NO. 12-462

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The Airline Deregulation Act of 1978 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)(1).

Respondent was a member of Northwest Airlines' frequent flyer program, which by its terms permitted Northwest to remove participants for "abuse" of the program as determined in Northwest's "sole judgment." After Northwest revoked respondent's Platinum Elite status membership due to abuse of the program, respondent filed suit alleging, *inter alia*, that Northwest breached both its contractual obligations and an implied covenant of good faith and fair dealing under Minnesota law. Although the district court dismissed the contract claim for failure to state a claim and the implied covenant of good faith and fair dealing 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 notwithstanding this Court's decisions in *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), and *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 PROCEEDING

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 frequent flyer program, WorldPerks, whose program status was allegedly revoked without valid cause during the four years prior to the filing of the complaint.

CORPORATE DISCLOSURE STATEMENT

Petitioners, which are private, non-governmental parties, hereby disclose and state that (a) on December 31, 2009, Northwest Airlines, Inc. was merged with and into Delta Air Lines, Inc. Prior to that date, it was a wholly-owned subsidiary of Delta Air Lines, Inc., and no other publicly held corporation owned ten percent or more of Northwest Airlines, Inc.'s stock; and (b) Delta Air Lines, Inc. has no parent corporation and there are no publicly held corporations that own ten percent or more of Delta Air Lines, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS BELOW

The Ninth Circuit's initial opinion reversing dismissal of the complaint and remanding to the district court is reported at 653 F.3d 1033 and reproduced at Pet. App. 20-40. The Ninth Circuit's order denying the petition for rehearing or rehearing en banc and attaching an amended opinion is reported at 695 F.3d 873 and reproduced at Pet. App. 1-19. The district court's opinion granting petitioners' motion to dismiss the complaint is unreported and reproduced at Pet. App. 56-73. The district court's opinion denying respondent's motion for reconsideration is unreported and reproduced at Pet. App. 41-55.

JURISDICTION

The Ninth Circuit denied Northwest's petition for rehearing and rehearing en banc on July 13, 2012. The petition for a writ of certiorari was filed on October 11, 2012, and granted on May 20, 2013. 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 in the appendix to this brief.

STATEMENT OF THE CASE

In 1978, Congress enacted the Airline Deregulation Act (ADA) in order to promote efficiency and innovation in the airline industry through maximum reliance on competitive market forces. To that end, the ADA expressly preempts any "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)(1). This Court has held complaints about frequent flyer programs to be related to prices, routes, or services, *see American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995), and emphasized the "broad preemptive purpose" of that provision, *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992). Applying those principles, this Court has recognized that "routine breach-of-contract claims" that do no more than enforce the parties' voluntary undertakings do not trigger preemption, while claims seeking an "enlargement or enhancement" of the parties' bargain based on "state laws or policies external to the agreement" remain preempted by the ADA. *Wolens*, 513 U.S. at 232-33.

In this case, respondent Binyomin Ginsberg brought both kinds of claims against petitioners after his Platinum Elite status membership in Northwest's frequent flyer program was revoked for abuse of the program. The district court held that his "routine breach-of-contract claim" was not preempted under *Wolens* but failed on the merits because the program's terms and conditions clearly and expressly provide that Northwest may revoke program membership if it believes in its "sole judgment" that a member has abused the program. The district court then rejected his separate claim for breach of the implied covenant of good faith and fair dealing (as well as two other counts) as preempted because it sought to alter and expand the parties' voluntary undertakings based on state-law policies external to the contract.

Ginsberg appealed the dismissal of his implied covenant claim (but not the dismissal of his breach of contract claim) and the Ninth Circuit reversed. The Ninth Circuit applied its own precedent to deem Ginsberg's claim (and all implied covenant claims) not related to petitioners' prices or services and therefore not preempted.

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

The Federal Aviation Act of 1958 (FAA) gave the federal government, through the Civil Aeronautics Board, the authority to regulate interstate airfares and take action against certain airline practices. The FAA did not expressly preempt state regulation and indeed contained a savings clause providing that "[n]othing … in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute." Thus, during the regulatory era, states remained free to regulate intrastate airfares and enforce their own laws against airline practices. *See Morales*, 504 U.S. at 378.

In 1978, Congress enacted the Airline Deregulation Act (ADA) with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces and on actual and potential competition." 49 U.S.C. § 40101(a)(6), (12)(A). Although Congress retained the FAA's savings clause, it added an express preemption provision "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S. at 378. That provision as originally drafted preempted "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." *Id.* at 383 (quotation marks omitted). Then, in 1994, Congress recodified the provision without substantive change to provide that a State "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)(1).[1]

This Court has addressed the preemptive scope of the ADA on two prior 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 phrase "relating to" reflects the ADA's "broad pre-emptive 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 (quotation mark omitted). The Court also rejected petitioners' appeal to the pre-ADA savings clause included in the FAA. *Id.* at 384. That general provision was a "relic

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[1] This Court expressly recognized in *Wolens* that this recodification effected no substantive change. *See* 513 U.S. at 222-23 & n.1; *see also* H.R. Conf. Rep. No. 103-677, at 83 (1994) (explaining that Conference Committee "intend[ed] no substantive change to the previously enacted preemption provision," and "d[id] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in" *Morales*); *accord, e.g.*, *Brown v. United Airlines, Inc.*, ___ F.3d ___, 2013 WL 3388904, at *5 (1st Cir. 2013).

of the pre-ADA/no pre-emption regime" that could not "supersede the specific substantive pre-emption provision" Congress later passed. *Id.* at 385. The Court indicated, however, that the ADA does not preempt state laws that affect prices, 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 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1990)).

Three years later, the Court considered *American Airlines, Inc. v. Wolens*, a class action suit challenging efforts by American Airlines to make retroactive changes to its frequent flyer program. The Court began by noting that the suit so obviously "relat[ed] to" the airline's rates and services that it "need not dwell on the question." 513 U.S. at 226. The Court dwelled instead on the "other words" in "the ADA's preemption clause … in need of interpretation, specifically, the words 'enact or enforce any law.'" *Id.*

The Court then held that the ADA preempted plaintiffs' claim under an Illinois consumer fraud statute because the statute "does not simply give effect to bargains offered by the airlines and accepted by airline customers"; rather, it was a means to "guide and police the … practices of the airlines." *Id.* at 228. But the Court held that the ADA did not preempt the plaintiffs' claim for breach of contract, because that claim sought recovery "solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* The "terms and conditions airlines offer and passengers accept are privately

ordered obligations," and a "remedy confined to a contract's terms" does not enforce state law but rather "simply holds parties to their agreement." *Id.* at 229. The critical distinction was not between claims that sound in contract rather than tort, but between "routine breach-of-contract" claims that seek the enforcement only of "self-imposed undertakings" and claims that seek an "enlargement or enhancement" of the parties' bargain based on "state laws or policies external to the agreement." *Id.* at 232-33.

