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 Respondent

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QUESTION PRESENTED

Rabbi S. Binyomin Ginsberg is a long-standing Northwest customer who, in 2005, earned the highest level of membership benefits in Northwest's "WorldPerks" frequent flyer program. In 2008, Northwest abruptly revoked his Platinum Elite membership, depriving him of benefits under the program, including miles he had already accrued. Ginsberg filed suit alleging, as relevant here, that Northwest breached the contractual obligation of good faith and fair dealing when it terminated his elite membership in the program. The question presented is:

Did the court of appeals correctly hold that Ginsberg's contract claim based on the covenant of good faith and fair dealing is not preempted by the Airline Deregulation Act's preemption provision, 49 U.S.C. § 41713(b)(1), which provides 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 that may provide air transportation"?

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INTRODUCTION

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222, 228 (1995), this Court held that although the Airline Deregulation Act (ADA) "bars state-imposed regulation of air carriers," it does not preempt claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." In this case, Rabbi S. Binyomin Ginsberg seeks recovery for Northwest's breach of the contractual obligation of good faith and fair dealing in its frequent flyer program contract, which it breached when it terminated his elite membership in the program.

Like the contract claim in *Wolens*, Ginsberg's claim is not preempted by the ADA. As in *Wolens*, Ginsberg's claim is a routine breach-of-contract claim that seeks to enforce the parties' self-imposed, contractual undertakings. It has long been recognized that the express terms of a contract do not always capture the full scope of the parties' agreement, and that contracts include both their express and implied terms. *See, e.g.*, *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.) ("[T]he whole writing may be instinct with an obligation, imperfectly expressed.") (internal quotation marks and citation omitted). The requirement that contracts be performed in good faith is a means of enforcing the implied terms in agreements into which parties have voluntarily entered.

The existence of implied terms in the WorldPerks contract is underscored by the contract's provision allowing Northwest to terminate membership for "improper conduct as determined . . . in its sole judgment." JA 64. If that provision were interpreted to allow Northwest to terminate membership for any reason whatsoever, Northwest would have discretion to deprive

Ginsberg of all benefits of the bargain into which the parties entered. In such a case, the parties' intent to be bound by a non-illusory, enforceable contract demonstrates that there are good faith limits on the discretionary term. Ginsberg's claim seeks to enforce those limits and, under *Wolens*, is not preempted.

Ginsberg's claim also is not preempted for two additional reasons. First, whether or not they arise from a contract, common-law claims do not involve "a law, regulation, or other provision" as required for preemption by the ADA. 49 U.S.C. § 41713(b)(1). Second, the ADA only preempts claims that are "related to" air carrier prices, routes, or services. *Id.* Ginsberg's claim relates to membership status in a frequent flyer program, not to flights or their prices. Although frequent flyer credits can be earned by flying or exchanged for airfare, they can also be earned and spent in many other ways, such as by credit card purchases and on Broadway shows.

STATEMENT OF THE CASE

A. Statutory Background

Until 1978, the Civil Aeronautics Board (CAB) had extensive authority to regulate interstate air travel. If an airline wanted to change the cities it served or the prices it charged, it had to seek permission from the CAB. The CAB could deny applications for new routes or refuse to allow new entrants to the industry. And even when it approved a proposal, its administrative processes could lead to extensive delays. *See* H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3737-38.

In 1978, concluding that "maximum reliance on competitive market forces" would lower prices and

improve services, Congress enacted the ADA, Pub. L. No. 95-504, 92 Stat. 1705, which largely deregulated the airline industry. "To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a preemption provision[.]" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). As currently codified, that provision provides 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 that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1).

This Court has twice interpreted the ADA's preemption provision. First, in *Morales*, 504 U.S. 374, the Court considered whether the ADA prohibited states from using their consumer protection statutes to enforce National Association of Attorneys General guidelines governing airline advertising. Focusing on the term "relat[ed] to," the Court explained that a state law could "relate to" airline rates, routes, or services even if it did not directly regulate them. *Id.* at 384-86. The Court held that the guidelines related to airline rates because "every one of the guidelines . . . bears a 'reference to' airfares," because they collectively established "binding requirements as to how tickets may be marketed if they are to be sold at given prices," and because "beyond the guidelines' express references to fares, it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares." *Id.* at 388. At the same time, the Court noted that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 390 (citation omitted).

