NO. _____

In the
Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,
PETITIONERS,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Airline Deregulation Act of 1978 ("ADA") includes a preemption provision providing that 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." 49 U.S.C. § 41713(b).

Respondent was a participant in Northwest Airlines' frequent flyer program, which by its terms permitted Northwest to remove participants from the program in Northwest's "sole judgment." After respondent was removed from the frequent flyer program, he filed suit against Northwest alleging, inter alia, that Northwest breached both its contractual obligations and an implied covenant of good faith and fair dealing under Minnesota law when it exercised its discretion to terminate respondent's membership in the program. Although the district court dismissed the contract claim for failure to state a claim and the implied covenant of good faith claim as preempted by the ADA, the Ninth Circuit reversed as to the implied covenant claim, finding such claims categorically unrelated to a price, route or service under a line of Ninth Circuit cases that have been recognized by other Circuits as inconsistent with this Court's precedents, especially *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

The question presented is:

Did the court of appeals err by holding, in conflict with the decisions of other Circuits, that respondent's implied covenant of good faith and fair dealing claim

was not preempted under the ADA because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent flyer program (the precise context of *Wolens*) and manifestly enlarged the terms of the parties' voluntary undertakings, which allowed termination in Northwest's sole discretion.

PARTIES TO THE PROCEEDINGS

Petitioners, who were the defendants-appellees below, are Northwest Airlines, Inc. and Delta Air Lines, Inc. Respondent, who was plaintiff-appellant below, is Rabbi S. Binyomin Ginsberg. Respondent seeks to represent a class composed of all other members of Northwest Airlines, Inc.'s customer loyalty program, WorldPerks, whose program status was allegedly revoked without valid cause during the four years prior to the filing of the Complaint.

RULE 29.6 STATEMENT

Petitioners, which are private, non-governmental parties, hereby disclose and state that (a) Delta Air Lines, Inc. has no parent corporation and there are no publicly held corporations that own ten percent (10%) or more of Delta Air Lines, Inc.'s stock; and (b) Delta Air Lines, Inc. is the parent corporation of Northwest Airlines, Inc. and owns ten percent or more of Northwest Airlines, Inc.'s stock.

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The amended opinion of the Ninth Circuit, reversing dismissal of the complaint and remanding to the district court is reproduced at App. 1-19.

The district court's opinion granting petitioners' motion to dismiss the complaint is unreported and reproduced at App. 56-73.

The district court's opinion denying respondent's motion for reconsideration is unreported and reproduced at App. 41-55.

JURISDICTION

The Ninth Circuit denied Northwest's petition for rehearing and rehearing en banc on July 13, 2012. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C § 41713, is reproduced at App. 74.

STATEMENT OF THE CASE

I. The ADA and This Court's ADA Preemption Cases

Congress enacted the Airline Deregulation Act ("ADA") in 1978 with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive

market forces." 49 U.S.C. App. § 1302(a)(4). "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), the ADA includes a preemption provision providing that 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." 49 U.S.C. § 41713(b).

This Court has addressed the preemptive scope of the ADA and its sister statute on three occasions. In *Morales v. Trans World Airlines*, the Court held that the ADA preempts States from prohibiting deceptive airline fare advertisements through enforcement of their general consumer protection statutes. Explaining that the phase "relating to" indicates the ADA's "broad preemptive purpose," 504 U.S. at 383, the Court concluded that the preemption provision encompasses all state laws "having a connection with or reference to" airline rates, routes, or services, *id*. at 384, even if the state law's effect on rates, routes, or services "is only indirect," *id*. at 386. The Court noted, however, that the ADA may not preempt state laws that affect rates, routes, or services in only a "tenuous, remote, or peripheral . . . manner," such as state laws criminalizing gambling or prostitution, or prohibiting obscenity in advertising. *Id*. at 390.

Three years later, this Court considered *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), a class action suit challenging American Airline's efforts to make changes to its frequent flyer program, in particular the imposition of blackout dates and caps on the number of seats available to passengers using

frequent flyer miles. The Court began by noting that frequent flyer programs obviously relate to both prices and services, and that it "need not dwell on the question" any further. *Id.* at 226. The Court observed, however, that "the ADA's preemption clause contains other words in need of interpretation, specifically the words 'enact or enforce any law.'" *Id.* The Court held that while the plaintiffs' claim under an Illinois consumer fraud statute required the enforcement of state law, their breach of contract claim sought "recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 227-28. "A remedy confined to a contract's terms simply holds parties to their agreements," *Wolens* explains, and thus does not amount to the enactment or enforcement of state law. *Id.* at 229. The Court thus dismissed the plaintiffs' fraud claim but allowed their breach of contract claim to proceed.

Finally, in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), this Court considered the preemptive effect of a provision in the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 40120, *et seq.*, prohibiting States from enacting any law "related to" a motor carrier's "price, route, or service," 49 U.S.C. § 14501(c). The plaintiffs argued that this provision preempted a Maine law forbidding any person from knowingly transporting tobacco products to a person in Maine unless either the sender or receiver has a Maine license, and requiring tobacco retailers to use a delivery service verifying that the recipient of a tobacco order may legally purchase tobacco. *Rowe*, 552 U.S. at 368-69. This Court began its analysis by noting that Congress borrowed the language in the

FAAAA's preemption provision from the ADA and intended that the two provisions be interpreted in the same way. *Id.* at 370. The Court then held that under *Morales*, the Maine law related to motor carrier services because, although it did not directly apply to carriers, it prompted tobacco suppliers to seek "tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 371-72. The Court also noted that if, as *Wolens* holds, "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program, . . . it must pre-empt state regulation of the essential details of a motor carrier's system for picking up, sorting, and carrying goods." *Id.* at 373.