The Court has also construed the scope of a similar preemption provision in the Federal Aviation Administration Authorization Act (FAAAA) that prohibits States from enacting or enforcing any law "related to" a motor carrier's "price, route, or service," 49 U.S.C. § 14501(c)(1). In *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) the Court observed 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. It then held preempted a Maine law forbidding any person from knowingly transporting tobacco products to a person in Maine unless either the sender or receiver had a Maine license, and requiring tobacco retailers to use a delivery service verifying that the recipient of a tobacco order may legally purchase tobacco. *Id.* at 368-69. The Court held that the Maine law "related to" motor carrier services because, although it did not directly apply to carriers, it could "freeze into place services that carriers might prefer to discontinue in the future." *Id.* at 372. Furthermore, its effect would be to require carriers to offer "services that differ

significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 371-72. The Court noted that given that "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program," as in *Wolens*, "it must pre-empt" the Maine law. *Id*. at 373.[2]

B. Ginsberg's Class Action Suit Against Petitioners

Respondent Binyomin Ginsberg is a resident of Minnesota and was a Platinum Elite member of petitioner Northwest's WorldPerks frequent flyer program. Northwest revoked Ginsberg's Platinum Elite membership on June 27, 2008. J.A. 35; Pet. App. 3. In January 2009, Ginsberg filed suit against petitioners challenging the revocation of his Platinum Elite membership. *See* J.A. 29-57; Pet. App. 4.[3] According to Ginsberg, he was told by a Northwest representative that his status was revoked because he had "abused" the program. J.A.

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[2] The Court had two other cases addressing the FAAAA last Term. *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013), addressed unique language in the FAAAA that was a "conspicuous alteration" of the ADA's language. *See id.* at 1778 (relying on "with respect to the transportation of property" language in FAAAA). In *American Trucking Ass'n v. City of Los Angeles*, 133 S. Ct. 2096 (2013), the Court reversed the Ninth Circuit and held that FAAAA preemption extended to contractual conditions the city wished to employ as a requirement for trucking companies to use its port. *See id.* at 2103-04.

[3] Petitioners Northwest and Delta merged in October 2008, and Northwest became a wholly-owned subsidiary of Delta. *See* J.A. 32-33. On December 31, 2009, Northwest was merged with and into Delta. *See* p. iv, *supra*.

35; Pet. App. 4. More specifically, Ginsberg attached to his complaint a July 2008 letter he received from Northwest stating that between December 2007 and July 2008 alone, Ginsberg filed 24 complaints with Northwest and "continually asked for compensation over and above [Northwest's] guidelines." J.A. 58-59; Pet. App. 57.

In his complaint, Ginsberg acknowledged that the General Terms and Conditions of the WorldPerks program ("the Agreement") grant Northwest the ability to control the membership of its program, up to and including the removal of members who engage in "abuse" of the program "as determined by Northwest in its sole judgment." As stated in the Agreement and alleged in the complaint:

> 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' instructions) 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.

J.A. 39-40, 64-65; Pet. App. 58. Ginsberg alleged that on November 20, 2008, he received an email from a

Northwest representative reiterating the foregoing provision and stating that Northwest was entitled to "enforce the WorldPerks program terms and conditions." J.A. 39-40, 60-62.

Ginsberg's complaint alleged four separate causes of action. In the first count, Ginsberg alleged breach of contract, contending that petitioners revoked his Platinum Elite membership "without valid cause." J.A. 49. In the second count, Ginsberg alleged a breach of the implied covenant of good faith and fair dealing, contending that petitioners did not act "consistent with [Ginsberg's] reasonable expectations" or apply the Agreement "in a reasonable manner" when Northwest revoked his Platinum Elite membership "without valid cause." J.A. 51-52. In the third and fourth counts, Ginsberg alleged negligent and intentional misrepresentation, respectively. J.A. 53-57; *see also* Pet. App. 4, 58-59.

Ginsberg proposed to sue on behalf of himself and other members of WorldPerks whose membership status Northwest allegedly revoked without valid cause. J.A. 46-49. Ginsberg sought damages on behalf of the class in excess of $5 million, as well as injunctive relief requiring Northwest to restore the class members' WorldPerks status and prohibiting Northwest from future revocations of members' WorldPerks status "without valid cause." J.A. 31, 57.

C. The District Court's Decision

The district court granted petitioners' motion to dismiss the complaint. *See* Pet. App. 56-73. Applying *Wolens*, the district court recognized that Ginsberg's

breach of contract claim was not preempted. Pet. App. 69. Nonetheless, the district court concluded that under Minnesota law, Ginsberg had failed to state a claim for relief because he failed to identify any material breach of the WorldPerks Agreement. The court observed that the Agreement "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 disqualification from program participation.'" Pet. App. 71 (ellipsis omitted). Although Ginsberg had complained that he was not provided an adequate explanation for revocation of his Platinum Elite membership and that "improper conduct" is not sufficiently defined in the Agreement, "Northwest was not required by the agreement to explain its decisions or define what it considers 'improper conduct.'" *Id.*

The court likewise rejected Ginsberg's "bare assertion" that petitioners revoked his Platinum Elite membership "without valid cause." *Id.* The court explained that because the "very issue of what qualifies as 'valid cause'" is "left to the 'sole judgment' of Northwest," Ginsberg was effectively asking the court to "replace Northwest's judgment with his own regarding what counts as 'abuse' of WorldPerks," which would "transgress the unambiguous terms of the agreement by inserting into it external norms." Pet. App. 71-72. Accordingly, the district court dismissed the breach of contract claim, but without prejudice so that Ginsberg could amend his complaint to include allegations of an actual breach of contract. Pet. App. 72.

