*, 720 F.3d at 62–66 (clarifying the scope of ADA preemption and observing that the Supreme Court and the First Circuit consistently give a wide interpretive sweep to ADA preemption); see also *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 n.8 (1995) (noting that principles of contract law may be preempted if they seek to effectuate state policies); *Morales*, 504 U.S. 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); *Frenette*, *supra* note 20, at 201 (arguing that further clarity was needed in ADA preemption analysis); *infra notes* 85–93 and accompanying text (explaining further how *Brown II* aligns with Supreme Court jurisprudence).

<sup>86</sup> See *Wolens*, 513 U.S. at 231 (holding that the ADA preemption clause prevents states from imposing their own substantive standards with respect to airline rates, routes, or services); *Morales*, 504 U.S. at 386 (noting that it would be irrational to create a preemption loophole to a comprehensive federal deregulatory scheme); *Brown II*, 720 F.3d at 62 (concluding that the enforcement of common law claims can create as much inconsistency as state laws, and therefore interpreting ADA preemption broadly to include certain common law claims, save those premised on an airline's self-imposed undertakings).

<sup>87</sup> Compare *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 194 (3d Cir. 1998) (indicating that little guidance regarding ADA preemption caused confusion among the courts and uncertainty for airline industries), and *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (indicating that common law claims may escape ADA preemption), with *Brown II*, 720 F.3d at 66 (clarifying that all common law claims related to an airline's price, route, or service will be subject to ADA preemption). See also *DiFiore II*, 646 F.3d 81, 88 (1st Cir. 2011) (noting that allowing such claims would enable juries to create their own ad hoc compliance schemes that would impact airline pricing and service policies).

<sup>88</sup> See *Brown II*, 720 F.3d at 62; see also, e.g., *Wolens*, 513 U.S. at 250 n.8 (clarifying that some state law principles of contract law might be preempted); *Am. Truck Ass'n v. City of Los Angeles*, 133 S. Ct. 2096, 2098 (2013) (concluding that terms of private agreement were preempted by the FAAAA because terms have the force and effect of law); *Riegel v. Medtronic, Inc.*, 522 U.S. 312, 324–25 (2008) (holding that common law claims are preempted even though not expressly named in preemption clause); *Morales*, 504 U.S. at 386 (holding that the preemption clause has an expansive scope and preempts state actions that relate to airline rates, routes, or services—or those that have a forbidden economic impact on the airline industry).

<sup>89</sup> See 49 U.S.C. § 41713(b) (2006); *supra* note 88 (collecting cases).

preemption clause, but merely to prevent airlines from using the ADA as shelter against actions that attempt to enforce their private agreements.<sup>90</sup> Accordingly, unjust enrichment and tortious interference claims should not fall under the *Wolens* exception as these claims involve obligations created by law that is external to a private agreement.<sup>91</sup> Thus, the ADA must preempt such common law claims, as these claims have the effect of positive state laws.<sup>92</sup> The two-pronged test enables this preemption as it refrains from engaging in a time-consuming analysis as to whether state enforcement of the claim is more aptly described as tenuous or significant.<sup>93</sup>

In addition, by interpreting the ADA to preempt such common law claims, the two-pronged test protects the airline industry from inconsistent back-door state regulations.<sup>94</sup> The First Circuit's broad definition of "service" in the ADA preemption provision enables consistent airline policies driven primarily by market forces.<sup>95</sup> Reliance on competitive market forces is ideal, as these policies have been found to best further the efficiency and innovation of airline services.<sup>96</sup>

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<sup>90</sup> See *Wolens*, 513 U.S. at 228 (holding that the ADA preemption clause does not shelter airlines from claims based solely on a violation of self-imposed obligations); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 37 (1st Cir. 2007) (holding that the *Wolens* exception is limited to only self-imposed undertakings). Nevertheless, the Court cautioned that some principles of contract law might be preempted to the extent they seek to effectuate public policies. See *Wolens*, 513 U.S. at 233 n.8. But see *Ginsberg v. Nw., Inc.*, 695 F.3d 873, 878–79 (9th Cir. 2012), cert. granted, 133 S. Ct. 2387 (2013) (holding that nothing in the ADA's language or history suggests Congress intended to displace common law contract claims that only indirectly affected carriers).

<sup>91</sup> See *Lagen v. United Cont'l Holdings Inc.*, 920 F. Supp. 2d 912, 918 (N.D. Ill. 2013) (finding that an unjust enrichment claim is preempted by ADA); see also Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 699 (1990) (arguing that social norms should not be used to enforce contracts).

<sup>92</sup> See *Morales*, 504 U.S. at 386; *Brown II*, 720 F.3d at 62; see also Matthew Azoulay, Note, *American Airlines, Inc. v. Wolens: The Supreme Court's Reregulation of the Airline Industry*, 5 WIDENER J. PUB. L. 405, 411 (1996) (arguing that claims based on state common law have the same potential to undermine the principal goals of the ADA).