Second, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, the Court considered whether the ADA preempted

state consumer-fraud-act and breach-of-contract claims challenging American Airlines' devaluation of frequent flyer program credits through the imposition of blackout dates and limits on available seats. The Court found that the claims related 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.* at 226. However, the Court went on to explain that the ADA's preemption provision "contains other words in need of interpretation, specifically, the words 'enact or enforce any law.'" *Id.* at 226 (citation omitted). The Court held that although the consumer-fraud-act claims involved the enactment or enforcement of a law, the breach-of-contract claims did not: "We do not read the ADA's preemption provision to shelter airline from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings," it explained. *Id.* at 228. "States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," but "terms and conditions airlines offer and passengers accept are privately ordered obligations 'and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law[.]'" *Id.* at 228-29, 229 n.5 (quoting Br. for the United States as Amicus Curiae 9, 16, *Wolens*, No. 93-1286 (U.S. June 2, 1994)).

This Court also has twice interpreted the "related to" language in a preemption provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA). That provision, which was based on the ADA, provides 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 any motor carrier . . . with

respect to the transportation of property." 49 U.S.C. § 14501(c)(1). *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (emphasizing that "the breadth of the words 'related to' does not mean the sky is the limit," and concluding that claims related to a towing company's disposal of a towed vehicle "are 'related to' neither the 'transportation of property' nor the 'service' of a motor carrier"); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371-73 (2008) (holding that provisions of a Maine statute regulating delivery of tobacco products "related to" motor carrier services where they "focus[ed] on trucking and other motor carriers," would require motor carriers to offer services they did not provide or freeze in place existing services, and "directly regulate[d] a significant aspect of the motor carrier's pickup and delivery service").

In the years since the ADA's enactment, frequent flyer programs have proliferated, spurred by the competition the ADA introduced into the industry. The programs began as a marketing mechanism to attract and promote loyalty among high-value customers. *See generally The Big 2-5—Celebrating 25 Years of Frequent Flyer Programs*, InsideFlyer Magazine (May 2006). However, because of partnerships between the airlines and other companies, the programs have turned into a profitable business in their own right. *See Airline Miles: Frequent Flyer Economics*, The Economist (May 2, 2002) ("Frequent-flyer miles started as a marketing gimmick, but they have become a lucrative business."). Consumers can now earn "miles" in many ways besides flying—most notably through credit card partnerships—and can likewise spend their miles on many things besides air transportation, such as on hotels, Broadways shows, sports tickets, and merchandise. *See, e.g.*, Delta, *Use Miles*, https://www.delta.com/content/www/en_US/skymiles/use

-miles.html (detailing ways Delta frequent flyer program members can use miles) (last visited Sept. 10, 2013).

B. Factual Background

Ginsberg is an expert in education and administration who travels extensively throughout the United States and abroad to give lectures, conduct seminars and workshops, and advise other educators and administrators. JA 34. Ginsberg and his wife travel almost exclusively on Northwest, logging approximately 75 flights with the airline each year. *Id.*

Since 1999, Ginsberg has been a member of Northwest's frequent flyer program, known as WorldPerks. *Id.* As a WorldPerks member, Ginsberg spent hundreds of thousands of dollars on Northwest tickets, choosing to fly Northwest even when other airlines offered comparable or better flights. Dist. Ct. Doc. No. 16-2, at ¶ 6. In 2005, Ginsberg achieved Platinum Elite status in the program, the highest level of benefits available. JA 34.

In April 2008, Northwest and Delta Air Lines entered into an Agreement and Plan of Merger, under which Northwest eventually merged into Delta. *Id.* 32-33. Two months later, Ginsberg received a call on his cell phone from a Northwest representative telling him that Northwest was revoking his WorldPerks status, purportedly because he had "abused" the program. *Id.* 35.[1]

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[1]The representative stated that the airline had determined that Ginsberg had complained to the Customer Care line too many times, been bumped from flights too often, and allegedly booked reservations on full flights with the intention of being bumped. JA 35. In fact, Ginsberg contacted customer service in only a small

(continued...)

At that time, Ginsberg's Platinum Elite card showed an expiration date of February 2009. *Id.* Ginsberg, who was in the car when he received the call, asked for the representative's number so he could call her back when he had access to his program records. The representative responded that there was nothing more to discuss, and that he would receive a letter from Northwest officially revoking his status and explaining in detail why it was being revoked. *Id.* 35-36.