In what it viewed as a straightforward application of *Wolens*, the district court dismissed Ginsberg's three remaining claims as preempted by the ADA. The court observed that this Court made "abundantly clear" in *Wolens* 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." Pet. 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." *Id.* In particular, the court observed that Ginsberg's claim for breach of the implied covenant of good faith and fair dealing was preempted under *Wolens* because the covenant "is a requirement of state policy, external to the contract itself, that is given 'the force and effect of law.'" Pet. App. 65.

Ginsberg moved for reconsideration, arguing *inter alia* that his implied covenant claim was not preempted under *Wolens* 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." Dist. Ct. Doc. No. 17, at 12. The court denied Ginsberg's motion. Pet. App. 41-55. It observed that *Wolens* distinguished "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,'" like the implied covenant of good faith and fair dealing. Pet. App. 45 (quoting *Wolens*, 513 U.S. at 233). It further noted

that Ginsberg's contention "effectively reduces breach of contract and good faith into the same cause of action." Pet. App. 47. And it reiterated that Ginsberg had failed to state a valid breach of contract claim. *Id.*

D. The Ninth Circuit's Decision

Ginsberg did not appeal the district court's holding that he failed to state a claim for breach of contract. He appealed only the dismissal of his implied covenant of good faith and fair dealing claim on preemption grounds. The Ninth Circuit reversed, holding that such claims are categorically exempted from ADA preemption. *See* Pet. App. 20-40.

Addressing this Court's ADA and FAAAA precedents, the Ninth Circuit dismissed *Morales* as a "narrow" holding that applied only to laws "that actually have a direct effect on rates, routes, or services." Pet. App. 27. It then (mis)cited *Wolens* for the proposition that the ADA does not preempt "breach of contract claims, including those based on common law principles such as good faith and fair dealing," while ignoring *Wolens*'s holding that claims involving frequent flyer programs relate to prices, routes, and services. Pet. App. 30. The Ninth Circuit instead relied heavily on its own decisions. It invoked *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), to hold that implied covenant of good faith and fair dealing claims are "too tenuously connected to airline regulation to trigger preemption under the ADA," and invoked *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc), for the proposition that the ADA permits state-law claims to proceed so

long as they "do not significantly impact federal deregulation." *See* Pet. App. 32-33. The Ninth Circuit concluded that "[a] claim for breach of the implied covenant of good faith and fair dealing does not interfere with the deregulatory mandate," and "state enforcement of the covenant is not 'to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption.'" Pet. App. 34-35 (quoting *Air Transport Ass'n of Am. v. City and Cnty. of San Francisco*, 266 F.3d 1064, 1074 (9th Cir. 2001)).

The Ninth Circuit reasoned that, despite *Wolens* and its frequent flyer program context, Ginsberg's claim did not "relate to" prices or services. The court reviewed the legislative history of the preemption provision and concluded that the history "suggests that Congress intended the preemption language only to apply to state laws directly regulating rates, routes, or services." Pet. App. 37 (internal quotation marks omitted). The Ninth Circuit faulted the district court's focus on the ADA's text, observing that the district court's "broad reading of the statute's language finds no support in the legislative history." *Id.* Citing *Wolens*, the court also believed the link between Ginsberg's claim and petitioners' prices to be "far too tenuous" and, invoking *Charas* for the proposition that "services" is defined narrowly under the ADA, it concluded that Ginsberg's claim "does not relate to 'services' because it has nothing to do with schedules, origins, destinations, cargo, or mail." Pet. App. 38.

Judge Rymer filed a concurring opinion explaining that she believed the panel's holding to be

compelled by the Ninth Circuit's earlier decision in *West*. She added, however, that *West* "seems out of step with the Supreme Court's holding" in *Wolens*. Pet. App. 39.

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, *see* Pet. App. 1-19, Judge Rymer was replaced on the panel by Judge Schroeder. The court denied the petition, Pet. App. 2, but amended its decision to delete Judge Rymer's concurrence and to delete the final two paragraphs of the main opinion relying on *Charas* to hold that Ginsberg's claim did not "relate to" petitioners' services. *Compare* Pet. App. 19, *with* Pet. App. 37-40.

SUMMARY OF ARGUMENT

This case requires little more than a straightforward application of this Court's pathmarking decision in *Wolens*. As in *Wolens*, there is no need to dwell on whether Ginsberg's implied covenant claim relates to prices, routes, or services. Indeed, this case arises in the exact same frequent flyer context as *Wolens*. That the Ninth Circuit could nonetheless deem Ginsberg's claim to be categorically unrelated to prices, routes, and services is a testament to how far the Ninth Circuit has strayed from this Court's precedents.

As in *Wolens*, the question the Court should dwell upon is whether Ginsberg's implied covenant claim seeks to enforce the parties' "self-imposed undertakings" or seeks to enlarge or expand that bargain by enforcing state law external to the parties'

agreement. Here too, the answer is clear. Ginsberg brought a "routine breach-of-contract claim" that sought to enforce only the parties' self-imposed undertakings, but that claim foundered on the Agreement's "sole judgment" language and was dismissed on the merits. Ginsberg's separate implied covenant of good faith and fair dealing claim is an obvious effort to enlarge the parties' bargain by using state law external to the agreement to limit Northwest's discretion and expand Ginsberg's rights. Indeed, 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." And Minnesota law, which governs Ginsberg's claim, makes clear that the implied covenant of good faith and fair dealing is exactly the kind of extra-contractual, state-law policy that removes a claim from the narrow exception to ADA preemption that *Wolens* recognized for "routine breach-of-contract claims."

The Ninth Circuit's *per se* carve-out of all implied covenant claims from ADA preemption thoroughly frustrates Congress' intent in expressly preempting state-law claims that enlarge the parties' bargains. The law governing implied covenants of good faith and fair dealing is far from uniform and notoriously malleable and thus risks imposing a patchwork of obligations on national and international carriers.

Even more important, precisely because Ginsberg's implied covenant claim seeks to impose obligations based on state law rather than the

parties' voluntary undertakings, it threatens to frustrate the deregulatory intent that was the motivating force behind the ADA. As this Court recognized in *Morales* and *Wolens*, the *raison d'être* for the ADA's express preemption provision is to prevent states from filling the gap created by deregulation at the national level with re-regulation on the state and local level. The Ninth Circuit rule would allow state law to regulate the circumstances in which an airline can exercise its contractual right to terminate a frequent flyer member's participation. Worse still, the decision below opens the door for state re-regulation in an area where the ADA reserved a continuing role for the Department of Transportation (DOT) and where DOT retains the capacity to act when necessary. *Wolens* correctly recognized that DOT has no ability to consider routine breach of contract disputes. But DOT retains the ability to police deceptive and unfair practices and retains the right to intervene in the unlikely event that airlines systematically turn on their most coveted customers.

