"NOT WITHOUT MY DAUGHTER": PREEMPTION OF CLAIMS AGAINST AN AIRLINE FOR PARENTAL CHILD ABDUCTION

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Children who are victims of family abduction are uprooted from their homes and deprived of their other parent. Often they are told the other parent no longer loves them or is dead. Too often abducted children live a life of deception, sometimes under a false name, moving frequently and lacking the stability needed for healthy, emotional development.¹

I. INTRODUCTION

I BECAME A FATHER for the first time a little more than one year ago. The day of my daughter’s birth was one of the happiest days, if not the happiest day, of my life. The minute Lauren entered the world, my life changed forever. She has brought me immeasurable joy—and, yes, perhaps just a tiny touch of occasional frustration—in the months since she was born. It is difficult to express the feeling I had the first time I held her, trembling from fear I would drop her; the first time she smiled; the first time she smiled at me; the first time she laughed; pretty much every other time she’s laughed. I could go on, but I think you get the picture, and for those readers with children, you have experienced this yourselves. I cannot wait to enjoy every moment I can with my daughter as she grows up, and I cannot imagine my life without her.

For the parents whose children are abducted, however, a life without a child is exactly what they must endure. And with increasing frequency, children are being abducted by one of their parents.²

According to a U.S. Government Accountability Office report, the State Department reported that between 2007 and 2009, it received 3,011 requests for assistance in effecting the return of 4,365 parentally-abducted children to the United States from other countries.³ The number of these requests increased every year between 2000 and 2009, from 405 in 2000 to 1,135 in 2009.⁴ Studies estimate the number of international parental abductions of American children is anywhere from 1,000 to 10,000 per year.⁵

² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-602, COMMERCIAL AVIATION: PROGRAM AIMED AT HIGH-RISK PARENT ABDUCTORS COULD AID IN PREVENTING ABDUCTIONS I (June 2011) [hereinafter COMMERCIAL AVIATION].
³ Id.
⁴ Id. at 3–4.
The reasons for the increase in international child abductions include advances in international transportation, increased freedom to travel across borders, an increase in the number of marriages between people of different countries, and an increase in the number of divorces.6

From 1998 to the present, there have been five court cases involving claims by left-behind parents against air carriers alleged to have transported the abducting parent and child(ren). The obvious question is: If there have only been five cases involving parental child abduction over the past sixteen years, why is this an issue with which air carriers should be concerned? The answer is straightforward: According to the State Department, approximately 64% of abductions are to non-border countries, almost all of which likely are accomplished by international flight.7

- As the number of abductions goes up each year, logic dictates that so too would the number of abductions accomplished through international flight.
- These abductions have very serious effects on both the children and the parents of children who have been abducted.8
- The potential recoveries are therefore quite substantial, as is evidenced by the cases that have reached a verdict.9

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7 Commercial Aviation, supra note 2, at 5.
8 Id. at 4 (“Research shows that recovered children often experience a range of problems, including anxiety, eating problems, nightmares, mood swings, sleep disturbances, and aggressive behavior. Parents whose children have been abducted may encounter substantial psychological, emotional, and financial problems in fighting for the return of their children.”); Noah L. Browne, Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction, 60 Duke L.J. 1193, 1198–99 (Feb. 2011) (“Abducting children uproots them from familiar surroundings, puts them at risk of serious emotional and psychological problems, and strains or even breaks their bonds with their left-behind parents. The effects of abduction, unfortunately, outlive the abduction itself; even if returned, many abducted children continue to have significant emotional and physical problems. The left-behind parents of abducted children similarly suffer emotional stress and turmoil, which can continue long after the children are returned.”).
In light of the increasing number of abductions and the stakes involved, it can be expected that these types of cases will arise with greater frequency in the years to come. This is especially so if an airline is hit with a substantial verdict, which, in the information age, will garner a great deal of adverse publicity.

Four of the five parental child abduction cases against air carriers ultimately resulted in judgments for the airline defendant, with the one exception involving a charter operator, not an airline. The basis for the four dismissals varied because courts have been inconsistent in their application of relevant law. As a result, carriers have reason to be concerned because liability in these cases likely will depend on the particular facts underlying the action and, perhaps more importantly, on the court in which the action is brought.

This article reviews these five cases and analyzes the issues raised by parental child abduction by air. It then explores the two most robust defenses carriers have to these actions: (1) preemption under the Airline Deregulation Act (ADA) and (2) preemption under the Warsaw/Montreal Convention. Ultimately, this article concludes that state law claims arising out of parental child abduction should be preempted by the ADA in all cases and also by the pertinent Convention in cases involving international transportation by air.

II. THE CASES

The five aviation-related parental child abduction cases to date focused on the following issues: (1) whether the claims were preempted by the ADA; (2) whether the claims were governed or preempted by the Warsaw/Montreal Convention;10 and (3) whether the plaintiff could establish his or her entitlement to recovery under state law if the claims were not pre-

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aside a $15 million dollar verdict against Icelandair for compensatory and punitive damages arising out of abduction of plaintiff's daughter to Iceland); see also Bower v. El-Nady, 962 F. Supp. 2d 368, 372 (D. Mass. 2013) (after a default judgment was entered, the court awarded Bower, the parent left behind, in excess of $40 million in damages against the abducting ex-wife).
emptied. While the decisions have not been uniform, they provide guidance for properly handling future claims.

A. Pittman v. Grayson

The first case to address parental child abduction in the aviation context was Pittman v. Grayson, which arose out of the abduction of Elizabeth Pittman (Elizabeth) by her mother, Erna Pittman Grayson (Erna). Erna, in contravention of court orders preventing her from removing either child from Northwest Florida, took Elizabeth and her daughter from a second marriage to Iceland. Erna, in contravention of court orders preventing her from removing either child from Northwest Florida, took Elizabeth and her daughter from a second marriage to Iceland.

The evidence established that an Icelandair official named Ellerup allowed the children to travel, despite the fact that the names on the tickets did not match the names on the passports, and he made false entries in the weight and balance codes to conceal the fact that Erna’s party consisted of a woman and two children. Moreover, Erna’s second husband (Grayson), contacted two of Icelandair’s offices by phone to voice his fears that Erna, in violation of court orders, intended to travel with the children.

Elizabeth’s father, Frederick Pittman (Frederick) sued Icelandair, Erna, Erna’s boyfriend, and Erna’s stepfather asserting claims of intentional interference with parental custody, intentional infliction of emotional distress, false imprisonment, and negligence. The individual defendants failed to appear, and, after removal to federal court, the case proceeded against Icelandair.

Prior to trial, Icelandair filed a motion to dismiss, which was denied. In denying the motion to dismiss, the district court found that (1) Article 28 of the Warsaw Convention, which sets forth the fora in which an action governed by the Convention may be brought, did not apply because there was no Article 17 “accident,” thus freeing the plaintiffs to pursue their state law

12 Id.
13 Id. at 116–17; see also Pittman v. Grayson, 1997 WL 370331, at *3 (S.D.N.Y. July 2, 1997).
14 Pittman, 149 F.3d at 115.
15 Id.
16 Id.
claims;\textsuperscript{18} and (2) the ADA did not preempt plaintiffs claims because allowing plaintiffs' suit to proceed "would not frustrate the ADA's economic deregulation of the airlines nor would it significantly impact the Airline's competitive posture," and "the ADA is not intended to be a safe harbor for airlines from civil prosecution for the civil analogues of criminal offenses."\textsuperscript{19} The subsequent motion for summary judgment was denied without discussion on the basis that there were disputed issues of material fact.\textsuperscript{20}

Despite motions for judgment as a matter of law during the presentation of plaintiffs' case and after the presentation of all evidence, the court submitted the case to the jury on the claims of interference with parental custody, intentional infliction of emotional distress, and false imprisonment.\textsuperscript{21}

The jury found Icelandair liable and returned a verdict of $15 million.\textsuperscript{22} The district court, however, then granted Icelandair's renewed motion for judgment as a matter of law, finding that despite the evidence that Icelandair had knowingly assisted Erna in surreptitiously leaving the country, there was insufficient evidence to "establish that Ellerup was aware that Erna's conduct violated Frederick's custody rights or a court order."\textsuperscript{23}

The appeals court held that because "Icelandair, as a common carrier, had a duty to transport anyone who sought passage and was not free to refuse to transport Erna and the girls simply because it had been informed of the court order," it had been informed of the court order, the district court erroneously charged the jury that liability could be predi-

\textsuperscript{18} Pittman, 869 F. Supp. at 1069-71. The court's analysis of the Warsaw Convention has been overruled, as the U.S. Supreme Court held in \textit{El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng}, 525 U.S. 155, 177 (1999) that the Convention exclusively governs all actions within its scope and preempts all state law claims. Moreover, as the parties agreed that the action arose out of "international transportation" under Article 1(2) of the Convention, the court did not make an independent finding that the claims fell within the Convention's scope. \textit{Id.} at 1068-69.