Ginsberg did not receive a letter with an explanation from Northwest. Over the following months, he attempted to obtain an explanation and clarification of his status with the WorldPerks program. *Id.* 36-39. In November 2008, Northwest's Customer Care Coordinator sent Ginsberg an email pointing him to paragraph 7 of the WorldPerks Terms and Conditions. *Id.* 60-62. That paragraph states:

> 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, violation of the tariffs of Northwest or any partner airline participant in the program, any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest 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

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[1](...continued)
percentage of the flights he and his wife took and had no control over Northwest's booking or bumping practices. *Id.* 43-44.

> previously issued but unused awards. Any violation of these rules may result in confiscation of tickets at any time (including en route) and the payment by the WorldPerks member or passenger of the full applicable Y, C, J, F or P fare for any segment traveled on program award tickets that have been misused. In connection with the enforcement of any of the terms and conditions governing the WorldPerks program, Northwest Airlines reserves the right to take appropriate legal action, as it deems necessary, and to recover damages, attorneys' fees, and court costs.

Id. 64-65. The email did not state in what way Northwest believed Ginsberg had abused the WorldPerks program.

As a result of the termination, Ginsberg lost valuable rights under the WorldPerks program, including mileage he had already accrued. *Id.* 45-56.

C. Proceedings Below

On January 8, 2009, Ginsberg filed this action against Northwest and Delta (collectively, Northwest) on behalf of himself and others similarly situated. Alleging that revocation of his WorldPerks membership status was "a pretext for cost-cutting in advance of the Delta merger," and that "defendants sought to lower their costs by revoking Program benefits, rights and privileges from Program members who asserted" them, JA 45, the complaint included counts for breach of written contract, breach of the contractual duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation. *Id.* 49-55.

With regard to his good faith claim, the complaint explained that "[t]he duty of good faith and fair dealing is implied in the subject contracts." *Id.* 51. "Under this

implied term of the agreements," it continued, "the good faith requirement precludes any action by defendants that would contravene the reasonable expectations of the plaintiff and Class members; even where a party to a contract is given absolute discretion, it must exercise that discretion in good faith in a manner consistent with the reasonable expectations of the other party or parties." *Id.*

The district court granted Northwest's motion to dismiss the complaint. Pet. App. 61. The court held that the claim that Northwest "breached the express terms of the WorldPerks agreement" failed because Ginsberg had not shown a violation of those terms. *Id.* 69. It dismissed the claim without prejudice, giving Ginsberg permission to amend. *Id.* 72. The court held that Ginsberg's other claims were preempted by the ADA and dismissed them with prejudice. *Id.*

Ginsberg moved for reconsideration, which was denied. *Id.* 41. Because he believed that the covenant of good faith and fair dealing was essential to determining whether Northwest breached the contract, Ginsberg filed a notice of voluntary dismissal of the breach-of-written-contract claim and moved for entry of a final judgment so that he could appeal dismissal of the good faith claim. The district court entered final judgment, and Ginsberg appealed solely with respect to his claim that Northwest breached the contract by violating its obligation of good faith and fair dealing.

The court of appeals reversed, explaining that the "purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing." *Id.* 3. "Congress's 'manifest purpose' was to make the airline industry more efficient by unleashing the market forces of

competition," the court noted. "[I]t was not to immunize the airline industry from liability for common law contract claims." *Id.*

Northwest petitioned for rehearing and rehearing en banc. While the motion was pending, one of the judges on the panel, Judge Rymer, passed away. The court assigned another judge and issued an amended decision, removing a concurrence by Judge Rymer and a few paragraphs on the definition of "services" that were not necessary to the outcome of the case. The court then denied the petition, with no judge requesting a vote on the petition for en banc rehearing. JA 25-26.

SUMMARY OF ARGUMENT

I. The parties to this case agree on one thing: "This case requires little more than a straightforward application of this Court's pathmarking decision in *Wolens*." Pet'r Br. 14. In *Wolens*, the Court held that although the ADA's preemption provision "bars state-imposed regulation of air carriers," it "allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 228. Here, Ginsberg's covenant-of-good-faith claim seeks to apply well-established, contract-law principles to identify and enforce implied contract terms—terms that, like express terms, are part of the contract. Because Ginsberg's covenant-of-good-faith claim asks the court to enforce the parties' contractual commitments, it is not preempted.