ARGUMENT

I. The Plain Language Of The ADA And This Court's Precedents Squarely Foreclose Ginsberg's Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

The ADA squarely preempts Ginsberg's implied covenant claim. That claim arises in precisely the same context as *Wolens* and is plainly "related to" petitioners' prices, routes, or services. And by alleging a breach of the implied covenant of good

faith and fair dealing, rather than of the express terms of the Agreement, Ginsberg patently seeks to enforce state policies external to the Agreement. His claim is thus preempted under the plain terms of the ADA's express preemption provision.

A. Ginsberg's Challenge to Northwest's Administration of Its Frequent Flyer Program Is "Related To" Petitioners' Prices, Routes, and Services.

This Court has repeatedly recognized the expansive sweep of the "related to" language in the ADA's preemption provision. Those words are "deliberately expansive," "conspicuous for [their] breadth," and "express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383-84 (internal quotation marks omitted). Thus a claim need only have "a connection with or reference to airline" prices, routes, or services to be preempted under the ADA. *Id.* at 384. Preemption is warranted even if the effect on prices, routes, or services "is only indirect," *id.* at 386 (internal quotation marks omitted), and it is immaterial whether state law is "'consistent' or 'inconsistent' with federal regulation," *Rowe*, 552 U.S. at 370, or is essential or unessential to airline operations, *Wolens*, 513 U.S. at 226. For good reason, then, the Court in *Wolens* viewed claims arising from a frequent flyer program to be so obviously related to both an airline's prices and services that it "need not dwell on the question." *Id.*

The Court need dwell no longer here. Ginsberg's claim directly challenges Northwest's administration of its frequent flyer program, including Northwest's ability to control the membership of that program

and the benefits it chooses to provide to members in the form of free flights, flight upgrades, mileage multipliers, and other rewards. Ginsberg seeks reinstatement of his program membership status and renewed access to the reduced prices and enhanced services that come from his membership status as well as compensation for the loss of those benefits. His claim is thus clearly "related to" both prices, including Northwest's "charges in the form of mileage credits for free tickets and upgrades," and services, including "access to flights and class-of-service upgrades." *Wolens*, 513 U.S. at 226. Indeed, "access to flights and class-of-service upgrades" are precisely what Ginsberg alleges he was deprived of as a result of Northwest's revoking his Platinum Elite membership. *See* J.A. 49 (complaint alleging deprivation of "valuable Program benefits … including, but not limited to, flight upgrades, accumulated mileage, [and] benefits on other airlines").

Like many airlines, moreover, Northwest's frequent flyer program is an important means for attracting and retaining high-margin customers and repeat business. That, in turn, affects the prices Northwest ultimately charges and the services it offers to all its customers. *See, e.g.*, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems* 31-35 (Feb. 1990) (describing frequent flyer programs and their relationship to airfares). In short, as in *Wolens*, Ginsberg's claim undeniably has "a connection with or reference to airline" prices, routes, or services, which is all that is

needed to satisfy this condition for ADA preemption. *Cf. Rowe*, 552 U.S. at 373 (stating that "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program").

The Ninth Circuit's conclusion that Ginsberg's claim is *not* "related to" petitioners' services or rates is nothing short of mystifying. The court did not acknowledge the repeated references in *Morales* to the broad sweep of the ADA's preemption provision; in fact, it did not mention *Morales* at all when addressing this issue. Even more remarkably, it failed to acknowledge that *Wolens* found claims arising from a frequent flyer program to be "related to" both prices and services. And it did not even attempt to construe or apply the plain text of the provision's "related to" language. Instead, the court invoked the ADA's legislative history to conclude that "Congress intended the preemption language only to apply to state laws directly regulating rates, routes, or services." Pet. App. 37 (internal quotation marks omitted). But that distinction between direct regulation and indirect effect is exactly what the Morales *dissent* advocated, *see* 504 U.S. at 425-26 (Stevens, J., dissenting), and what the majority rejected in no uncertain terms. *See* 504 U.S. at 385 ("Had the statute been designed to preempt state law in such a limited fashion, it would have forbidden the States to 'regulate rates, routes, and services.'"); *id.* at 386 (observing that state law may satisfy the "related to" requirement even if "the effect is only indirect"). The Ninth Circuit's conclusion that Ginsberg's claim is categorically unrelated to prices, routes, or services thus only serves to underscore how

far the Ninth Circuit has deviated from this Court's precedents.

B. Ginsberg's Claim Seeks to Enlarge the Parties' Voluntary Agreement By Enforcing State Policies External to the Agreement, and Thus Falls Outside the *Wolens* Exception for Routine Breach-of-Contract Claims.

This Court in *Wolens* recognized that the fact that a claim relates to prices, routes, or services is not enough to render it preempted. The plain text of the ADA's express preemption provision also requires the state to "enforce" a state law or policy relating to prices, routes, or services. This is the requirement on which the Court in *Wolens* did "dwell," and which gave rise to the distinction between the preempted fraud claims and the routine breach-of-contract claims which were allowed to proceed. Both sets of claims related to prices, routes, or services, but only the fraud claims sought to enforce state law external to the parties' agreement. The "routine breach-of-contract claims" were allowed to proceed because they did not seek to enforce state law, but instead only the parties' "self-imposed undertakings," *i.e.*, that "an airline dishonored a term the airline itself stipulated." 513 U.S. at 232-33.

The very logic of *Wolens* necessitates a distinction between "routine breach-of-contract claims" and claims, whether they sound in tort, contract, or some netherworld between the two, that depend on state law or state policies external to the agreement to enlarge or expand the parties' bargain. *Id.*; *see also Brown v. United Airlines, Inc.*, ___ F.3d

___, 2013 WL 3388904, at *10 (1st Cir. 2013) (finding unjust enrichment claims preempted while recognizing the doctrine "exists in the hazy realm of quasi-contract and restitution"). The latter clearly involve the enforcement of state law and are thus preempted.