\textsuperscript{19} \textit{Id.} at 1074.


\textsuperscript{21} Pittman v. Grayson, 149 F.3d 111, 116-17 (2d Cir. 1998) (effectively dismissing the negligence cause of action by refusing to give the jury an instruction on it).

\textsuperscript{22} \textit{Id.} at 117.

\textsuperscript{23} \textit{Id.} at 117-18 (hinging its determination on the lack of evidence that Ellerup was aware of the phone calls and the possibility that Ellerup believed Erna was fleeing an abusive relationship, not abducting her children).
cated on a finding that Icelandair had notice of the court order prohibiting Erna from transporting Elizabeth.  

The plaintiffs appealed, but the only issues before the Second Circuit were whether the evidence was sufficient to establish a claim for interference with parental custody (i.e., “that Icelandair aided and abetted or conspired with Erna in interfering with parental custody”) and whether the negligence cause of action should have been submitted to the jury. The Second Circuit affirmed the district court’s judgment on the interference claim on the basis that the airline was not given adequate notice that Erna’s travel to Iceland with Elizabeth violated a court order. The Second Circuit also affirmed the district court’s decision on the negligence claim. It held Icelandair did not owe any duty to Frederick, a member of the general public. Moreover, while it owed a duty to Elizabeth, there is “no authority for the proposition that a common carrier has a duty—either generally or based on oral representations—to ensure that a minor traveling with a custodial parent is not being transported in violation of a court order.” While Icelandair avoided liability, the Second Circuit’s decision left the door open for liability in another case with stronger evidence of notice to the carrier.

B. Streeter v. Executive Jet Management, Inc.

The next parental child abduction case arose out of the abduction of Cornelia Streeter’s (Streeter) two minor children to Cairo, Egypt, by Anwar Wissa, Jr. (Wissa), the children’s father and Streeter’s ex-husband. At the time of the abduction, Streeter and Wissa shared legal custody under valid and enforceable court orders, with Streeter having primary physical custody. The flight to Cairo was operated by Executive Jet Management (Executive Jet), a private charter company, and

24 Id. (explaining the district court’s reasoning).
25 Id. at 118–19, 124.
26 Id. at 123 (focusing on Grayson’s failure to (1) contact Icelandair’s New York offices where Icelandair’s senior officials were located; (2) ask to speak with a high-ranking officer; (3) contact Icelandair in writing; or (4) provide Icelandair with copies of the court orders restricting Erna’s right to travel with her daughters).
27 See id. at 124.
28 See id. at 125.
29 Id. at 125.
31 Id.
was arranged with less than thirty hours notice for $160,000.\(^{32}\) The fee was paid from the personal account of an individual with no apparent connection to Wissa after Wissa's attempt to pay with a corporate credit card did not cover the full amount.\(^{33}\) Executive Jet's Director of Charter Operations could not recall any instance where a flight was booked on such short notice, for such a high fee, or by one parent traveling with children and without the other parent.\(^{34}\)

Executive Jet filed a motion to dismiss the complaint on the basis that plaintiffs' state law claims were preempted by the Warsaw Convention.\(^{35}\) The court dismissed the minor plaintiffs' state law claims, finding they were governed and preempted by the Warsaw Convention.\(^{36}\) The court concluded, however, that the Warsaw Convention did not govern the mother's claims.\(^{37}\)

Executive Jet also filed a motion for summary judgment, which was denied.\(^{38}\) Of relevance to the denial of summary judgment was the court's analysis of whether Executive Jet owed and breached any legal duty to Streeter (i.e., whether it was negligent).\(^{39}\) The court acknowledged the Second Circuit's holding in \textit{Pittman} that the carrier owed no duty of care to the non-traveling father,\(^{40}\) but it focused instead on the fact that the harm to plaintiff was a reasonably foreseeable consequence of Executive

\(^{32}\) Id. at *1, *14.
\(^{33}\) Id. at *14–15.
\(^{34}\) Id. at *14. There was also evidence that Executive Jet violated the charter industry's "Know Your Customer" rule—which recommends that the charterer inquire whether a "pop-up customer" owns a home or has a bank account, that Executive Jet failed to gather information about the source of the payment, and that its sister company issued a publication that provided warnings and guidance regarding potential child abductions and recommended that children carry a notarized letter from the non-traveling parent. \textit{Id.} at *15–17.
\(^{35}\) Streeter v. Bruderhof Cmty., 852 A.2d 889, 890–91 (Conn. Super. Ct. 2003) (the action had already been removed to federal court and then remanded in part based on a finding that the claims fell outside the scope of the Warsaw Convention).
\(^{36}\) \textit{Id.} at 895 (applying the law of the case insofar as the district court held that there was no bodily injury, which is a prerequisite for recovery under the Warsaw Convention).
\(^{39}\) Id. at *15, *19.
\(^{40}\) Id. at *19.
Jet’s conduct and that the abduction was within its control.\textsuperscript{41} The court found that Executive Jet had sufficient information to suspect that an abduction was planned.\textsuperscript{42} It held that actual knowledge of the father’s wrongful intent was not required for liability, especially since there was no effort by Executive Jet even to inquire whether the mother was alive and consented to the trip—in sum, the harm was reasonably foreseeable.\textsuperscript{43}

Having found the harm reasonably foreseeable, the court concluded:

Where, as here, a private charter company handsomely profits from the sale of its services rendered with a blind eye regarding the totality of all of the circumstances surrounding the flight it arranged, no compelling reason exists to so narrow the scope of the duty owed to non-passengers who are reasonably foreseeable victims harmed in reasonably foreseeable ways since that would encourage lack of vigilance.\textsuperscript{44}

The case then went to trial, and the jury awarded Streeter $27 million.\textsuperscript{45} Post-trial motions followed.\textsuperscript{46} Executive Jet filed post-trial motions in which it “for the first time” argued that plaintiff’s claims were preempted by the ADA.\textsuperscript{47} Although the court believed the argument to have been “abandoned,” it nonetheless analyzed the ADA issue and found that it was not intended to preempt common law tort claims, particularly when there was no showing that the claims conflicted with federal oversight or regulation of air travel.\textsuperscript{48} The court also held that the issue of proximate causation was properly submitted to the jury based on the evidence of peculiarities regarding the booking of the flight and Executive Jet’s failure to follow industry norms, its sister company’s published recommendations for preventing ab-

\begin{itemize}
\item \textsuperscript{41} Id. at *20.
\item \textsuperscript{42} Id. at *21–22.
\item \textsuperscript{43} Id. at *20–22.
\item \textsuperscript{44} Id. at *23. The court also denied summary judgment as to plaintiff’s claim that Executive Jet aided and abetted Wissa’s interference with her custodial relations, finding that the question of whether Executive Jet had sufficient knowledge to impose liability was a question suited for the trier of fact. Id. at *40.
\item \textsuperscript{45} Streeter, 2005 Conn. Super. LEXIS 3702, at *3.
\item \textsuperscript{46} Id. at *4.
\item \textsuperscript{47} Id. at *7, *32–34.
\item \textsuperscript{48} Id. at *7–9 (citing Pittman v. Grayson, 869 F. Supp. 1065 (S.D.N.Y. 1994) with approval).
\end{itemize}
ductions, or both. Finally, the court rejected Executive Jet’s motion to set aside the verdict and for new trial or remittitur.

Thus, in Streeter, the court rejected arguments of ADA and Warsaw Convention preemption (as to the non-traveling parent) and found that there was sufficient evidence to support a verdict that Executive Jet had breached a duty of care to the non-traveling plaintiff, despite the lack of evidence that Executive Jet had actual knowledge that the children were being abducted.