II. Ginsberg's Class Action Suit Against Northwest

Respondent Binyomin Ginsberg is a former member of Petitioner Northwest's WorldPerks Platinum Elite frequent flyer program. Northwest revoked Ginsberg's membership on June 27, 2008. App. 3. According to Ginsberg, he was told by a Northwest representative that his status was revoked because he had "abused" the program. App. 4. More specifically, Ginsberg attached to his Complaint a letter he received from Northwest stating that between December 2007 and July 2008, Ginsberg filed 24 complaints with Northwest and "'continually asked for compensation over and above [Northwest's] guidelines.'" App. 57 (quoting Compl. Ex. A).

Alleging that Northwest revoked his WorldPerks status without valid cause, Ginsberg filed this suit as a class action on behalf of himself and other members

of WorldPerks whose membership allegedly was revoked without valid cause during the four years before the filing of the Complaint. Ginsberg seeks damages on behalf of the class in excess of $5 million, as well as injunctive relief requiring Northwest to restore the WorldPerks status of the Class members and prohibiting Northwest from future revocations of the Class members' WorldPerks status without valid cause. Dist. Ct. Doc. No. 1, at ¶ 2.

Ginsberg acknowledges that the General Terms and Conditions of the WorldPerks program ("the Agreement") grant Northwest discretion to remove someone from the program:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct *as determined by Northwest in its sole judgment*, including, among other things, . . . any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructtions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards.

App. 58 (emphasis added).

Ginsberg speculates that he was dismissed for "untoward or harassing behavior with reference to [a] Northwest employee." Dist. Ct. Doc. No. 1, at ¶ 29. He

argues, however, that the Agreement fails to sufficiently define "improper conduct" and "untoward or harassing behavior." *Id.* at ¶ 30. He also claims that any alleged abusive conduct by him was the result of the frequency with which he travels on Northwest, and that his complaints and conduct were all legitimate. *Id.* at ¶¶ 32, 33, 35, 38. And he alleges that he never received an adequate explanation from Northwest for the revocation decision. *Id.* at ¶ 29.

III. The District Court Dismisses Ginsberg's Suit as Largely Preempted Under the Airline Deregulation Act

Ginsberg asserted four causes of action under state law: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation. App. 58-59.

The district court dismissed the complaint, explaining that all but the breach of contract claim are preempted under the ADA and this Court's precedents. The district court observed that this Court made "abundantly clear" in *Wolens*, 514 U.S. at 226, that "a frequent flier program relates to 'prices' and 'services,' and the WorldPerks program at issue here is none other than a frequent flier program." App. 69. The court concluded that "[b]ecause Plaintiff's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state law and relate to both airline prices and services, all are preempted by the ADA." App. 69.

With regard to Ginsberg's breach of contract claim, the district court explained that under *Wolens*, claims that "an airline breached terms of a contract the airline 'itself stipulated'" are not preempted by the ADA because such claims do not involve the enforcement of state law, but rather the enforcement of the parties' own voluntary undertakings. App. 69-71. The court nonetheless dismissed the claim because Ginsberg's complaint failed to identify any material breach of the WorldPerks Agreement. The Agreement "states unambiguously that abuse of WorldPerks, including 'improper conduct as determined by Northwest *in its sole judgment*' is grounds for membership cancellation." App. 71 (quoting the Agreement). The district court explained that although Ginsberg complained that he was not provided an adequate explanation for Northwest's revocation decision and that "improper conduct" is not well defined in the agreement, "Northwest was not required by the agreement to explain its decisions or define what it considers 'improper conduct.' To hold that Northwest was required to explain itself to Plaintiff's satisfaction would be an 'enlargement or enhancement' of the parties' agreement beyond its express terms, which *Wolens* does not allow." App. 71. Accordingly, the district court dismissed the breach of contract claim for failure to state a claim, but without prejudice so that Ginsberg would have an opportunity to amend his complaint to include allegations of an actual breach of contract. App. 72.

Ginsberg had argued that his "breach of implied covenant of good faith claim and fair dealing claim" (hereinafter "implied covenant of good faith claim") was also a "breach of contract" claim merely seeking to

enforce the terms and conditions of the WorldPerks program, because "every contract imposes upon each party a duty of good faith and fair dealing." Dist. Ct. Doc. No. 11, at 8 (internal quotation omitted). Ginsberg argued that he and the rest of the Class were entitled to recovery under this theory because although the WorldPerks Agreement allows for dismissal based on Northwest's "sole judgment," Minnesota law imposes extra-contractual "good faith" obligations limiting Northwest's exercise of its "sole judgment." *See id.* at 5-13. The district court rejected this argument, however, observing that Ginsberg "misses that this duty does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." App. 64-65. The court explained: "That parties must act in good faith and deal fairly with one another is a requirement of state policy, external to the contract itself, that is given 'the force and effect of law.'" App. 65

Ginsberg moved for reconsideration, arguing that the district court erred in failing to recognize that the ADA's preemption clause does not apply to state common law claims. Ginsberg asserted that "[t]o preempt a cause of action under the ADA according to *Wolens*, one need identify an offending state statute, that affects the zone of pre-empted activities, and establish that an action lies without a connection to preserved contract rights." Dist. Ct. Doc. No.17, at 6. He also argued that his implied covenant of good faith claim was not preempted because "[i]n Minnesota, every contract is subject to an implied covenant known as a covenant of good faith and fair dealing,

which is automatically deemed to be part of a contract." *Id*. at 12.