The plaintiffs in *Wolens* assailed American Airlines' changes to its frequent flyer program retroactively imposing blackout dates and caps on available seats. They contended that these retroactive changes constituted fraud and violated the express terms and conditions of the program's membership agreement, thus constituting a breach of contract. While the fraud claims involved the enforcement of state law and were thus preempted, the Court held that the contract claim was not preempted because it sought recovery "solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 228. Adjudication of such "routine breach-of-contract claims" did not involve the enforcement of state law within the meaning of the ADA because the "terms and conditions airlines offer and passengers accept are privately ordered obligations," and a "remedy confined to a contract's terms simply holds parties to their agreement." *Id.* at 229.

The Court explained that because the ADA is designed to "stop[] States from imposing their own substantive standards" related to airlines' prices, routes or services, claims that seek an "enlargement or enhancement" of the parties' bargain by enforcing "state laws or policies external to the agreement" are preempted. *Id.* at 232-33. Thus claims that

implicate "binding standards of conduct that operate irrespective of any private agreement," "official, government-imposed policies, not the terms of a private contract," or a State's "own public policies" may not proceed. *Id.* at 229 n.5.

Wolens clearly mandates preemption here. As the district court correctly recognized, Ginsberg's claim for breach of the implied covenant of good faith and fair dealing—as opposed to his separate "routine breach-of-contract" action that failed on the merits—does not fall within the *Wolens* exception because the whole point of the claim is to override the express contractual terms that put control over program membership in Northwest's "sole judgment" and doomed Ginsberg's contract claim on the merits. Ginsberg's claim for breach of the implied covenant does not allege that Northwest "dishonored a term the airline itself stipulated." *Id.* at 232-33. Nor does it allege a breach of the "terms and conditions [Northwest] offer[ed] and [Ginsberg] accept[ed]" or seek a "remedy confined to [the Agreement's] terms." *Id.* at 228-29. Rather, it quite plainly seeks an "enlargement or enhancement" of the Agreement between Ginsberg and Northwest *beyond* those terms, based on "state laws or policies external to the agreement," *id.* at 233—namely, the implied covenant of good faith and fair dealing.

There is nothing subtle or difficult about this. The very name of the cause of action—an *implied* covenant of good faith and fair dealing—makes clear that state law is supplementing the express terms of the parties' self-imposed undertakings. *See* Monique C. Lillard, *Fifty Jurisdictions in Search of a*

Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context, 57 Mo. L. Rev. 1233, 1240 (1992) ("[B]y implying 'in law' a covenant of good faith and fair dealing, the courts are … imposing contractual terms to which the parties did not actually consent"). And the very fact that Ginsberg's separate contract claim (count 1) fails on the merits underscores that the implied covenant claim (count 2) adds something to the parties' agreement, and it does so via the enforcement of "state laws or policies external to the agreement," *Wolens*, 513 U.S. at 233.

As the district court aptly put it, Ginsberg's implied duty of good faith claim "does not appear *ex nihilo*"; rather, "it is implied by state law." Pet. App. 64-65. Ginsberg's implied covenant claim does not dispute that the terms of the WorldPerks program vest questions of membership eligibility based on program abuse in Northwest's "sole judgment." Instead, Ginsberg argues that state law overrides that contractual provision and limits Northwest's exercise of that judgment, and he seeks a class-wide injunction prohibiting Northwest from relying on that contractual provision. What Ginsberg's claim seeks—indeed, what it *requires*—is not enforcement of the parties' voluntary undertakings, but "state enforcement of the covenant." Pet. App. 35. The Ninth Circuit acknowledged as much *in haec verba* but failed to comprehend the implications for that conclusion under *Wolens*. Since Ginsberg's claims all relate to prices, routes, or services, a claim that involves "state enforcement of the covenant" as opposed to the parties' self-imposed undertakings is preempted.

Indeed, Minnesota law, which indisputably governs Ginsberg's state-law claims, underscores this conclusion. In construing and applying the implied covenant of good faith and fair dealing, Minnesota, like some, but not all, states, looks to Section 205 of the Restatement (Second) of Contracts. *See, e.g.*, *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995). Section 205 defines "[g]ood faith performance or enforcement of a contract" as that which "excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205 cmt. a (1981); *see also* Farnsworth on Contracts § 7.17 (3d ed. 2004) (describing the duty of good faith and fair dealing as "based on fundamental notions of fairness"); *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312-13 (2010) (describing the implied covenant of good faith and fair dealing as a "fairness requirement" permitting parties to obtain relief "inconsistent with the express terms" of an agreement (brackets and internal quotation marks omitted)).

Were Ginsberg's claim to proceed, therefore, its merit would be determined in accordance not with the "privately ordered obligations" into which Ginsberg and Northwest entered, *Wolens*, 513 U.S. at 228-29, but with shapeless "community standards" of "decency, fairness or reasonableness" imposed by "state laws or policies external to the agreement." Such claims are squarely preempted under the text of the ADA and the logic of *Wolens*. They involve the enforcement of state policy and community standards, not self-imposed undertakings. *See Buck*

v. American Airlines, Inc., 476 F.3d 29, 35 (1st Cir. 2007) (preempting claim for breach of the implied covenant of good faith and fair dealing under ADA because plaintiffs sought "to further a state policy"); *Harper v. Healthsource New Hampshire, Inc.*, 674 A.2d 962, 965 (N.H. 1996) ("The implied covenant of good faith and fair dealing is an example of a common law application of public policy to contract law.").

In this respect, Ginsberg's claim invoking the implied covenant to escape the express terms of a contract is little different from a claim invoking the doctrine of unconscionability to accomplish the same result. Although part of contract law, the unconscionability doctrine constitutes a "state law[] or polic[y] external to the agreement" and is a "binding standard[] of conduct that operate[s] irrespective of any private agreement." *Wolens*, 513 U.S. at 229 n.5, 233.