C. Braden v. All Nippon Airways Co.

The next aviation decision involving parental child abduction was issued in 2010. In Braden v. All Nippon Airways Co., Patrick Braden (Braden), the father of an infant daughter abducted to Japan on an All Nippon Airways (ANA) flight by her mother, Ryoko Uchiyama (Uchiyama), asserted claims of negligence and interference with custodial relations. The claims were based on ANA’s failure to require proof of Braden’s consent to the travel or proof that Uchiyama had sole custody of the child. Braden and Uchiyama were never married but shared legal and physical custody of their daughter. The trial court dismissed Braden’s amended complaint (after having dismissed the original with leave to amend) in part on the basis that his claims were preempted by the ADA. The California Court of Appeals reversed, holding that ANA’s boarding procedures are not services within the meaning of the ADA. The court adopted the Ninth Circuit’s holding that “services” covers “prices, schedules, origins and destinations of the point-to-point transportation of passengers but not the provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.” The court then held that “regulating airlines’ boarding practices is not preempted by the ADA because it does not affect economic deregulation and

49 Id. at *15–18.
50 Id. at *61–62.
51 See id.
53 Id. at *1–2. No action was commenced on behalf of the infant daughter.
54 Id. at *2–3.
55 Id. at *1.
56 Id. at *3.
57 Id. at *4.
58 Id. at *6–7 (internal quotation marks omitted).
has no impact on prices, schedules, origins, or destinations. Additionally, the regulation of airlines’ boarding practices is not a legitimate interest needing protection under the ADA.\textsuperscript{59}

The court proceeded to analyze the merits of Braden’s causes of action and dismissed each for failure to state a claim.\textsuperscript{60} The court dismissed the negligence cause of action because ANA did not owe any duty to Braden under California law, which as a general rule in the absence of a special relationship does not recognize a duty to control the conduct of a third-party or warn those endangered by that conduct.\textsuperscript{61} The court then dismissed the intentional interference with custodial relations claim because ANA did not know that Braden had not consented to the travel and had no duty to investigate whether Uchiyama’s travel violated a court order.\textsuperscript{62}

Thus, here again, the appellate court ultimately determined that the plaintiff’s state law claims were not preempted under the ADA, and it left open the possibility of liability when the airline knew the traveling parent was not permitted to travel with the children.\textsuperscript{63}

\subsection*{D. Ko v. Eva Airways Corp.}

In Ko v. Eva Airways Corp., Andrew Ko (Ko) asserted causes of action for negligence, negligent infliction of emotional distress, and interference with custodial relations with a minor child arising out of the abduction of his twin boys to Singapore on an Eva Airways (EVA) flight by his ex-wife, Yu Xin Wang (Wang).\textsuperscript{64} Ko alleged that EVA violated industry best practices by failing to obtain proof of custody from Wang or a letter of consent from Ko and that, despite entering such information on a federal system, EVA also failed to collect I-94 Departure Cards from the minor children.\textsuperscript{65}

\textsuperscript{59} Id. at *8.
\textsuperscript{60} Id. at *9, *14.
\textsuperscript{61} Id. at *11–13 (citing the Second Circuit’s analysis in Pittman v. Grayson, 149 F.3d 111, 125 (2d Cir. 1998) with approval).
\textsuperscript{62} Id. at *14–15.
\textsuperscript{63} See id. at *4.
\textsuperscript{64} Tentative Rulings on: (1) Motion for Judgment on the Pleadings, and (2) Motion to Amend Court’s Scheduling Order Dated September 19, 2011 at 1, Ko v. Eva Airways Corp., No. 2:11-cv-05995-GW-MRW (C.D. Cal. filed July 20, 2011) (subsequently adopted as the court’s final ruling on the motion for judgment on the pleadings).
\textsuperscript{65} Id. at 1.
EVA moved for judgment on the pleadings, and the court dismissed the claims as preempted under the ADA. The court questioned whether the Ninth Circuit’s restrictive interpretation of “services” in Charas v. Trans World Airlines, Inc. remained valid in light of the U.S. Supreme Court’s decision in Rowe v. New Hampshire Motor Transport Ass’n, but it found that the claims fit even within the Charas definition. The court then held that EVA’s ticketing and boarding process constituted a service and that a tort judgment would “directly impact that service.” For good measure, the court added:

[I]t is not so clear to this Court that effectively imposing on airlines operating in California the obligation to perform certain measures to determine the proper custodial status of children traveling with only one adult would not “adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry.”

It is noteworthy that the first court to find ADA preemption of child abduction claims was a California federal court, as the Ninth Circuit’s definition of “service” is the narrowest among the Circuits, leading to optimism at the time among air carriers and their insurers that other courts might follow suit. Shortly after the decision in Ko was issued, another court did.

66 Id. at *2, *12. Although the court dismissed based on ADA preemption, finding the Second Circuit’s analysis in Pittman, 149 F.3d at 124–25, persuasive and equally valid under California law, it noted that plaintiff could not state a claim for negligence because EVA did not owe any duty of care to him. Id. at 3 n.2. The court further noted that plaintiff’s claim for interference with custodial relations also was not sufficiently pleaded because there was no evidence that EVA “had knowledge that plaintiff did not consent” to the transportation, nor did it “abduct” or ’otherwise compel or induce’ the children to leave plaintiff.” Id.

67 Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc).


69 Tentative Rulings on: (1) Motion for Judgment on the Pleadings, and (2) Motion to Amend Court’s Scheduling Order Dated September 19, 2011 at 7–8, Ko v. Eva Airways Corp., No. 2:11-CV-05995-GW-NRW (C.D. Cal. filed July 20, 2011).

70 Id. at *10.

71 Id. at *10–11 n.8. The court reviewed the district court’s decision in Pittman v. Grayson, 869 F. Supp. 1065 (S.D.N.Y. 1994), finding that the ADA analysis appears untenable in light of the Supreme Court’s decision in Rowe. Id.

E. BOWER v. EGYPTAIR AIRLINES CO.

In Bower v. EgyptAir Airlines Co., Colin Bower (Bower) sued EgyptAir and his ex-wife, Mirvat El-Nady (El-Nady), on behalf of himself and his two minor children. He asserted claims for "interference with custodial relations, negligence, negligent infliction of emotional distress, and loss of filial consortium" arising out of El-Nady's abduction of their two minor children to Egypt. El-Nady drove to JFK International Airport, where she purchased three one-way business-class tickets to Cairo at a cost of nearly $10,000. El-Nady and the children presented Egyptian passports, and EgyptAir failed to recognize that the children's passports had no entry visa evidencing their arrival in the United States. EgyptAir also failed to check for their I-94 forms or comment on the fact that the children's last names did not match El-Nady's.

EgyptAir filed a motion for summary judgment, which was granted. Although the district court rejected EgyptAir's arguments that the plaintiffs' claims were preempted by the ADA, the Montreal Convention, or both, it found that the plaintiffs could not establish an issue of material fact sufficient to submit their claims to a jury. The district court dismissed the claims for interference with Bower's custodial relations based on a lack of evidence that EgyptAir had actual knowledge of El-Nady's intention to abduct the children, and it dismissed the negligence

74 Id. at 88, 93.
75 Id. at 88 (pursuant to the decree granting Bower custody, his ex-wife was prohibited from taking the children out of Massachusetts).
76 Id.
77 Id. "The I-94 form is an arrival/departure record issued by Customs and Border Protection (CBP)," and the departure portion generally must be filled out and provided to the airline upon departure, which then provides it to CBP. Id. at 88 n.3. U.S. citizens do not require I-94 forms. 8 C.F.R. § 231.2(b)(2) (2014).
79 Id. at 272–73 (holding that even if the ticketing and check-in procedures are "services," any impact on them would be incidental and would impact all carriers, thus negating the possibility that any one carrier would be placed at a competitive disadvantage). In other words, the district court "felt that the claims did not 'relate to' the 'services' strongly enough." Bower, 731 F.3d at 95.
80 El-Nady, 847 F. Supp. 2d at 273–74 (finding that the ticketing transaction out of which plaintiffs' claims arose did not occur within an act of embarking the aircraft, thus removing the action from the scope of the Convention).
81 Id. at 274–81.
82 Id. at 274.
claims on the basis that EgyptAir did not owe any duty to the plaintiffs to investigate whether El-Nady was traveling with her children in violation of a court order.\textsuperscript{83}

On appeal, the First Circuit affirmed the dismissal, but on the basis that the plaintiffs’ claims were preempted by the ADA.\textsuperscript{84} The court found that the plaintiffs’ state law causes of action were covered by the ADA’s “other provision having force and effect of law” language and adopted the broader definition of “service” utilized by a majority of the Circuits.\textsuperscript{85} The broader definition includes such items as baggage handling, food and beverage service, and ticketing and boarding procedures.\textsuperscript{86} The court rejected the plaintiffs’ argument that the relation to services was too tenuous, remote, or peripheral, and found that the imposition of liability against EgyptAir would have the effect of imposing a new set of obligations on the carrier, likely forcing international airlines departing from states in the First Circuit to change their policies and procedures to account for the threat of international abductions.\textsuperscript{87}

This First Circuit decision dismissing parental abduction claims on ADA preemption grounds continued the momentum that originated with the district court’s decision in Ko. The district court’s rejection of preemption, however, illustrates that there has been far from uniform handling of these claims, and, therefore, risk to air carriers remains.