The district court denied the motion, explaining that this Court's decision in *Wolens* makes no distinction between state common law and state statutes, but instead distinguishes "between terms an airline itself stipulates on the one hand, and *any* 'enlargement or enhancement based on state laws or policies external to the agreement.'" App. 45 (quoting *Wolens*, 513 U.S. at 233). The district court observed that "state common laws [a]ffecting contracts are not – as the *Wolens* court demands to avoid preemption – terms of the contract itself. They are expansions beyond the explicit terms of the contract, as demonstrated by the fact that they apply regardless of whether the parties agree to them in the contract itself. They exist independently of the contract." App. 46. With regard specifically to Ginsberg's implied covenant of good faith claim, the district court noted its earlier holding, not challenged in the reconsideration motion, that Ginsberg "failed to allege any actual violation of the WorldPerks agreement." App. 47. Accordingly, the district court explained, Ginsberg's implied covenant of good faith claim must be dismissed either for failure to state a claim or because it is based on the alleged violation of an obligation not found in the terms of the agreement and instead arising out of preempted state law. App. 47-48.

IV. The Ninth Circuit Reinstates Ginsberg's Claim for Breach of Implied Covenant of Good Faith as Categorically Exempted from ADA Preemption

Ginsberg appealed to the Ninth Circuit only with respect to the dismissal of his implied covenant of good faith claim. The Ninth Circuit reversed, holding that such claims are categorically exempted from ADA preemption. App. 21. The Ninth Circuit cited its decisions in *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), holding that implied covenant of good faith claims are "too tenuously connected to airline regulation to trigger preemption under the ADA," and in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc), holding that the ADA does not preempt common law remedies so long as they "do not significantly impact federal deregulation." App. 33. The court of appeals held that these cases are consistent with this Court's holding in *Wolens* that claims based on "contract law" are not preempted under the ADA. App. 29-30.

The Ninth Circuit also reasoned that, despite *Wolens* and its frequent flyer program context, implied covenant of good faith claims do not "relate to" prices or services because the legislative history of the ADA indicates that Congress intended the preemption provision "only to apply to state laws directly regulating rates, routes, or services." App. 37 (internal quotation omitted). Citing *Charas* for the proposition that "services" is defined narrowly under the ADA, the court of appeals held that "[a] claim for breach of good faith and fair dealing does not relate to

'services' because it has nothing to do with schedules, origins, destinations, cargo, or mail." App. 38.

Judge Rymer filed a concurring opinion explaining that although she believed the panel's holding to be compelled by the Ninth Circuit's decision in *West*, "*West*'s rule for contract claims seems out of step with the Supreme Court's holding" in *Wolens*. Judge Rymer also observed that the decision "places us in tension with the Seventh Circuit," in particular *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996), which holds that this Court's decision in *Morales* "does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA." App. 39. Judge Rymer noted that if *West* "were not in the picture," the court would be faced "with the *Wolens* inquiry of whether Ginsberg's claim alleges a violation of a state-imposed obligation or a self-imposed undertaking." App. 40. Judge Rymer found this to be "a difficult question," not answered by the panel's decision, but "the answer [to which] is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs." App. 40.

Northwest filed a petition for rehearing or rehearing en banc. While the petition was pending, Judge Rymer passed away. When the court of appeals eventually ruled on the petition, Judge Rymer was replaced on the panel by Judge Schroeder. The court denied the petition, but amended its decision to delete Judge Rymer's concurrence, and to delete the final two paragraphs of the main opinion discussing the

court's holding in *Charas* that the term "services" does not include "fringe benefits" having "nothing to do with schedules, origins, destinations, cargo, or mail." *Compare* App. 19 *with* App. 38-39.

REASONS FOR GRANTING THE PETITION

Over the last 20 years, this Court has addressed the preemptive effect of the ADA and FAAAA on three occasions – *Morales*, *Wolens*, and *Rowe*. Consistent with Congress's intent, these decisions interpret the ADA and FAAAA to provide the airline and transportation industries with substantial protection from state statutory and common law claims that impose extra-contractual duties, while allowing plaintiffs to enforce the terms of voluntary undertakings by bringing contract claims. Although most lower courts have followed this Court's guidance, the Ninth Circuit has charted its own path that veers further and further from this Court's jurisprudence with each decision the Ninth Circuit issues. The decision below – finding a breach of implied covenant claim about a frequent flyer program, the precise context of this Court's *Wolens* decision, not related to prices and services even though the state law claim would directly override the terms of the parties' voluntary undertaking – is the culmination of this trend and conflicts with the decisions of this Court and the other Circuits which follow this Court's precedents.

This case is the most recent in a trifecta of Ninth Circuit ADA decisions that numerous courts have described as profoundly at odds with this Court's precedent and the source of significant Circuit conflict. Rather than acknowledging – as many other courts

have – that the Ninth Circuit's prior decisions in *West* and *Charas* cannot possibly be good law following this Court's holdings in *Wolens* and *Rowe*, the decision below expressly affirms and relies upon *West* and *Charas*, thus entrenching and perpetuating the already existing conflict between the Ninth Circuit's interpretation of the ADA and that of this Court and the other courts of appeals.

The decision below is the *non plus ultra* of the Ninth Circuit's deviation from the teachings of this Court. *Wolens* was clear that whether a particular claim is preempted under the ADA turns not on the plaintiff's labeling of the claim but on the extent to which the plaintiff's arguments invoke laws or policies outside the scope of the parties' agreement to enlarge the parties' voluntary undertakings. Ginsberg's implied covenant of good faith claim is a prototypical preempted claim: Ginsberg seeks to circumvent the terms and conditions of Northwest's frequent flyer program, which gives Northwest sole discretion to determine whether a member's behavior constitutes abuse warranting dismissal from the program, by invoking state law purporting to limit that discretion. It is hard to imagine a claim that more obviously enlarges the parties' bargain than a claim that an airline breached an "implied" duty of good faith and fair dealing notwithstanding the parties' express agreement that the dispute at issue is left to the airline's "sole judgment." Nor can there be any serious dispute that Ginsberg is invoking state law in a manner that relates to prices and services – despite the Ninth Circuit's contrary holding, *Wolens* specifically holds that claims arising out of disputes

over frequent flyer programs *easily* satisfy that requirement.