<sup>93</sup> See *Brown II*, 720 F.3d at 62 (clarifying that all common law claims that are related to an airline's price route or service, save those premised on an airline's self-imposed undertakings, are preempted); cf. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996) (explaining that preemption of common law previously required a case-by-case analysis); *Spinrad v. Comair, Inc.*, 825 F. Supp. 2d 397, 407 (E.D.N.Y. 2011) (finding that previous ADA analyses have left courts unclear as to which common law claims are preempted); Frenette, *supra* note 20, at 198 (arguing that federal courts interpret the preemption provision to accommodate the case at hand).

<sup>94</sup> See *Brown II*, 720 F.3d at 62 (noting that courts adjudicating common law claims can create as much uncertainty and inconsistency as can state laws or regulations); see also *Morales*, 504 U.S. at 386 (noting that it would be irrational to create a preemption loophole allowing states to impair a federal scheme through application of a general statute).

<sup>95</sup> See 49 U.S.C. § 41713(b) (2006); *Brown II*, 720 F.3d at 62.

<sup>96</sup> See *Morales*, 504 U.S. at 378–79 (expressing that Congress included the ADA preemption provision to ensure that states do not replace federal deregulation with regulation of their own).

Given that the two-pronged approach achieves much-needed clarity regarding the ADA and consistency for the airline industry, other courts should adopt this test.<sup>97</sup> A uniform treatment of state common law and positive law will allow courts to focus the analysis on an action's impact on the airline industry.<sup>98</sup> Moreover, this two-pronged test can be reconciled with federal appeals courts that narrowly interpret "services" in the ADA preemption provision.<sup>99</sup> The Ninth Circuit's narrow interpretation of "services" aligns with the two-pronged test, as it has held the point-to-point transportation of cargo to fall within the ADA's expansive preemption provision.<sup>100</sup> Therefore, under the two-pronged analysis, courts can apply a uniform mode of analysis that can be reconciled with prior jurisprudence and may yield more consistent results.<sup>101</sup>

### CONCLUSION

Since the Supreme Court's 1995 decision in *American Airlines, Inc., v. Wolens*, federal appeals courts have struggled to resolve the preemptive scope of Airline Deregulation Act. In *Brown v. United Airlines, Inc.*, the

<sup>97</sup> See *Brown II*, 720 F.3d at 62 (providing clarity to ADA preemption jurisprudence); *Travel All Over the World*, 73 F.3d at 1432 (explaining that ADA preemption rulings have had a pattern of inconsistency); see also Frenette, *supra* note 20, at 198 (arguing that courts would benefit from further clarity in ADA preemption analysis).

<sup>98</sup> See Murphy, *supra* note 10, at 1206–17 (arguing that analyses adopting a broad definition of services and that focus on a state law's connection to air carriers would provide greater clarity).

<sup>99</sup> See 49 U.S.C. § 41713(b); *Brown II*, 720 F.3d at 62; see also, e.g., *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003) (holding that "services" should be read broadly); *Charas*, 160 F.3d at 1261 (defining "services" as generally referring to point-to-point transport of passengers); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (holding "services" to include boarding procedures and baggage handling). Accordingly, the two-pronged approach would have yielded the same result as in *Ginsberg*, even though the *Ginsberg* court applied a narrow definition of "services." See *Brown II*, 720 F.3d at 62–66; *Ginsberg*, 695 F.3d at 880–81 (finding that although common law contract claims can be preempted by the ADA, an implied covenant of good faith and fair dealing did not sufficiently relate to the airline price, route, or service).

<sup>100</sup> Compare *Charas*, 160 F.3d at 1265 (defining services narrowly as generally referring to point-to-point transportation), with *Brown II*, 720 F.3d at 64 (adopting the two-pronged approach and classifying the curbside checking of baggage as itself part of the "service" referred to in the ADA's preemption), and *DiFiore II*, 646 F.3d at 87, 88 (indicating that point-to-point transportation includes arranging for the transportation of baggage). But see *Duncan v. Nw. Airlines, Inc.*, 208 F.3d 1112, 1114–15 (9th Cir. 2000) (handling of luggage falls outside term "services").

<sup>101</sup> See *Brown II*, 720 F.3d at 62–66 (clarifying the scope of ADA preemption and observing that the Supreme Court consistently gives a wide interpretive sweep to ADA preemption); see also *Wolens*, 513 U.S. at 232 n.8 (noting that principles of contract law may be preempted if they seek to effectuate state policies); *Morales*, 504 U.S. 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); Frenette, *supra* note 20, at 201 (arguing that further clarity would benefit courts).

First Circuit articulated a two-pronged analysis that provides airlines and courts with much needed clarity as to the ADA's preemptive scope. The First Circuit's approach is better aligned with the manifest purpose of airline deregulation, as it prevents the *Wolens* exception from becoming an avenue for state regulation of the airline industry. Although this institutional limitation may shield the airline industry from certain litigation, the First Circuit's decision preserves Congress's manifest purpose when enacting the ADA. Because it provides clarity to the courts and protects the airline industry and the American public from inconsistent regulation and pricing, other courts should adopt the two-pronged analysis articulated in *Brown*.

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