\section*{III. LOOKING FORWARD: PREEMPTION OF CLAIMS ARISING OUT OF PARENTAL CHILD ABDUCTION}

As the foregoing cases reveal, in the absence of preemption, the determination of liability in an abduction case will depend

\textsuperscript{83} Id. at 275–81 (finding that EgyptAir owed no duty to Bower because there was no special relationship sufficient to trigger an exception to the general rule that there is no duty to control the conduct of a third party so as to prevent him from harming another. While EgyptAir and the minor plaintiffs were in a special relationship based on their status as passengers of a common carrier, the court dismissed the minor plaintiffs’ negligence claims as well on the basis that the “red flags” relied upon by plaintiffs, which allegedly should have alerted EgyptAir to the abduction, “fell well short of giving EgyptAir a warning of the possibility that a parental child abduction was afoot,” and EgyptAir did not owe the minor plaintiffs a duty “to investigate whether their mother was traveling with them in violation of a court order.”).

\textsuperscript{84} Bower, 731 F.3d at 98.

\textsuperscript{85} Id. at 93–94.

\textsuperscript{86} Id.

\textsuperscript{87} Id. at 96–97.
on the underlying facts and a patchwork of state laws. While Streeter remains the only case in which an air carrier ultimately was held liable for its role in a child abduction, the decisions in Pittman, Braden, and Bower (the district court decision) do little to allay fears of huge verdicts under the right set of facts for interference with custodial relations (in some states, applied as conspiracy or aiding and abetting) or negligence.

Accordingly, preemption under the ADA, the Warsaw/Montreal Convention, or both, is an essential first line of defense to claims arising out of parental child abduction. It is therefore unfortunate that the courts often have misapplied both to the detriment of carriers. As is discussed below, a proper analysis leads to the conclusion that child abduction claims are preempted by the ADA, and when the transportation is international, the Warsaw and Montreal Conventions as well.

A. Preemption Under the ADA

The defendant in each of the five cases discussed above argued at some point during the litigation that the plaintiffs’ claims were preempted by the ADA. Only two were successful. A review of the ADA’s preemption provision in conjunction with its legislative history and guidance provided by the United States Supreme Court, however, leads to the conclusion that the three courts that rejected the ADA preemption argument were mistaken.

1. Background of the ADA

The ADA was enacted in 1978 based on Congress’s conclusion that “maximum reliance on competitive market forces” would best further ‘efficiency, innovation, and low prices’ as well as ‘va-
riety [and] quality . . . of air transportation services."\(^9\) In an effort to ensure that the goals of the ADA would not be thwarted by a spate of state regulation, the ADA included a provision pre-empting state laws "relating to rates, routes, or services."\(^9\) The ADA’s preemption provision was set forth at 49 U.S.C. § 1305(a)(1), and stated in pertinent part: "[N]o State . . . 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."\(^9\)

The ADA was recodified in 1994, at which time the preemption provision was revised to read as follows:

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.\(^9\)

Congress did not intend for the minor revisions to the text of the preemption provision (for example, replacement of “rates” with “price”) to make any substantive change to this provision.\(^9\)

On its face, the scope of the ADA’s preemption appears clear: there must be (1) “a law, regulation, or other provision having the force and effect of law”; and (2) it must “relate[ ] to a price, route or service of an air carrier.”\(^9\) In practice, courts have found applying this standard exceedingly difficult, and a consistent, clear-cut test remains elusive.\(^9\) While it would be hubris for one to think that he or she has solved the ADA preemption puzzle and come up with a clear test, I will say what a number of courts have implied without expressly stating: "I know it when I


\(^{94}\) See id.


\(^{97}\) See, e.g., Brown v. United Airlines, Inc., 720 F.3d 60, 63 (1st Cir. 2013) (quoting 49 U.S.C. § 41713(b)(1)).

\(^{98}\) See Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 192 (3d Cir. 1998) (noting that courts have struggled with the relationship between the ADA’s preemption provision and state tort claims, and that results have been inconsistent).
see it, and state law tort claims against air carriers relating to parental child abduction are preempted.

2. **Provision Having Effect of Law**

Even prior to the Supreme Court's decision in *Northwest Inc. v. Ginsberg*, the cases to address this issue—either expressly or implicitly—overwhelmingly held that the state tort law implicated by these parental child abduction actions qualifies as a "provision having the force and effect of law." The *Ginsberg* decision ended any debate by expressly holding that "state common-law rules fall comfortably within the language of the ADA pre-emption provision." Accordingly, there is little basis for debate as to whether state tort law causes of action implicated by parental child abduction suits satisfy this first step in the pre-emption analysis.

Consequently, the relevant question in each of the parental child abduction cases to date is whether the state common law...
causes of action raised in these suits are “related to a . . . service of an air carrier.” By definition, this inquiry has two parts: (1) are the airline activities implicated by these lawsuits “services” within the meaning of the statute; and (2) if so, do the claims sufficiently relate to those services to warrant preemption.

3. Definition of “Service”

The circuit courts of appeal that have attempted to craft a definition of “service,” have, roughly speaking, adopted one of two definitions:

- The First, Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have adopted a broad definition of “services,” which includes the provision or anticipated provision of labor to passengers, including baggage handling, in-flight food and beverage provision, and ticketing and boarding procedures.

- The Ninth Circuit, and arguably the Third Circuit, have adopted a narrow definition of “service,” holding that Congress used the term in reference to “the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail,” and that in context “service” refers to matters such as “the frequency

103 See, e.g., Bower, 731 F.3d at 93.

104 See, e.g., id.

105 First Circuit: Bower, 731 F.3d at 94 (noting that the First Circuit had adopted the broader definition of “service”); see also Brown, 720 F.3d at 64 (implicitly holding that handling of baggage by skycaps is a “service”); DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 88 (1st Cir. 2011); Second Circuit: Air Transp. Ass’n of Am., Inc. v. Cuomo, 520 F.3d 218, 222–23 (2d Cir. 2008) (implicitly adopting broader definition of “service” applied by majority of circuits, while expressly rejecting narrow definition applied by Third and Ninth Circuits); see also Weiss, 309 F. App’x at 485 (referring to analysis of “service” set forth in Cuomo); Fourth Circuit: Smith v. Comair, Inc., 134 F.3d 254, 258–59 (4th Cir. 1998) (boarding procedures undoubtedly are a service rendered by the airline); Fifth Circuit: Hodges, 44 F.3d at 336 (adopting en banc the broad definition of “services” set forth by the panel, and noting that the broad definition was “inferentially reinforced by the Court’s decision in American Airlines v. Wolens.”); see also Onoh, 613 F.3d at 599–600 (confirming the continuing validity of the definition of “services” set forth in Hodges); Sixth Circuit: Wellons v. Nw. Airlines, Inc., 165 F.3d 493, 495 (6th Cir. 1999) (accepting Northwest’s contention that the “selection of reservation clerks has ‘a connection with’ services—i.e., airline reservations—provided by the airline through its personnel”); Seventh Circuit: Travel All Over the World, Inc. v. Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996) (adopting Fifth Circuit’s definition of “services”); Eleventh Circuit: Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1257 (11th Cir. 2003) (same); Koutsouradis, 427 F.3d at 1343 (same).
and scheduling of transportation,” and “the selection of markets.”106 It clarified that it does not “include an airline’s provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.”107

The ticketing and boarding procedures implicated by parental child abduction claims clearly fit within the majority definition of “service.” While ticketing and boarding procedures do not fit within the minority definition of “service,” the minority view appears to contradict the text and intent of the ADA. For example, in implementing the ADA, the Civil Aeronautics Board (CAB)108 stated: “preemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger’s [sic] fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing.”109 The CAB added:

[A] state may not interfere with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage would clearly be “service” regulation within the meaning of section 105.110

The narrow definition also appears to be contrary to the guidance provided by the United States Supreme Court in *Morales*

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106 Charas v. TransWorld Airlines, 160 F.3d 1259, 1261, 1265–66 (9th Cir. 1998); see also Cuomo, 520 F.3d at 223 (noting that the Third Circuit has construed the term “services” in the same manner as the Ninth Circuit); Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 193–94 (3d Cir. 1998) (seeming to approve of the Ninth Circuit’s definition of “service,” but focusing on whether “a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation”). But see Adams v. US Airways Group, Inc., No. 12-5603, 2013 WL 5676356, at *5 (E.D. Pa. Oct. 18, 2013) (holding that the Third Circuit’s decision in *Taj Mahal* indicated an intent to adopt the Charas definition of “service,” but noting that other district courts in the circuit had applied the majority definition because the Third Circuit did not expressly adopt Charas’ definition).