The Ninth Circuit's ruling provides a model for plaintiffs to eviscerate the preemptive effect of the ADA and FAAAA simply by labeling their state law claims as "breach of implied covenant of good faith" claims. This categorical exemption for implied covenant of good faith claims undermines the ADA's purpose of uniformity and efficiency by exposing airlines and other carriers to a patchwork of state laws that, depending on the state, may impose an inquiry into reasonableness or good-faith motivation every time an airline or carrier acts under the express terms of a specific agreement. The decision below also widens the gulf between the Ninth Circuit and the rest of the federal judiciary, declaring all implied covenant of good faith claims exempt from ADA preemption despite contrary holdings by the vast majority of courts to address this issue, including the First and Seventh Circuits.

The consequences of the conflict between the Ninth Circuit and this Court extend beyond implied covenant of good faith claims. At the center of the Ninth Circuit's flawed decision is its persistent failure to apply the analytical framework articulated in this Court's ADA and FAAAA jurisprudence. *Wolens* specifically explains that the narrow preemption exemption for breach of contract claims arises from the fact that such claims involve only the enforcement of the parties' own self-imposed obligations and do not require the enforcement of any state law. Instead of recognizing that Ginsberg's implied covenant of good faith claim is a paradigmatic effort to expand an

airline's obligations beyond its voluntary undertaking, the Ninth Circuit insisted that *Wolens* somehow supports its holdings in *West* and *Charas* that entire categories of common law contract and tort claims are wholly exempt from ADA preemption, regardless whether the plaintiff's underlying allegations or theory of recovery relate to routes, rates or services or rely on the enactment or enforcement of state law. This Court's intervention is necessary to put an end to a growing body of Ninth Circuit ADA jurisprudence causing significant conflict among the Circuits and robbing the airline and transportation industries of many of the protections Congress intended the ADA and FAAAA to afford.

I. The Ninth Circuit's Decision Below is Wrong and Irreconcilable with This Court's Precedent

A. *Wolens* does not remotely support the Ninth Circuit's categorical exemption of implied covenant of good faith claims from ADA preemption

In *Wolens*, this Court recognized a narrow exception to ADA preemption for "routine breach-of-contract claims" that seek only to "give effect to bargains offered by the airlines and accepted by airline customers." 513 U.S. at 228. The plaintiffs in *Wolens* argued that American Airline's changes to its frequent flyer program, imposing blackout dates and caps on available seats, violated the terms and conditions of the membership agreement, thus constituting a breach of contract. The Court explained that although the allegations obviously related to airline rates and services within the meaning of the

ADA, the plaintiffs based their breach of contract claim entirely on "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 232-33. Because such claims are "confined to a contract's terms," seeking "simply [to] hold[] parties to their agreements," they do not rely on the enactment or enforcement of state law and thus do not trigger ADA preemption. *Id.* at 229.

As the district court correctly recognized, Ginsberg's claim for breach of an implied covenant of good faith, as opposed to his contract action that failed to state a breach, does not fall within the *Wolens* exception because the whole point of the claim is to override the contractual terms which granted Northwest "sole judgment" and doomed Ginsberg's contract claim. There is nothing subtle or difficult about this. The very name of the cause of action – an *implied* covenant of good faith – makes clear that state law is supplementing the express terms of the parties' voluntary undertaking. And the very fact that Ginsberg's contract claim fails on the merits underscores that the implied covenant claim adds something to the parties' agreement. As the district court aptly put it: Ginsberg's implied duty of good faith claim "does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." App. 64-65. Ginsberg does not contest that the terms of the WorldPerks program give Northwest sole discretion regarding membership termination. Instead, he argues that state law overrides that contractual provision and limits Northwest's exercise of its discretion. It is hard to imagine a more obvious example of using state law to

enhance the terms and conditions of an airline program beyond the airline's self-imposed undertakings.

The Ninth Circuit avoided grappling with the extra-contractual nature of Ginsberg's claim, instead simply declaring all implied covenant of good faith claims part of the arsenal of routine breach of contract claims saved from preemption in *Wolens*. But *Wolens* makes no mention of implied covenant of good faith claims and certainly does not suggest that such claims are categorically exempt from preemption. To the contrary, *Wolens* explicitly limits the contract actions that survive preemption to those that enforce self-imposed undertakings without enlarging the terms of the bargain.

Indeed, *Wolens* specifically observed that some state law principles of contract law would be preempted to the extent that "they seek to effectuate the State's public policies, rather than the intent of the parties." 513 U.S. at 233 n.8 (quoting Brief of the United States as Amicus Curiae at 28). As the First, Seventh, and Eighth Circuits have recognized, *Wolens* at the very least requires an individualized inquiry into the nature of the implied covenant of good faith claim asserted by the plaintiff, and cannot possibly support the categorical exemption adopted by the Ninth Circuit. *See Data Manufacturing, Inc. v. United Parcel Serv.*, 557 F.3d 849, 853-54 (8th Cir. 2009) (holding preempted state law claims based on implied contractual obligations, including an implicit duty not to charge unlawful penalties, because such claims were not part of the agreement between the parties); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34-37 (1st Cir.

2007) (finding plaintiffs' implied covenant of good faith claim preempted by the ADA because it imposed state policies on the airline by attempting to create implicit contract terms not found in the agreement); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996) (remanding to the district court to determine whether "the plaintiffs are relying on principles of contract law that . . . could be open to preemption under *Wolens*").