Indeed, in *Wolens*, the Solicitor General explicitly argued that unconscionability was one of "those aspects of [a State's] common law of contracts … that go beyond ascertaining and enforcing the private agreement between the parties," thereby warranting preemption. Br. for the United States 9-10, *Wolens*, No. 93-1286 (U.S. June 2, 1994); *see also id.* at 28 (noting that principles of unconscionability "seek to effectuate the State's public policies, rather than the intent of the parties"). This Court expressly embraced the position of the Solicitor General in *Wolens*, *see, e.g.*, 513 U.S. at 226, and its reference to state policies external to the agreement fits the unconscionability doctrine to a tee. Not surprisingly,

lower courts have rejected efforts to invoke the unconscionability doctrine as inconsistent with the ADA and *Wolens*. *See, e.g., Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 854 & n.3 (8th Cir. 2009) (preempting breach-of-contract claim under ADA to the extent plaintiff alleged that a contractually established fee "is too unconscionably high"); *ICU Investigations, Inc. v. Simonik Moving & Storage, Inc.*, 2009 WL 2475225, at *9 (N.J. Super. Ct. App. Div. Aug. 14, 2009); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 902 (Wash. Ct. App. 2000); *cf. Leonard v. Nw. Airlines, Inc.*, 605 N.W.2d 425, 431 (Minn. Ct. App. 2000) (preempting claim relying on equitable doctrine against contract penalties that "has as its foundation the unconscionability doctrine").

The "community standards" criterion articulated by Section 205 of the Restatement evokes the same public policy concerns underlying unconscionability claims. In fact, the commentator whose work substantially influenced Section 205 of the Restatement has described that section as "of a piece with explicit requirements of 'contractual morality' *such as the unconscionability doctrine* and various general equitable principles." Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 811 (1982) (emphasis added); *see also* Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 Iowa L. Rev. 497, 499 (1984) (observing that the "*Restatement*-Summers formulation … implies a ground for judicial decision that lies outside of and may take precedence over the agreement of the parties"). And there is no doubt

about the source of those notions of "contractual morality." They come from state law, and involve the enforcement of state "policy external to the agreement."[4]

Finally, allowing implied covenant claims to proceed effectively sanctions avoidance of this Court's ADA precedents. A plaintiff whose claim is squarely foreclosed under a contract can simply re-label it as a claim for breach of an implied covenant of good faith and fair dealing. The end run around *Wolens* is dramatically illustrated in this case 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. To permit such claims to go forward robs the airline industry of much of the protection conferred by Congress in the ADA, and it can hardly be what this Court had in mind when it decided *Wolens*.

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[4] Repeatedly conflating claims for breach of the implied covenant with "routine breach-of-contract claims," *see* Pet. App. 21, 23, 30, the Ninth Circuit dismissed petitioners' argument that Ginsberg's claim sought to enlarge the parties' bargain because "the Supreme Court rejected this argument in *Wolens*," Pet. App. 34. But *Wolens* used the limiting modifier "routine" with good reason. The Court recognized that some claims that sound in contract nonetheless invoke state policy external to the agreement. Such claims are non-routine in the sense relevant for ADA preemption; they do something more than enforce the parties' self-imposed undertakings and instead enforce state policy external to the agreement.

II. Preemption Of Claims For Breach Of The Implied Covenant Of Good Faith And Fair Dealing Is Consistent With The Policies Underlying The ADA.

The plain text of the ADA's express preemption provision and the logic of this Court's decision in *Wolens* clearly compel preemption of Ginsberg's implied covenant claim. That is enough to resolve this case. Nonetheless, it bears emphasis that the Ninth Circuit's contrary rule is fundamentally antithetical to Congress' intent in enacting the ADA.

A. The Open-Ended and Amorphous Nature of the Implied Covenant of Good Faith and Fair Dealing Would Produce Patchwork Regulation.

The ADA is designed to avoid a "state regulatory patchwork" inconsistent with Congress' desire to leave matters concerning airlines either to federal regulators or to the competitive marketplace. *Rowe*, 552 U.S. at 373. In *Wolens*, the Court rejected concerns that permitting "routine breach-of-contract claims" to proceed might result in nonuniform regulation of airlines. "Because contract law is not *at its core* 'diverse, nonuniform, and confusing,'" the Court observed, there was "no large risk of nonuniform adjudication inherent in state-court enforcement of the terms of a uniform agreement." 513 U.S. at 233 n.8 (emphasis added; quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion), and Br. for United States 27, *Wolens*).

But while contract law is uniform enough at its core, *i.e.*, when it comes to enforcing the express

terms of voluntary contracts, the precise opposite is true with respect to the implied covenant. Courts and commentators do not agree even on which standards to apply when adjudicating claims alleging a breach of the implied covenant. And the amorphous and open-ended standards that characterize implied covenant claims make a patchwork of regulation all but inevitable. Even if two states agree that there is an implied covenant to apply community standards of decency, the nature of those community standards in the two states may vary substantially. Indeed, this Court has recognized the inevitable variance among jurisdictions when it comes to community standards of decency in other contexts. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 32-33 (1973). Accordingly, the Ninth Circuit's approach "could easily lead to"—indeed, all but guarantees—the "state regulatory patchwork" Congress specifically intended to prevent. *Rowe*, 552 U.S. at 373.

The law governing implied covenant claims is far from uniform and is permeated with vague standards that can be interpreted differently from case to case even within a single jurisdiction. "From the beginning, the good faith criterion has been criticized for being so difficult to define that it is unhelpful as a legal standard." Lillard, *supra*, at 1236. The doctrine of good faith and fair dealing has "been defined variously as requiring reasonableness or fair conduct, reasonable standards of fair dealing, decency as well as fairness and reasonableness, fairness, and community standards of fairness, decency and reasonableness." Nicola W. Palmieri, *Good Faith Disclosures Required During*

Precontractual Negotiations, 24 Seton Hall L. Rev. 70, 79 (1993) (footnotes omitted). Indeed, commentators have identified no fewer than eight different approaches that "have been proposed by commentators and adopted by the courts" for "determining whether conduct violates the covenant." Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 Hastings L. J. 585, 590 (1996). As Justice Souter aptly summarized matters in his days as a common law jurist, "the commentators despair of articulating any single concept of contractual good faith." *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 191 (N.H. 1989) (Souter, J.).

Even proponents of the doctrine were candid about its malleability and variability. As one of the doctrine's earliest proponents wryly observed, the "varieties of good faith are not quite as infinite as those of religious faith." E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 668 (1963).

Critics of the doctrine have been even more pointed. Because "[e]fforts to devise workable standards or relevant criteria for determining when the covenant has been violated have been unavailing," the result is "a doctrine whose application has been ad hoc, yielding inconsistent results and depriving parties of the ability to predict what conduct will violate the covenant." Diamond & Foss, *supra*, at 585-86. Given the "ability of the

implied obligation of good faith to confound and confuse contract law," application of the covenant has become "a confusing and unsatisfying business." Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 St. John's L. Rev. 559, 587, 612 (2006); *see also* Seth William Goren, *Looking For Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance*, 37 U.S.F. L. Rev. 257, 258 (2003) (noting "considerable confusion as to the nature of the covenant of good faith, when the covenant is implicated, and how claims arising from a breach of the covenant are enforced").