107 See Charas, 160 F.3d at 1261.

108 The Civil Aeronautics Board is the entity that had economic regulatory authority over interstate air transportation until the deregulation imposed by the ADA. See, e.g., Hodges, 44 F.3d at 395; Charas, 160 F.3d at 1262.


110 Id.
and Wolens that the ADA's preemption provision was intended to have a broad scope.\textsuperscript{111} It is the Supreme Court's decision in Rowe, however, that appears definitively to have rendered the minority definition unworkable.\textsuperscript{112}

Thus, the majority definition of "service" better embodies the intent and purpose of the ADA as well as the Supreme Court's guidance; the ticketing and boarding procedures implicated by child abduction claims fall within that definition. Accordingly, the remaining issue is whether the claims sufficiently relate to the service to warrant preemption.

4. Relation to the "Service"

Any analysis of the phrase "relating to" must begin with the Supreme Court. In Morales, the Court was faced with the question of whether state laws setting forth detailed standards for advertising (specifically the Travel Industry Enforcement Guidelines composed by the National Association of Attorneys General as they related to airline fare advertising) were preempted.

\textsuperscript{111} Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (stating that the language of the ADA's preemption provision "express[es] a broad pre-emptive purpose"); Wolens, 513 U.S. at 245–46 (O'Connor, J., concurring in part and dissenting in part) ("Without question, Morales gave § 1405 a broad pre-emptive sweep," which Congress "did not intend to alter" when it revisited § 1305 in 1994.) (internal quotation marks omitted); Brown, 720 F.3d at 68 ("[T]he so-called presumption against preemption" is inapplicable to the ADA because the statute's contrary purpose is apparent.); DiFiore, 646 F.3d at 86 (1st Cir. 2011) (explaining that all three major Supreme Court cases read the preemption language broadly, and none suggested a presumption against preemption in areas historically occupied by state law); Onoh, 613 F.3d at 599 (noting that the Supreme Court has interpreted the ADA's preemptive scope broadly); Cuomo, 520 F.3d at 222 ("[T]he Supreme Court has repeatedly emphasized the breadth of the ADA's preemption provision."). But see Taj Mahal, 164 F.3d at 192 ("[T]he interpretation of even express preemption provisions such as the one in the Act must begin with the 'presumption that Congress does not intend to supplant state law.'").

\textsuperscript{112} See Bower, 731 F.3d at 94 ("In our view, Rowe forecloses the Charas interpretation of 'service' as a term closely related to prices and routes."); Cuomo, 520 F.3d at 223 (noting that Rowe "necessarily defined 'service' to extend beyond prices, schedules, origins and destinations"); Tentative Rulings on: (1) Motion for Judgment on the Pleadings, and (2) Motion to Amend Court's Scheduling Order Dated September 19, 2011 at 7, Ko v. Eva Airways Corp., No. 2:11-cv-05995-GW-MRW (C.D. Cal. filed July 20, 2011) ("In fact, there is at least some basis to question whether Charas's definition is even valid any longer."); Foley v. JetBlue Airways Corp., No. C 10-3882 JCS, 2011 WL 3359730, at *7 (N.D. Cal. Aug. 3, 2011) ("The United States, in its Statement of Interest filed in United Airlines, and some district courts in the Ninth Circuit have called into question the validity of Charas's definition of 'service' after the Supreme Court's ruling in Rowe.").
under the ADA. The Court began its analysis with the ordinary definition of the key phrase, "relating to," which it found to "express a broad pre-emptive purpose." It then adopted a standard where "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted under [the ADA]."

In adopting this broad definition, the Court largely disregarded the FAA's "saving" clause as a "general 'remedies' saving clause" that "cannot be allowed to supersede the specific substantive pre-emption provision," especially where, as here, "the 'saving' clause is a relic of the pre-ADA/no preemption regime." The Court also cautioned that the preemptive scope is not limited to provisions specifically addressed to the airline industry, but rather, encompasses laws of general applicability that have only an indirect effect on rates, routes, or services.

The Court found that the NAAG guidelines "obviously" related to "rates," as "every one of the guidelines enumerated above bears a 'reference to' airfares," but added for good measure that "[i]n any event," the "state restrictions on fare advertising have the forbidden significant effect upon fares." The Court's use of the phrase "[i]n any event" is interesting, as it seems to indicate that the "forbidden significant effect upon fares" might be sufficient to support preemption, but is not necessary. The Court clarified that not every law that relates to rates, routes, or services is preempted, as "'some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have [a] pre-emptive effect," giving state laws against gambling and prostitution as examples.

The Court did not provide any significant further guidance regarding the meaning of "related to" in American Airlines v. Wolens, the second of three Supreme Court cases addressing the

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113 Morales, 504 U.S. at 379.
114 Id. at 383.
115 Id. at 384.
116 Id. at 384-85.
117 Id. at 386.
118 Id. at 387-88.
119 See id.; see also Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371 (2008) ("[P]re-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives."). In Wolens, however, the Court described its decision in Morales as having "emphasized that the challenged guidelines . . . imposed [obligations that] would have a significant impact upon . . . the fares [airlines] charge. Wolens, 513 U.S. at 224.
120 Morales, 504 U.S. at 390.
ADA’s preemption provision. The Court instead focused on whether state contract law constituted a “provision having the force and effect of law.”

In *Rowe v. New Hampshire Motor Transport Ass’n*, the Court had another chance to provide guidance on interpreting the phrase “relating to,” when it considered whether several provisions of a Maine statute regulating the delivery and sale of tobacco products were preempted under the Federal Aviation Administration Authorization Act of 1994 (FAAAA), whose preemption provision was taken from the ADA. The provisions in question (1) required retailers of tobacco products to employ delivery services that would verify a number of facts about the person to whom the tobacco products were being delivered; and (2) prohibited any person from knowingly transporting a tobacco product to anyone in Maine unless the sender or receiver had a Maine license.

The Court cautioned that the FAAAA’s preemption provision should be interpreted identically to that set forth in the ADA and incorporated its guidance in *Morales*. The Court held that the statutes were preempted because they (1) had a significant and adverse impact on the objectives of the FAAAA (forcing carriers to offer a new system or services, or at a minimum, freeze into place services that carriers might otherwise prefer to discontinue); (2) would require carriers to offer tobacco delivery services significantly different from those that the market might dictate in the absence of the regulation; and (3) would lead to a patchwork of state laws, rules, and regulations, regardless of whether the regulation would impose any significant additional cost upon carriers.

Thus, the Supreme Court’s decisions in *Wolens* and *Rowe* seem to tell us the following about what constitutes a sufficient relationship between “a law, regulation, or other provision having the force and effect of law” and a carrier’s “price, route, or service”: the analysis must begin with a determination of whether the provision in question has a connection with or reference to airline rates, routes, or services, keeping in mind the ADA’s broad preemptive scope.

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121 *Wolens*, 513 U.S. at 226.
122 Id.
123 *Rowe*, 552 U.S. at 367–68.
124 Id. at 368–69.
125 Id. at 370.
126 Id. at 371–73.
The provision need not specifically address the airline industry, but rather, may be a provision of general applicability that has only an indirect effect on rates, routes or services;

- The provision in question has a significant impact related to Congress’s deregulatory and preemption-related objectives;
- It is likely sufficient that the provision has a significant effect upon prices, routes, or services, although this is not necessary; and
- While the cost imposed upon carriers as a result of the provision, or the lack thereof, is not determinative of the analysis, provisions whose relationship to “prices, routes or services” are too tenuous, remote, or peripheral, are not preempted.