Ginsberg's claim clearly illustrates why the Ninth Circuit's blanket rule is irreconcilable with *Wolens*. Rule 7 of the WorldPerks Program states unambiguously that abuse of WorldPerks, including "improper conduct as determined by Northwest in its sole judgment," is grounds for "cancellation of the member's account and future disqualifications from program participation. . . ." App. 58. Ginsberg's implied covenant of good faith claim seeks a class-wide injunction prohibiting Northwest from revoking membership in its frequent flyer program on any basis not considered reasonable under state law, despite the fact that the terms and conditions of the program expressly reserve Northwest's right to exercise its "sole judgment" in determining whether someone has abused the program. As the district court explained, "Plaintiff in effect asks that the Court replace Northwest's judgment with his own regarding what counts as 'abuse' of WorldPerks. This, however, would transgress the unambiguous terms of the agreement by inserting into it external norms supplied by the Plaintiff, the Court, or both." App. 71-72. In short, Ginsberg seeks precisely the sort of enforcement of state law that *Wolens* identified as preempted under the ADA.

Moreover, the Ninth Circuit was flatly wrong in likening implied covenant of good faith claims to the breach of contract claims this Court contemplated would pose little risk of non-uniform adjudication across States. App. 16 (citing *Wolens*, 513 U.S. at 233 n.8). Many States reject implied covenant claims where, as here, the alleged good faith obligations are inconsistent with the contract's terms, including those expressly giving one party sole discretion with regard to particular actions. *See, e.g.*, *Shoney's LLC v. MAC East, LLC*, 27 So.3d 1216, 1223 (Ala. 2009); *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (Cal. Ct. App. 1995); *Chrysler Credit Corp. v. Dioguardi Jeep Eagle, Inc.*, 596 N.Y.S.2d 230, 232-33 (N.Y. App. Div. 1993). Other States, however, impose good faith and fair dealing obligations that override "sole discretion" clauses. *See, e.g., Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1187 (7th Cir. 1996); *A.I. Transp. v. Imperial Premium Fin., Inc.*, 862 F. Supp. 345, 348 (D. Utah 1994). To subject airlines to a "patchwork" of varying state laws (as well as inevitable forum shopping) on the implied covenant of good faith promises the uncertainty and inconsistency that the ADA sought to avoid. *Rowe*, 552 U.S. at 373.

B. This Court's precedent flatly contradicts the Ninth Circuit's conclusion that implied covenant of good faith claims are categorically unrelated to rates, routes and services under the ADA, regardless of the underlying allegations and theory of recovery

At the center of the Ninth Circuit's flawed decision is its persistent failure to apply the analytical

framework articulated in this Court's ADA jurisprudence. *Wolens* specifically explains that the narrow exemption for breach of contract claims arises from the fact that such claims involve only the enforcement of the parties' own self-imposed obligations and do not require the enforcement of any state law.

Instead of recognizing that this reasoning compels the rejection of Ginsberg's theory that a state-law implied covenant of good faith claim overrides the contractual "sole discretion" language, the Ninth Circuit insisted that *Wolens* is consistent with and indeed supports its holdings in *West* and *Charas* that certain categories of common law contract and tort claims are categorically unrelated to rates, routes, and services.

The incoherence of the Ninth Circuit's reasoning is on full display in its conclusion that Ginsberg's implied covenant of good faith claim does not relate to rates, routes, or services under the ADA despite the fact that *Wolens* expressly holds that claims arising out of disputes over frequent flyer benefits easily satisfy that requirement. *Wolens* rejected the plaintiffs' effort to separate "matters 'essential' from matters unessential to airline operations," with only the former preempted. *Wolens*, 513 U.S. at 226. Instead, *Wolens* viewed claims arising from a frequent flyer program to be obviously related to both rates and services: "Plaintiffs' claims relate to 'rates,' i.e., American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' i.e., access to flights and class of service upgrades unlimited by retrospectively applied capacity controls and blackout

dates." *Id.* And *Rowe* reiterates that under *Wolens*, "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program." 552 U.S. at 373; *see also* App. 49-50 (the district court observing that it is "patently obvious" that Ginsberg's implied covenant of good faith claim relates to airline rates and services within the meaning of the ADA). The breach of contract claim in *Wolens* avoided preemption not because it was somehow unrelated to rates and services, but only because it did not involve the enforcement of state law – an exemption that plainly has no application to Ginsberg's implied covenant of good faith claim. The bottom line is that the decision below simply cannot be reconciled with *Wolens* and the preemptive scope of the ADA.

II. The Ninth Circuit's Decision in this Case is the Third in a Set of Ninth Circuit Cases Dramatically Departing from this Court's Precedent and Contributing to Significant Conflict Among the Circuits Regarding the Scope of ADA Preemption

The Ninth Circuit has its own trilogy of seminal ADA preemption cases. Unfortunately, the Ninth Circuit's trilogy bears little resemblance to this Court's decisions in *Morales*, *Wolens*, and *Rowe*. Although the first of the Ninth Circuit cases pre-dated *Morales*, the Ninth Circuit has not revisited its precedents in light of the intervening decisions of this Court, but rather has doubled down and insisted that its precedents are undisturbed. As a result, each one of its decisions takes the Ninth Circuit further from this Court's trilogy and deepens the conflict in the Circuits. As numerous other courts have recognized,

the Ninth Circuit's jurisprudence has been the source of significant Circuit conflict, and is profoundly at odds with this Court's holdings regarding the scope of the ADA's preemption clause.