Despite differences in the formulation of the doctrine, courts charged with construing and applying the implied covenant, however defined, agree on one thing: the doctrine is remarkably vague and open-ended. For example, the Minnesota Supreme Court has described the covenant as inviting "judicial incursions into the amorphous concept of bad faith." *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986) (quoting *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Hawaii 1982)); *accord Ross v. Times Mirror, Inc.*, 665 A.2d 580, 586 (Vt. 1995); *Hinson v. Cameron*, 742 P.2d 549, 554 (Okla. 1987); *Hillesland v. Fed. Land Bank Ass'n of Grand Forks*, 407 N.W.2d 206, 214 (N.D. 1987).

Because "[g]ood faith is a concept that defies precise definition," *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates*, 864 A.2d 387, 395 (N.J. 2005), the implied covenant of good

faith and fair dealing "nebulously hovers over the contracting parties," *Lake Martin/Alabama Power Licensee Ass'n, Inc. v. Alabama Power Co., Inc.*, 601 So. 2d 942, 945 (Ala. 1992); *see also State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Comm'rs*, 937 N.E.2d 1274, 1276 (Ohio 2010) (characterizing good faith as "a general and somewhat indefinite term" with "no constricted meaning" (internal quotation marks omitted)); *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("[T]he term 'good faith' has no set meaning, serving only to exclude a wide range of heterogeneous forms of bad faith." (quotation marks omitted)); *Pierola v. Moschonas*, 687 A.2d 942, 950 (D.C. 1997) (referring to "vague and subjective notions of good faith"). The federal courts of appeals are in agreement. *See, e.g.*, *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 92 (3d Cir. 2000) ("The covenant of good faith … is vague and amorphous."); *Kansas City Power & Light Co. v. Ford Motor Credit Co.*, 995 F.2d 1422, 1430 (8th Cir. 1993) ("'Good faith' is an amorphous concept, capable of many forms yet requiring none."); *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988) (deeming good faith "an amorphous notion").

The broad, shapeless nature of the implied covenant of good faith and fair dealing all but guarantees a patchwork of inconsistent results. For example, consistent with the general principle that "there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract," Williston on Contracts § 63:22 (4th ed.), many states reject out of

hand implied covenant claims where, as here, the alleged good faith obligations are inconsistent with contractual terms that expressly give one party sole discretion to take particular actions. *See, e.g.*, *Steiner v. Thexton*, 226 P.3d 359, 365 (Cal. 2010); *Shoney's LLC v. MAC East, LLC*, 27 So.3d 1216, 1223 (Ala. 2009); *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 744 A.2d 1134, 1137-39 (N.H. 2000); *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66, 82 (1993); *Automatic Sprinkler Corp. of Am. v. Anderson*, 257 S.E.2d 283, 284 (Ga. 1979). Other states, however, have held that even if a contract provides a party with sole discretion to take particular actions, the party must exercise that discretion consistent with the obligations of "good faith and fair dealing." *See, e.g., Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1159 (Utah 2003); *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1129-30 (N.J. 2001); *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995).

The potential for differing outcomes arising from claims for breach of the implied covenant is well illustrated by state courts' experience with implied covenant claims in the at-will employment context. The common-law rule of at-will employment provides that any hiring is presumed to be "at will," granting an employer complete discretion to discharge an employee without any cause. *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 Harv. L. Rev. 1816, 1816 (1980). Most states, including Minnesota, have rejected claims that the implied covenant of good faith and fair dealing cabins employers' discretion to discharge at-will employees.

See, e.g., *Hunt*, *supra*; *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 220 (Iowa 1996); *Breen v. Dakota Gear & Joint Co., Inc.*, 433 N.W.2d 221, 224 (S.D. 1988); *Morriss v. Coleman Co., Inc.,* 738 P.2d 841, 851 (Kan. 1987); *Hillesland v. Fed. Land Bank Ass'n of Grand Forks*, 407 N.W.2d 206, 214 (N.D. 1987); *Cockels v. Int'l Bus. Expositions, Inc.*, 406 N.W.2d 465, 468 (Mich. App. 1987); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1086 (Wash. 1984); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838 (Wisc. 1983); *Murphy v. Am. Home Products Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Hawaii 1982).

Several states, however, have applied the covenant to restrict the complete discretion afforded to employers under the at-will rule. *See, e.g.*, *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992); *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744 (Idaho 1989); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), *modified by Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980). The precise limits imposed by the implied covenant vary among those jurisdictions. *See* James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law,* 32 Comp. Lab. L. & Pol'y J. 773, 779-85 (2011) (describing the "distinct conceptual approaches" taken by states applying the covenant to at-will employment).

That the states have reached diverging answers to the at-will question is instructive for two reasons.

First, it constitutes a concrete example of the covenant's amorphous, open-ended nature: applying the covenant to the same straightforward question of law, different jurisdictions have reached dramatically different results. Second, the at-will employment context is analogous to the circumstances in this case. Just as the at-will rule gives complete discretion to employers to discharge employees, the Agreement allows Northwest to terminate abusive members "in its sole judgment." As in the at-will employment context, permitting plaintiffs like Ginsberg to bring claims invoking the implied covenant to override contractual grants of discretion invites a patchwork of varying results. The inevitable result would be the uncertainty, inconsistency, and "state regulatory patchwork"—not to mention inevitable forum shopping—that Congress intended to avoid in enacting the ADA. *Rowe*, 552 U.S. at 373.

B. Claims for Breach of the Implied Covenant Create a Significant Risk of State Interference With Competition and Commercial Activity in the Airline and Transportation Industries.

Even if implied covenant law were more uniform or more susceptible to consistent application, the Ninth Circuit's approach still would run afoul of the ADA's clear deregulatory intent. Congress enacted the ADA to further "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(6), (12)(A). The express preemption provision directly serves those goals by "ensur[ing]

that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. But implied covenant claims ask a court to substitute state law for competitive market forces, contrary to Congress' deregulatory intent. Worse still, this case arises in one of the discrete contexts in which DOT retains substantial regulatory authority and capacity. If DOT determines that airlines are being deceptive or manipulative in exercising their discretion to remove abusive members of their frequent flyer programs (an unlikely prospect since the programs exist to reward and retain the most valued customers), DOT has authority to act. Absent such a determination, there is no role for courts applying state law concepts of fundamental fairness and decency.