A number of courts have attempted to develop a definitive approach to address the preemption issue. One such approach draws a distinction between “services” provided by the airline and conduct connected with the “operation and maintenance of the aircraft,” with claims for physical injury or property damage caused by the operation or maintenance of the aircraft not being preempted.127 Other courts, however, have rejected this approach,128 with its shortcomings highlighted by the Ninth Circuit in Charas v. Trans World Airlines, Inc. The Charas court noted that under this approach, “a plaintiff injured when struck by a beverage cart door would be able to bring a tort action if the door swung open because a bolt was missing . . . , but not if the flight attendant negligently failed to latch the door properly . . . ”129


128 See Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 194 (3d Cir. 1998) (rejecting the distinction between “operation or maintenance of aircraft” and “service”).

129 Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1263 (9th Cir. 1998) (“As Judges O’Scannlain and Jolly predicted in their respective concurrences in Gee and Hodges, the distinction between an airline’s operations and its service turned out to be as elusive as it is unworkable.”).
A second approach focuses on the congressional intent to achieve economic deregulation of the airline industry. This approach, however, has also met with its share of critics.

A third approach focuses on the economic impact of the provision at issue, holding that preemption is proper if it has a significant economic impact on services. Despite the language in Morales evidencing the relevance of economic impact, this approach also has its detractors.

Finally, one last method for evaluating whether tort claims sufficiently relate to a service to support preemption was set forth by now-Supreme Court Justice Sotomayor in Rombom v. United Airlines, Inc. Under this test, courts first determine whether the activity at issue is an airline service and, if so, whether the claim affects the airline service directly, or does so tenuously, remotely or peripherally. If the activity is a service and the claim directly affects it, the claims will be preempted as long as the "underlying tortious conduct was reasonably necessary to the provision of the service." In Rombom, the plaintiff's claims arose out of the flight crew's treatment of her after she allegedly caused a disturbance during the in-flight safety instructions. The court held that Rombom's claims stemming from her arrest would not be preempted if, as she claimed, her arrest

130 See Charas, 160 F.3d at 1261; Taj Mahal, 164 F.3d at 194.
131 See United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605, 608–09 (7th Cir. 2000) (“Opinions ... which say that state law is preempted by § 105(a)(1) only if it ‘frustrates Congressional intent [or] impose[s] a state utility-like regulation on the airlines’, cannot be reconciled with Wolens.”).
132 See, e.g., Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1258–59 (11th Cir. 2003) (explaining that the connection necessary for preemption is established by showing the state law directly regulates such services or has a significant economic impact on them); Travel All Over the World v. Saudi Arabia, 73 F.3d 1423, 1432 (7th Cir. 1996).
133 See Bower v. EgyptAir Airlines Co., 731 F.3d 85, 96 (1st Cir. 2013) (rejecting this test as not being “the correct analysis post-Rowe,” which “shows that non-economic laws that nonetheless have a significant regulatory effect on the airlines are preempted”); DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 86 (1st Cir. 2011) (“[P]reemption might have been confined to state laws that themselves aimed at economic regulation as opposed to other state interests, but that course too has been foreclosed.”).
135 Id.
136 Id. at 222.
137 Id. at 216.
was motivated by spite and not because it was the only way to remove her from the aircraft.\textsuperscript{138}

The third prong set forth in \textit{Rombom} appears to reflect the possibility that an airline’s act may relate to a service on its face, but be so outrageous as to make that action’s relation to the service too tenuous, remote, or peripheral to support preemption.\textsuperscript{139} During oral argument, the court asked whether a passenger’s state tort claims would be preempted if a flight attendant asked him to be quiet during the safety instructions and then shot him when he refused.\textsuperscript{140}

With all due respect to Justice Sotomayor, the third prong of her test seems only to stand for the proposition that even where claims may on their face appear to relate directly to a service, the specific facts of the case may show that the actions in dispute relate to that service in a tenuous, remote, or peripheral manner, rendering the third prong simply a different way to look at the second prong.\textsuperscript{141} Thus, it is unclear how this test makes ADA preemption analysis any simpler.

Moreover, some courts seem to interpret the test to weigh against preemption whenever claims arise out of the alleged negligent provision of a service—this is a misapplication of Justice Sotomayor’s opinion and an inaccurate oversimplification of the ADA preemption standard.\textsuperscript{142} Although many courts held

\textsuperscript{138} Id. at 224.

\textsuperscript{139} See also Smith v. Comair, 134 F.3d 254, 259 (4th Cir. 1998) (citing \textit{Rombom}, 867 F. Supp. at 222, 224) (“Suits stemming from outrageous conduct on the part of an airline toward a passenger will not be preempted under the ADA if the conduct too tenuously relates or is unnecessary to an airline’s services.”).

\textsuperscript{140} \textit{Rombom}, 867 F. Supp. at 222; see also N. Cypress Med. Ctr. v. FedEx Corp., 892 F. Supp. 2d 861, 868 (S.D. Tex. 2012) (applying the tripartite test enunciated in \textit{Rombom} to find that the claims arising out of the dropping of a box and failure to collect documents that scattered when the box opened were preempted, while claims arising out of FedEx’s deliberate decision to conceal the damage were only tenuously related to the service itself, and therefore not preempted).

\textsuperscript{141} This is consistent with the Supreme Court’s statement in \textit{Morales} that state laws against gambling and prostitution would not be preempted, as any relationship between such statutes and airline service would be tenuous because gambling and prostitution are not services associated with transportation by air. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992). If gambling and prostitution were “services” commonly associated with air travel, it seems unlikely that the Court would so cavalierly state that state laws inhibiting those activities would be exempt from preemption, and it would be expected that Congress would step in to outlaw such activities.

\textsuperscript{142} See, e.g., Donkor v. British Airways Corp., 62 F. Supp. 2d 963, 972 (E.D.N.Y. 1999) (“\textit{W}hen negligence in the provision of a service causes injury, the claim may not be preempted by the Airline Deregulation Act.”); Trinidad v. Am. Air-
that the ADA did not intend to preempt tort claims arising out of personal injury, there is no bright-line rule.143

So, in light of the foregoing, we are left with one obvious question.

5. Is There Any Workable Standard That Can Be Applied?

It is easier to point out flaws in tests set forth by others than to fashion a proper one, and, unfortunately, I have not fashioned the one-size-fits-all test that has to date eluded some of the best jurists in the country.144

Thus, in evaluating whether parental child abduction claims are preempted, we are left with the guidance provided by the Supreme Court in Morales (and to a lesser extent Wolens and Rowe), the potentially relevant factors enunciated by the circuit courts of appeal and other courts,145 and those famous words of Justice Stewart in Jacobellis: “I know it when I see it.”146 When it comes to a question of whether parental child abduction claims

lines, 932 F. Supp. 521, 525–26 (S.D.N.Y. 1996) (referencing Rombom and holding that negligence claims arising out of flight into turbulent airspace without warning were not preempted despite the fact that they related to the service the airline provided).

143 Compare Ginsberg v. Nw., Inc., 695 F.3d 873, 881 (9th Cir. 2012), rev’d and remanded, 134 S. Ct. 1422 (2014) (asserting that “[i]n Wolens all the justices—including the dissenters—agreed that the ADA does not preempt common law tort claims such as personal injury and wrongful death”) with Am. Airlines v. Wolens, 513 U.S. 219, 242–43 (1995) (O’Connor, J., concurring in part and dissenting in part) (noting that her view does not mean that personal injury claims are always preempted, and that many courts have allowed personal injury claims to proceed where the claims did not relate to services, much as the Court in Morales had suggested with regard to laws against gambling and prostitution); see also Bower v. EgyptAir Airlines Co., 731 F.3d 85, 95 (1st Cir. 2013) (acknowledging that personal injury claims are generally not preempted by the ADA but holding that there were “numerous distinctions” between the claims asserted in this case and personal injury claims).

144 See Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77, 85–86 (2d Cir. 1997) (remarking that the ADA preemption clause provides an “illusory test,” and that it could “offer no bright line relief,” instead having to apply the provision on a case-by-case basis); Travel All Over the World, Inc. v. Saudi Arabia, 73 F.3d 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 ADA. 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.”).