A. *West v. Northwest Airlines*

Before this Court decided any of its ADA/FAAAA preemption cases, the Ninth Circuit addressed the scope of ADA preemption in *West v. Northwest Airlines*. West brought suit against Northwest seeking compensatory and punitive damages after he was bumped from a flight due to overbooking. Like Ginsberg, West argued that Northwest's actions constituted a breach of the implied covenant of good faith, although West based his claim on Montana rather than Minnesota law. *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 150 (9th Cir. 1993). The Ninth Circuit held that the ADA preempted West's punitive damages claim, but did not preempt his claim for compensatory damages under Montana law. *Id.* While the parties' cross-petitions for certiorari were pending, however, this Court issued its decision in *Morales*. This Court subsequently denied West's petition, but granted Northwest's petition, vacated the decision, and remanded the case for reconsideration of the holding allowing West's compensatory damages claim to proceed. *Id.* Upon receiving a second petition from West arguing that the Supreme Court Rules prohibited granting certiorari on a cross-petition but not the initial petition, this Court vacated its earlier denial of West's petition and remanded the punitive damages holding for reconsideration as well. *Id.*

On remand, the Ninth Circuit reached the same conclusion it had before *Morales*, although this time

the decision was not unanimous. All of the panel members agreed that West's punitive damages claim was preempted because "[o]verbooking and bumping are accepted forms of price competition and reduction in the deregulation period, thus any law or regulation which results in penalizing airlines for these practices is preempted." *Id.* at 152. The panel majority nonetheless allowed West's claim for compensatory damages to proceed, on the theory that it was "too tenuously connected to airline regulation to trigger preemption under the ADA." *Id.*at 151.

Judge Brunetti dissented with regard to the compensatory damages claim, explaining that *Morales* "made clear that the 'relating to' language [in the ADA] is to have a very broad scope, encompassing within its reach statutes or actions 'having a connection with or reference to airline 'rates, routes, or services.'" *Id.* at 153. Judge Brunetti observed: "[O]ne strains to conceive of an action which could relate to those services more directly than a lawsuit seeking damages for the inevitable result of [an airline's] boarding practices." *Id.*

West soon became the subject of Circuit conflict. In 1995, the Fifth Circuit sitting en banc specifically noted its disagreement with *West* in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 339 (5th Cir. 1995) (en banc). The Fifth Circuit allowed to proceed a state tort claim alleging that the plaintiff was injured by luggage that fell out of an overhead compartment on a commercial airplane, explaining its position that claims for physical injury resulting from the negligent operation of an aircraft are not related to rates, routes, or services under the ADA. *Id.* at 336-37. The

Fifth Circuit emphasized, however, that its holding was narrow and "*does not* extend to" state tort claims that more clearly relate to airline services, pointing in particular to *West* as an example of claims that are "preempted under our interpretation of 'services.'" *Id.* at 339-40 (emphasis in original). The court of appeals explained, "[u]nder either *Morales* or the analysis advanced here, it is difficult to see how a lawsuit for overbooking would not 'relate to' the airline's contract for 'services' with its passenger." *Id.* at 340. The Fifth Circuit was not the only court to call out the Ninth Circuit's reasoning in *West* as obviously contrary to *Morales* – a New Jersey state court described *West* as reflecting the Ninth Circuit's "stunning indifference to *Morales*." *El-Menshawy v. Egypt Air*, 276 N.J. Super. 121, 126, 647 A.2d 491 (N.J. Sup. 1994).

Indeed, *Wolens* subsequently made clear the *West* majority's error in finding "the state contract and tort laws under which West seeks relief" – including an implied covenant of good faith claim – too tenuously related to routes, rates, and services to trigger preemption. In *Wolens*, this Court easily concluded that a breach of contract claim in that case related to rates and services because it arose out of a frequent flyer program. *Wolens*, 513 U.S. at 226. The Court found the breach of contract claim outside the scope of the ADA not because it was "too tenuously connected" to airline regulation under *Morales,* but because the claim did not involve the enactment or enforcement of state law. *Id.* at 227-29. If, as *Wolens* holds, a breach of contract claim arising out of a dispute over frequent flyer benefits relates to rates, routes and services under the ADA, then *West* cannot possibly be correct that an implied covenant of good faith claim arising

out of an overbooking incident does *not* relate to rates, routes, and services. Indeed, Judge Rymer observed in her concurrence, with some understatement, that "*West*'s rule for contract claims seems out of step with the Supreme Court's holding" in *Wolens*. App. 39.

This Court's subsequent decision in *Rowe* also squarely foreclosed the Ninth Circuit's holding that the claim in *West* did not relate to routes or services under the ADA. The tobacco regulations at issue in *Rowe* did not even apply to carriers, but this Court nonetheless found them preempted under the FAAAA because they prompted tobacco suppliers to seek "tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Rowe*, 552 U.S. at 372. If, as *Rowe* holds, state tobacco laws "relate to" rates, routes, and services if they regulate tobacco suppliers in a manner that impacts the delivery services that suppliers require from their carriers, then the *West* majority's reasoning that a claim asserting a breach of an implied duty of good faith not to overbook flights is unrelated to rates, services, and schedules is simply irreconcilable with this Court's precedents.

B. *Charas v. Trans World Airlines*

In 1998 – after *Morales* and *Wolens* but before *Rowe* – the Ninth Circuit heard en banc a set of consolidated cases asserting state law tort claims for physical injuries occurring during travel on a commercial flight. *See Charas*, 160 F.3d at 1261-62 (describing claims for injuries arising, inter alia, from falling luggage and a service cart collision). The Ninth Circuit once again struggled to read ADA preemption narrowly: "[W]e hold that Congress used the word

'service' . . . in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail . . . [and not] an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." *Id.* at 1261, 1264. Reading *Wolens* selectively to focus on the Court's holding that "Congress did not intend to preempt common law contract claims," *id.* at 1264, while ignoring the finding of preemption for the fraud claims, the *Charas* court held that state law tort claims are likewise outside the scope of the ADA, because "[n]othing in the Act itself, or its legislative history, indicates that Congress had a clear and manifest purpose to displace state tort law in actions that do not affect deregulation in more than a peripheral manner." *Id.* at 1265 (internal quotation omitted).