As this Court implicitly recognized in *Wolens*, frequent flyer programs are an integral component of airline competition. Indeed, they "were introduced soon after the advent of deregulation." Abhijit Banerjee & Lawrence H. Summers, *On Frequent Flyer Programs and Other Loyalty-Inducing Economic Arrangements* 22, Harvard Institute of Economic Research (Sept. 1987), *available at* http://econ-www.mit.edu/files/501. "[O]ne of the most effective marketing practices yet devised for differentiating airline services," frequent flyer programs "open up new avenues for competition" and "make a positive contribution to airline productivity and efficiency." *Airline Marketing Practices*, *supra*, at 31, 39, 41. Airlines "without a frequent flyer base are at a competitive disadvantage." Banerjee & Summers, *supra*, at 23.

To ensure that their programs are cost-effective and economically sustainable, airlines must "maintain strict control over the disposition of frequent flyer awards," *Airline Market Practices*, *supra*, at 32, which in turn requires a corresponding level of control over the program's membership—both overall and at specific reward levels. Like many carriers, Northwest has chosen to ensure that necessary level of control by expressly providing that it may remove members for abuse of the program "in its sole judgment." There is nothing deceptive about this express contractual retention of discretion—it is explicitly spelled out in the Agreement.

Nor are these reservations of discretion likely to be frequent sources of customer complaint. The *raison d'être* of frequent flyer programs is to reward an airline's most valued and valuable customers. *See id.* at 31 ("Frequent flyer programs are directed toward the most lucrative segment of airline traffic—the full-fare business traveler."); Paul Stephen Dempsey, *The Financial Performance of the Airline Industry Post-Deregulation*, 45 Hous. L. Rev. 421, 453 (2008) (noting that frequent flyer programs are intended to "induce consumer loyalty among high-yield business traffic"). Airlines go to substantial efforts to build up their frequent flyer memberships. *See, e.g.*, *Airline Marketing Practices*, *supra*, at 32-33, 40 (describing airline partnerships with hotel, car rental, and credit-card companies, partnerships with foreign airlines, and "custom-tailored promotional bonuses" to attract and retain members). They will not lightly take action to reduce their memberships.

Nonetheless, if despite the clear contractual language and unlikelihood of recurring customer complaints, DOT identified problematic practices, it would not lack authority to act. While Congress largely deregulated the airline industry in the ADA, DOT retains the authority to investigate and determine whether an airline "has been or is engaged in an *unfair* or deceptive practice," including any related to frequent flyer programs. 49 U.S.C. § 41712(a) (emphasis added); *see also* FAA Modernization and Reform Act of 2012, § 408, Pub. L. 112-95, 126 Stat. 11 (providing that the Secretary of Transportation "may investigate consumer complaints regarding … the rights of passengers who hold frequent flyer miles or equivalent redeemable awards earned through customer-loyalty programs"). Thus, there is no need to unleash courts and juries nationwide to apply their own varying notions of fairness, when the expert regulatory agency retains the authority to police unfair practices.

Not only does DOT have the authority to investigate unfair practices concerning frequent flyer programs, it "has relied on [this] authority … to prevent unfair and deceptive practices involving such programs." Br. for the United States 4, *Wolens*; *see also, e.g.*, U.S. Department of Transportation, Office of Aviation Enforcement and Proceedings, Air Travel Consumer Report 38 (June 2013) (listing 16 frequent-flyer-related complaints received for the month of April 2013). Indeed, DOT itself has expressed the view that claims like Ginsberg's are preempted. In 1992, DOT issued an order declining to issue regulations governing frequent flyer programs. *See* Order Dismissing Complaint and Denying Petition

for Rulemaking, 1992 WL 133179 (May 29, 1992). The applicants for the order had argued, among other things, that agency regulations were necessary because "various state and federal courts may in effect regulate the programs through their adjudication of individual contract suits," leading to regulatory disuniformity. *Id.* at *9. DOT found this concern unavailing because, in its view, "state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable, to the extent they relate to an airline's rates, routes and services." *Id.* The reason for this, DOT continued, is that "*[s]uch state regulation is preempted*" by the ADA. *Id.* (emphasis added).[5]

Contrary to the Ninth Circuit's suggestion, therefore, it is not the case that if Ginsberg's implied covenant claim were preempted, he "literally would have no recourse." Pet. App. 31; *see also* Resp. C.A. Br. 19 (contending that absent a claim for breach of the implied covenant, "the Airlines are free to lie, cheat and steal"). Most obviously, Ginsberg had the ability to enforce the actual terms of his contract, and to the extent his concern is that those terms are simply too unfair, he can lodge a complaint with

[5] DOT's own "Fact Sheet" on frequent flyer programs informs consumers that "[e]ach airline's program carries certain conditions and limitations," and consumers "should read carefully the promotional material and 'fine print' booklet that the airline should give you when you become a member." U.S. Department of Transportation, Frequent Flier Programs: How to Make the Right Decision, http://www.dot.gov/airconsumer/frequent-flier-programs (July 23, 2013).

DOT, which retains authority to police unfair practices.

DOT's authority and capacity to police unfair practices stands in stark contrast to its capacity to address "routine breach-of-contract" claims. In *Wolens*, the Court credited the Solicitor General's representation that DOT "has neither the authority nor the apparatus required to superintend a contract dispute resolution regime." 513 U.S. at 232 (citing Br. for the United States 22). Thus, if a frequent flyer member wants to enforce the terms of the contract, the remedy lies in court. But when the complaint is that the contract as written is unfair and the member invokes a "fairness requirement" in an effort to obtain relief "inconsistent with the express terms" of the contract, *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312-13 (2010), a different result obtains. Such an invocation of state policy external to the agreement is manifestly an effort to enforce state law, clearly relates to prices and services, and is just as clearly preempted under the ADA and *Wolens*. DOT remains available to police such alleged unfairness, but can do so employing notice and comment and uniform nationwide rules. The alternative envisioned by the Ninth Circuit has nothing to recommend it, and is in all events fundamentally inconsistent with the text of the ADA and the teachings of this Court's precedents.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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