145 While no court has come up with a one-size-fits-all test for evaluating preemption under the ADA, all the factors set forth by these courts help to evaluate preemption on a case-by-case basis.

are preempted by the ADA, I know what I see, and I see claims that are preempted.

- Whether the claims are for interference with custodial relations or negligence, or some other related tort, they implicate the ticketing, check-in and boarding of passengers, each of which is a "service" as that term is used in the ADA's preemption provision.147

- The relationship between the state law claims being asserted in these cases and the "services" provided by the airlines is substantial, not tenuous. A finding of liability against air carriers for claims arising out of child abduction will have a direct and substantial impact on carriers' ticketing, check-in, and boarding procedures relating to the handling of single adults traveling with children.148

- As the decisions of these cases undoubtedly will not be uniform, the requirements imposed will not be uniform. Thus, allowing these types of claims to proceed runs the risk of a patchwork of "state regulations" for the handling of single adults traveling with minors.149

- The insurance provision set forth at 49 U.S.C. § 41112(a) is not implicated because the insurance provision requires insurance to pay "for bodily injury to, or death of," passengers, and parental abduction claims do not involve bodily injury.150

A majority of cases dealing with state tort claims arising out of denial of boarding have been preempted.151 The parental child abduction cases implicate the decision to allow passengers to

148 See Bower, 731 F.3d at 98.
149 Id. at 96, 97 (analogizing the additional verification duties that would be imposed on airlines if defendants were found liable to the statutory verification duties the Court found preempted in Rowe); DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 88 (1st Cir. 2011) (holding that application of Massachusetts's tip statute operates in same manner as a guideline expressly condemning the same conduct even though statute is mediated by a jury); United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605, 608–09 (7th Cir. 2000) (finding preemption only where state law imposes a state utility-like regulation on airline contrary to holding in Wolens); see also COMMERCIAL AVIATION, supra note 2, at 19–20 (noting that airlines are ill-equipped to implement the procedures necessary to thwart parental child abduction).
150 49 U.S.C. § 41112(a) (2006); see also Bower, 731 F.3d at 95.
151 See, e.g., Onoh v. Nw. Airlines, Inc., 613 F.3d 596, 599–600 (5th Cir. 2010); Weiss v. El Al Israel Airlines, 309 F. App’x 483, 485 (2d Cir. 2009); Weber v. US Airways, Inc., 11 F. App’x 56, 58 (4th Cir. 2001); Smith v. Comair, 134 F.3d 254, 259 (4th Cir. 1998); see also Travel All Over the World v. Saudi Arabia, 73 F.3d.
board an aircraft. There is no reason why the decision to board a passenger should have a different result than the decision to deny boarding. Accordingly, the courts in Bower and Ko were correct in finding state law claims arising out of a child abduction preempted, and the courts in Pittman, Streeter, and Braden were mistaken.

B. PREEMPTION UNDER THE WARSAW/MONTREAL CONVENTION

Three of the five parental child abduction cases discussed addressed the potential applicability of the Warsaw Convention/Montreal Convention (the Convention) to the plaintiffs' claims. In Bower, the court determined that the Convention did not apply to either the non-traveling parent or minor children's claims. In Streeter, the court determined that the Convention applied to and preempted claims on behalf of the minor children but not to the non-traveling parent. Finally, in Pittman, the court conceded that the plaintiffs' claims arose out of international transportation, and therefore fell within the scope of the Convention, but the court determined that because there was no Article 17 "accident," their state law claims survived the defendant's motion to dismiss. This issue is important: even if the plaintiffs are able to establish an Article 17 "accident," which as noted below is far from certain, the Convention precludes recovery for the mental injuries that result from these abductions, and therefore will often preclude recovery.

1. The Convention's Applicability to Claims by Traveling Minors

Although there is little case law providing direct guidance on this issue, as is evidenced by the dearth of case law cited by EgyptAir in support of its motion to dismiss and opposition to

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1423, 1434 (7th Cir. 1996) (holding that fraud claims expressly referred to airline "services," which included ticketing, and were thus preempted under the ADA).


the appeal on this issue, a review of analogous cases supports the conclusion that claims by the traveling minors fall within the scope of the Convention. The scope of the Convention's applicability to passenger injury claims is set forth in Article 17 of the Convention, which states: "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Thus, Article 17.1 sets forth a three-part test whereby the carrier is liable under the Convention only if: (1) there is an "accident" (2) that caused "death or bodily injury" (3) that "took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The first step temporally in this analysis is to determine whether the operative event occurred on the aircraft or during the period of embarking or disembarking because the Convention applies on the aircraft only. In Bower, the parties did not dispute that the events during ticketing and check-in did not fall

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157 The author assumes for purposes of this analysis that transportation by air falls within the scope of Article 1(2) of the Convention, meaning that there is transportation between two parties to the same treaty, or transportation within one party that includes a stop in another State (i.e., round-trip transportation beginning and ending in a country that is party to a treaty with a stop in another country). See Avero Belg. Inc. v. Am. Airlines, Inc., 423 F.3d 73, 86 (2d Cir. 2005) (holding that the United States did not accede to Hague Protocol when it became party to Montreal Protocol 4); Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 314 (2d Cir. 2000) (holding that there are no treaty relations between the United States, which was party to Warsaw Convention, and the Republic of Korea, which was party to Hague Protocol).

158 Montreal Convention, supra note 10, art. 17.1 (Article 17 of the Warsaw Convention, the Warsaw Convention as amended by the Hague Protocol and the Warsaw Convention as amended by the Hague Protocol and Montreal Protocol 4 are substantively identical to Article 17.1 of the Montreal Convention).

159 See id.

160 El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 171–72 (1999) (noting that the Convention only addresses airline liability for passenger injuries occurring on board the aircraft or during the course of embarking or disembarking and that "[t]he Convention's preemptive effect on local law extends no further than the Convention's own substantive scope").
within the Convention's scope, yet the travel itself did. Thus, the central dispute in determining whether the Convention governed was whether the relevant event was the airline's failure to realize that an abduction was occurring during ticketing or check-in, or the actual transportation of the minor plaintiffs to Egypt on the EgyptAir flight.

Case law suggests that while the ticketing and check-in might be relevant to the accident analysis, the actual transportation and abduction by air of the minor passenger(s) certainly is. In *Air France v. Saks*, which involved injuries sustained by a passenger as the result of the normal operation of the cabin's pressurization system, the Supreme Court set forth the definition of "accident" under the Warsaw Convention. In defining accident, and distinguishing it from the contributory negligence defense set forth by Article 20(1) of the Warsaw Convention, the Court explained that

> [t]he "accident" requirement of Article 17 is distinct from the defenses in Article 20(1), both because it is located in a separate article and because it involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury.

While factually distinguishable from the type of case discussed in *Saks*, the airline's care or alleged lack thereof in diagnosing a parental child abduction during ticketing and check-in more accurately falls within the category of "care taken by the airline to avert the injury," while the abduction itself would be the "event

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162 In determining whether the Convention applies to the question of an airline's liability for death or bodily injury, courts employ a totality of the circumstances approach with several particularly relevant factors: (1) the passenger's activity at the time of the incident; (2) the passenger's location at the time of the incident; (3) the amount of control exercised by the carrier over the passenger at the time of the injury; and (4) the imminence of boarding. See Marotte v. Am. Airlines, Inc., 296 F.3d 1255, 1260 (11th Cir. 2002); King v. Am. Airlines, 284 F.3d 352, 359 (2d Cir. 2002). The author assumes for purposes of this article, as did the parties in *Bower*, that the carrier's failure to recognize an abduction during ticketing and check-in generally will occur prior to the course of embarking, while the abduction itself occurs during the international transportation by air. Unfortunately, none of the cases applying the "totality of the circumstances approach" resolve the issue of what events are relevant to the test.


165 *Id.* at 407.
which caused the injury.”\textsuperscript{166} Thus, these cases tend to indicate that only the air transportation is relevant to the “accident” analysis and therefore whether claims arising out of an abduction fall within the scope of the Convention.