Charas is part of a widely recognized and well-established conflict among the Circuits over the meaning of "relating to . . . services" in the ADA, with the vast majority of Circuits on the other side of the split. In 2000, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas acknowledged the split in dissenting from denial of a petition for a writ of certiorari in *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000). In *Duncan*, the Ninth Circuit concluded that the ADA does not preempt a claim challenging an airline policy allowing smoking on trans-Pacific flights, explaining that the case was directly controlled by the narrow definition of "services" adopted in *Charas*. *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000). The Justices dissenting from the denial of certiorari

explained that they would have granted the petition because the courts of appeals "have taken directly conflicting positions on this question of statutory interpretation," and because "[r]esolution of this question would provide needed certainty to airline companies." *Duncan*, 531 U.S. at 1058 (O'Connor, J. dissenting). The dissenting Justices pointed to *Charas* and the Third Circuit's decision in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998) as examples of cases interpreting the term "services" in the ADA narrowly, in contrast to the broader readings of the Fourth, Fifth, and Seventh Circuits, *see Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Hodges*, 44 F.3d at 336; *Travel All Over the World*, 73 F.3d at 1433. Three years later, the Eleventh Circuit also noted the split and specifically rejected the reasoning in *Charas*, explaining that it found "more compelling" the broader reading of the ADA's preemption clause adopted by the Fifth and Seventh Circuits. *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1256-57 (11th Cir. 2003).

Rowe decisively rejected the Ninth Circuit's reasoning in *Charas*. As numerous courts have now recognized, *Rowe* makes clear that the Ninth Circuit's analysis in *Charas* reflects a significant misunderstanding of what it means for a law to be related to airline deregulation under *Morales*, as well as this Court's rationale for exempting breach of contract claims in *Wolens*. *See, e.g.*, *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) ("[T]his dispute has been super[s]eded by controlling Supreme Court case law – namely, by *Rowe*'s expansive treatment of the term 'service.' The weight of circuit court authority now favors the broader definition.")

(citation omitted); *Air Transport Assoc. of America v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) ("*Charas*'s approach, we believe, is inconsistent with the Supreme Court's recent decision in *Rowe*."). Indeed, last year, the U.S. Department of Transportation submitted a Statement of Interest in a district court case, stating the Department's position that *Charas* conflicts with *Rowe* and now stands on "unstable ground." *Nat'l Fed'n of the Blind v. United Airlines, Inc.,* No. 10-4816, 2011 WL 1544524, at *5 (N.D. Cal. Apr. 25, 2011).

C. The Ninth Circuit Doubles (or Triples) Down: *Ginsberg v. Northwest*

In the decision below, the Ninth Circuit dug in its heels, expressly affirming and relying upon *West* and *Charas*, thus entrenching and perpetuating the already existing conflict between the Ninth Circuit's ADA jurisprudence and that of this Court and the vast majority of courts of appeals. Instead of recognizing *West*'s abrogation by *Wolens* and *Rowe*, the decision below declares *West* "still good law" requiring the conclusion that Ginsberg's implied covenant of good faith claim is "too tenuously connected" to airline regulation to trigger preemption. App. 14. Likewise, instead of recognizing *Charas*' abrogation by *Rowe*, the Ninth Circuit (although abbreviating its discussion of *Charas* when it amended its opinion) relied on *Charas* for the proposition that implied covenant of good faith claims are outside the scope of state laws that Congress intended the ADA to preempt. App. 14-17.

The decision below widens the gulf between the Ninth Circuit and the rest of the country by holding

that all implied covenant of good faith claims are exempt from ADA preemption, contrary to decisions by the vast majority of courts to address this issue. Relying on *Charas* and *West*, the decision adopts a blanket rule exempting "state-based common law contract claims, such as the implied covenant of good faith and fair dealing" from ADA preemption. App. 5. The First Circuit, in contrast, has specifically rejected a categorical preemption exemption for implied covenant of good faith claims. The plaintiffs in *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007) sued several airlines seeking a refund of fees and taxes paid in the purchase of non-refundable tickets that were subsequently not used. The First Circuit found plaintiffs' implied covenant of good faith claim preempted by the ADA because it imposed state policies on the airline by relying on "implicit" contract terms not found in the agreement. *Id.* at 34-37. Similarly, in *Data Manufacturing, Inc. v. United Parcel Services*, 557 F.3d 849, 853-54 (8th Cir. 2009), the Eighth Circuit held preempted state law claims based on implied contractual obligations, including an implicit duty not to charge unlawful penalties, because such claims were not part of the agreement between the parties.

And the U.S. District Court for the Northern District of Illinois recently recognized "a direct conflict" between the decision below and Seventh Circuit precedent, explaining: "*Ginsberg* was decided in large part . . . on the conclusion that the implied covenant of good faith and fair dealing can never 'relate to' prices, routes or services. That holding appears to be in direct conflict with the Seventh Circuit's decision in *Travel All Over the World*, which

held that any contract claim can relate to price depending on the facts alleged." *Newman v. Spirit Airlines, Inc.*, No.12-2897, 2012 WL 3134422, *3-4 (N.D. Ill. July 27, 2012). *See Travel All Over the World,* 73 F.3d at 1432 n.8 (recognizing that under *Wolens*, "'some state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties'"); *see also* Jol A. Silversmith, *Federal Preemption Over Air Carrier Prices, Routes, and Services: Recent Developments*, 3 Air & Space L. 4, 6 (2012) (citing the *Ginsberg* decision for the proposition that "courts are divided as to whether claims based solely on the implied covenant of good faith and fair dealing are preempted" and noting that the Ninth Circuit "has taken an approach, relying on a narrow reading of the terms 'prices' and 'services,' that seemingly conflicts with Supreme Court decisions, as well as with other courts").

Consistent with the approach of the First, Seventh, and Eighth Circuits, numerous district courts have rejected plaintiffs' attempts to assert implied covenant of good faith claims by sheltering behind the *Wolens* preemption exception for breach of contract claims. *See, e.g.*, *ATA Airlines, Inc. v. Fed. Express Corp.*, No. 08-0785, 2010 WL 1754164, *4 (S.D. Ind. April 21, 2010) (claims for breach of fiduciary duty and breach of duty of good faith and fair dealing "are preempted because the claims impose duties that are implied under state law and beyond the scope of the parties' agreements"); *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2008 WL 2323923, *10 (W.D. Ark. June 2, 2008) ("Plaintiff's breach of contract claims which allege a breach of the implied

covenant of good faith and fair dealing based on Defendant's Customer Service Plan and Conditions of Carriage are preempted. The Supreme Court has held that the ADA 'confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.'" (quoting *Wolens*, 513 U.S. at 233)); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008) (breach of implied covenant of good faith claim must be dismissed because "to the extent a plaintiff seeks to impose limits 'beyond those to which the parties actually agreed, the [implied covenant] claim is invalid. To the extent the implied covenant claim seeks simply to invoke terms to which the parties *did* agree, it is superfluous.'") (quoting *Harm v. Frasher*, 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367 (1960)).

Finally, even beyond the more specific splits of authority when it comes to substantive results, the Ninth Circuit's methodological approach to ADA and FAAAA preemption is out of step with precedents from this Court and the other Circuits. Part of the Ninth Circuit's problem is its persistent and erroneous view that the ADA's preemption provision should be interpreted narrowly, despite this Court's repeated statements to the contrary. The decision below describes *Morales* as "cabin[ing] its holding to those laws that actually have a direct effect on rates, routes, or services," and going to "great lengths to make clear that its holding was narrow." *Morales*, however, repeatedly affirmed the breadth of the ADA's preemption language, stating that the clause "express[ed] a broad preemptive purpose," had a "sweeping nature," and was "broadly worded." 504

U.S. at 383-84. *Wolens* reiterated a broad construction of the ADA preemption clause, applying it to claims relating to "unessential," as well as "essential," services. 514 U.S. at 226. And *Rowe* affirms that a claim may have an effect that is "only indirect" on prices, routes, or services, and still be preempted. 552 U.S. at 370. As the First Circuit recently summarized: "All three of the major Supreme Court cases endorsed preemption and read the preemption language broadly and none adopted [the position] that we should presume strongly against preempting in areas historically occupied by state law." *DiFiore*, 646 F.3d at 86 (internal citation omitted).

III. This Court's Review is Necessary to Bring the Ninth Circuit's ADA Jurisprudence in Alignment with that of this Court and the Other Courts of Appeals and to Put an End to the Ninth Circuit's Frustration of Congress's Deregulation Efforts in the Airline and Transportation Industries

The decision below has widespread commercial ramifications in the aviation and transportation industries, much greater than the frequent flyer program at issue here. Each time a carrier acts pursuant to its express and unequivocal rights under a contract, it may be exposed to a state law claim for breach of an implied covenant of good faith. Airlines and other carriers must be able to rely and act on the standard terms in their self-undertaken contracts. The ADA and *Wolens* guarantee as much. Yet the Ninth Circuit's decision casts significant doubt on whether airlines can continue to rely on their standard contract terms without being subject to

extra-contractual claims and obligations. As Judge Rymer observed, "[t]he answer [to whether implied covenant of good faith claims are preempted] is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs." App. 40.

The Ninth Circuit's decision here provides a roadmap for avoiding this Court's ADA precedent by allowing a plaintiff to pursue a claim squarely foreclosed under a contract by labeling it a claim for breach of an implied covenant of good faith. The end run around *Wolens* is dramatically illustrated by Ginsberg's decision to drop his contract claim (which was effectively foreclosed by the contract's "sole judgment" language) and pursue the "implied covenant" theory to obtain what the express terms of the contract plainly did not provide. The decision entrenches and exacerbates an already existing split between the Ninth Circuit and the majority of other courts of appeals, and robs the industry of much of the protection conferred by Congress in the ADA.

But the conflict between the Ninth Circuit and this Court is about much more than whether the ADA preempts implied covenant of good faith claims. Over the last 20 years, the Ninth Circuit has repeatedly strayed from this Court's teaching about the ADA. While other courts have recognized that *Wolens* and *Rowe* abrogated the Ninth Circuit's decisions in *West* and *Charas*, the Ninth Circuit has dug in its heels and relied on those cases to reach results like the one here that would be inconceivable in other Circuits. At this point, it is as if the Ninth Circuit is speaking a

different language than the rest of the federal judiciary: While this Court and the other courts of appeals conduct an inquiry into the underlying allegations to determine whether the claim at issue (1) relies on the enactment or enforcement of state statutory or common law in a manner that (2) relates to airline rates, routes, or services, the Ninth Circuit is issuing sweeping declarations that entire categories of common law claims are unrelated to airline deregulation and do not implicate the "narrow" preemptive effect of the ADA. Indeed, in the decision below, the Ninth Circuit quite literally was asking the wrong question. Rather than focus on whether Ginsberg's "implied covenant" claim enlarged the parties' bargain based on state law (a question that could only be answered affirmatively), the Ninth Circuit focused on whether the claim related to rates and services (a question that was already answered affirmatively in *Wolens*). The decision below makes clear that the Ninth Circuit is deeply committed to its flawed approach to ADA preemption and will not align itself this Court and the rest of the courts of appeals without direct intervention by this Court.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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