Alternatively, some case law indicates that both the actual transportation by air and the events during ticketing and check-in are relevant. In \textit{Olympic Airways v. Husain}, the plaintiff commenced litigation on behalf of herself and her deceased husband to recover for his alleged wrongful death resulting from exposure to ambient cigarette smoke on an Olympic Airways flight after a flight attendant refused three separate requests to move the decedent from the smoking section.\textsuperscript{167} The issue before the Supreme Court was whether the decedent’s death resulted from an Article 17 “accident,” with the airline arguing that there was no “accident” because the decedent’s internal reaction to the normal smoking on the aircraft was the relevant event, and the plaintiff countering that the relevant event was the flight attendant’s refusal to allow the decedent to change seats.\textsuperscript{168}

The Court noted that “petitioner’s ‘injury producing event’ inquiry—which looks to the precise factual ‘event’ that caused the injury’—neglects the reality that there are often multiple interrelated factual events that combine to cause any given injury,” adding that in \textit{Saks}, it had recognized that any one of these factual events might be a link in the chain of causes and could satisfy the “accident” inquiry.\textsuperscript{169} The Court added: “Indeed, the very fact that multiple events will necessarily combine and interrelate to cause any particular injury makes it difficult to define, in any coherent or non-question-begging way, any single event

\textsuperscript{166} See Damon v. Air Pac. Ltd., 203 F. App’x 33, 34–35 (9th Cir. 2006) (noting in DVT failure to warn case that the passenger’s affliction with DVT was the relevant event for the “accident” inquiry, while the airline’s failure to warn would be care taken to avert the injury is relevant to a determination of whether the Article 20(1) “all necessary measures defense is available to the carrier.”); Caman v. Cont’l Airlines, Inc., 455 F.3d 1087, 1092 (9th Cir. 2006); Miller v. Cont’l Airlines, Inc., 260 F. Supp. 2d 931, 937–38 (N.D. Cal. 2009) (finding that allegations that DVT was caused by defective design and outfitting of aircraft were not sufficient to take claims outside scope of Convention); Magan v. Lufthansa German Airlines, 181 F. Supp. 2d 396, 403 (S.D.N.Y. 2002) (noting that airline’s failure to warn passenger of anticipated turbulence was not relevant to the “accident” determination), rev’d on other grounds, 339 F.3d 158 (2d Cir. 2003).


\textsuperscript{168} Id. at 652–54.

\textsuperscript{169} Id. at 653.
as the 'injury producing event.'” In Husain, “[t]he exposure to the smoke and the refusal to assist the passenger are happenings that both contributed to the passenger’s death.” Based on the Court’s analysis in Husain, both the airline’s failure to detect an abduction during ticketing and check-in and the abduction itself would be relevant to the determination of whether the Convention applies.

Although all of the above cases focused on whether an “accident” had occurred, they nonetheless provide guidance as to the events relevant to whether an incident falls within the scope of Article 17 of the Convention.

Thus, it seems clear that the Convention governs claims asserted on behalf of the traveling minor children.

2. The Non-Traveling Parent

It is a separate question whether the Convention governs claims by the non-traveling parent (i.e., whether the Convention governs claims by non-passengers when those claims relate to injuries sustained by passengers that fall within the scope of the Convention). Although the cases are sparse, the courts that have addressed this issue have held that the Convention does in fact provide for claims by non-passengers. In Miller v. Continental Airlines, Inc., the court examined whether a derivative claim for loss of consortium was permitted under and governed by the Convention, and noted:

Contrary to plaintiffs’ assertion, the Convention’s preemptive range is not limited solely to claims by the international traveler. Instead, the Convention’s “cardinal purpose,” as observed by the Supreme Court and recited earlier in this order, is to achieve uniformity of rules governing claims arising from international air transportation generally. Thus, the Convention extends to

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170 Id.
171 Id. at 654.
172 See generally id.
173 Some of the confusion may result from the fact that there is no one obvious moment of injury in parental child abduction cases. Rather, it is the entirety of the transportation (i.e., the abduction) that is the injury-producing event. Nevertheless, it is clear that the abduction is relevant for purposes of the “accident” analysis, much as the act of another passenger is relevant in any passenger on passenger tort case. If the focus of the “accident” inquiry was only on the allegedly wrongful act(s) of the carrier, as the plaintiffs in Bower argued, the Convention would not apply to any event caused by the carrier’s alleged negligence prior to the flight, such as defective maintenance of the aircraft or negligent security that failed to prevent a threat to the flight or passengers, which is inconsistent with Article 17’s text and the intent of the drafters.
claims by non-passengers based on events during international air travel. Even Article 17, which provides the exclusive remedy for personal injuries under the Convention, delineates liability in universal terms and not merely in terms personal to the passenger.\footnote{Miller v. Cont'l Airlines, Inc., 260 F. Supp. 2d 931, 940 (N.D. Cal. 2003) (citation omitted); see also Diaz Lugo v. Am. Airlines, 686 F. Supp. 373, 376 (D. P.R. 1988) (Article 17's "language does not limit the recoverable damages to those suffered by the passenger. The article does not state that American shall be liable for damage sustained by a passenger if he dies or suffers bodily injury; it says American will be liable for damages sustained without specifying who suffers them.").}

As the district court in \textit{Diaz Lugo v. American Airlines} noted, Article 17 also has been interpreted to allow independent actions for wrongful death.\footnote{\textit{Diaz Lugo}, 686 F. Supp. at 376.}

Admittedly, claims asserted by non-traveling parents in cases of abduction are distinguishable from those for loss of consortium or wrongful death in that they arise out of the event governed by the Convention (i.e., the abduction by international transportation by air), not the injury or death resulting from the event.

Thus, while the comparative negligence provision set forth in Article 20 of the Montreal Convention states:

\textit{When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger,\footnote{Montreal Convention, \textit{supra} note 10, art. 20.} it does not provide guidance for the non-traveling parent's claims, which do not arise directly out of death or injury of the "passenger," as it does for loss of consortium or wrongful death claims, which do.\footnote{Brief of Defendant-Appellee, \textit{supra} note 156, at 55–64 (making this argument).}}

While the applicability of the Convention to claims by the non-traveling parent therefore presents a close question, and one for which the Convention's Drafting History appears to provide little guidance, the Convention's goal of uniformity seems to weigh in favor of finding non-traveling parents' claims to be governed by the Convention.\footnote{El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 169 (1999) (noting the Warsaw Convention's cardinal purpose of achieving uniformity with re-}
Thus, the holdings of the district courts in *Bower v. EgyptAir Airlines Co.* and *Streeter v. Bruderhof Communities* that the non-traveling parents' claims were not governed by the Warsaw/Montreal Convention were incorrect.

3. *The Convention Preempts State Law Claims and Precludes Liability Against Air Carriers*

It is well settled that where the Convention applies, it does so exclusively and preempts all state law causes of action within its scope.\(^{179}\) Thus, state law claims for interference with custodial relations, negligence, etc., which arise out of a parental child abduction are preempted if the Convention applies.

Moreover, because these claims do not involve allegations of bodily injury,\(^{180}\) recovery is not permitted under the Convention because purely emotional injuries are not compensable.\(^{181}\) Accordingly, a finding that the Convention applies to claims arising out of a parental child abduction will preclude liability against the air carrier.\(^{182}\)

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(1) An event occurs during international transportation by air that results in a bodily injury, this must be analyzed separately under the Convention. See Montreal Convention, *supra* note 10, art. 17.1.

(2) If an event occurs during international transportation by air that results in a bodily injury, this must be analyzed separately under the Convention. See Montreal Convention, *supra* note 10, art. 17.1.

(3) I would be remiss if I failed to note that there also is a question as to whether parental child abduction constitutes an "accident" under Article 17 of the Convention. For example, in *Bower*, EgyptAir Airlines Co. argued that an "accident" finding requires that there was (1) an unexpected or unusual event or happening external to the passenger, that (2) arose out of or related to the oper-
IV. CONCLUSION

Parental child abduction is an issue of increasing concern to society as a whole and to airlines in particular. In light of the increasing number of abductions each year, a majority of which are accomplished through international transportation by air, claims against air carriers in these abductions can be expected to arise more frequently. As the verdicts of $15 million and $27 million in the two cases to reach verdict against the carrier evidence, airline exposure for these claims is substantial. Because of the high stakes and sympathy for the plaintiffs, carriers do not want to rely on the application of state tort law to the facts of a particular case. Accordingly, it is essential that carriers vigorously pursue all available defenses, especially the defense of preemption under the ADA or the Warsaw/Montreal Convention. While the results to date have been mixed, the law is on the side of the carriers.

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