Northwest relies on a provision of the WorldPerks contract stating that membership may be terminated for "improper conduct as determined by Northwest in its sole judgment," to argue that Ginsberg seeks to override the contract and impose a non-contractual term. As the Court recognized in *Wolens*, however, the scope of a reservation

of rights is a "question of contract interpretation." 513 U.S. at 234. That a contract contains words such as "sole judgment" does not mean that the parties intended the party with discretion to be able to exercise that discretion in bad faith. And courts are particularly loath to interpret a contract to provide one party with absolute discretion where, as here, doing so would deprive the other party of all benefits of the bargain and could render the contract illusory.

Moreover, Ginsberg's decision not to appeal the dismissal of his breach-of-written-contract claim does not convert his covenant-of-good-faith claim into one based on extra-contractual policies, as argued by the United States. Ginsberg brought two claims alleging that Northwest breached the WorldPerks contract: the "breach-of-written-contract" claim, which alleged that Northwest breached express terms in the contract, and the "breach-of-the duty-of-good-faith-and-fair-dealing" claim, which alleged that Northwest breached implied terms in the contract. Because contracts encompass both express and implied terms, the breach-of-good-faith claim, like the breach-of-written-contract claim, is a claim that Northwest breached the terms of the contract into which it voluntarily entered.

Holding airlines like Northwest to implied terms of their contracts and requiring them to perform those contracts in good faith furthers the ADA's purposes. As this Court recognized in *Wolens*, the competitive market depends on parties' ability to enforce their agreements. Requiring a party to perform in good faith increases the stability of contracts and reduces the costs of entering into them. Northwest relies on the authority of the Department of Transportation (DOT) to investigate unfair and deceptive practices, but DOT's authority does not replace the role of a system for adjudicating private contract

disputes, whether those disputes involve express or implied terms.

II. Even aside from *Wolens*, Ginsberg's claim is not preempted because it does not involve the "enact[ment] or enforc[ement] [of] a law, regulation, or other provision." 49 U.S.C. § 41713(b)(1). Since *Wolens*, this Court has unanimously held that a statutory provision that preempts enforcement of "a law or regulation" does not preempt common-law claims. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002). For the same reasons that the words "a law or regulation" in the Federal Boat Safety Act provision at issue in *Sprietsma* do not encompass common-law duties, the words "a law [or] regulation" in the ADA's preemption provision do not encompass the common law. And because the ordinary meaning of the word "provision" does not extend to common-law duties, the addition of the words "or other provision" underscores that the ADA's preemption provision preempts only positive state enactments, and not common-law claims like Ginsberg's.

III. Ginsberg's claim is also not preempted because it does not relate to airline prices, routes, or services. Although, like the claim in *Wolens*, Ginsberg's claim involves a frequent flyer program, unlike in *Wolens*, his claim does not challenge access to flights and upgrades or the number of miles needed to obtain air tickets. Rather, his challenge is to the termination of his WorldPerks elite membership. This claim does not expressly reference or seek to regulate the price, route, or service of air transportation, and its outcome will not affect such a price, route, or service. The claim does relate to the WorldPerks program, but that program is not itself a "service" within the meaning of the ADA. Indeed, the Department of Transportation advises consumers to "consider legal action through the appropriate civil court" if they are unhappy

with the way a frequent flyer program is administered. Moreover, frequent flyer miles can be earned and spent on many things unrelated to air transportation, such as concert tickets, jewelry, newspapers, and golf clubs. Consumers' ability to be active participants in frequent flyer programs without buying a single airline ticket underscores the distance between the administration of a frequent flyer program and the prices, routes, and services Congress intended to deregulate when it enacted the ADA.

ARGUMENT

To be preempted by the ADA, a claim must both involve the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law" and be "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1). Ginsberg's claim meets neither of these requirements.

I. Ginsberg's Covenant-of-Good-Faith Claim is Not Preempted Under *Wolens*.

A. Ginsberg's Covenant-of-Good-Faith Claim Seeks to Enforce the Parties' Bargain, Not to Expand It.

In *Wolens*, this Court held that although the ADA preempts "state-imposed regulation of air carriers," it does not preempt contract claims that seek to enforce "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 U.S. at 223, 238. The Court explained that it did not read the ADA's preemption provision "to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228. Because Ginsberg's claim seeks to enforce the

parties' bargain, without enlargements based on state policies, his claim is not preempted.

Like the contract claim in *Wolens*, Ginsberg's covenant-of-good-faith-and-fair-dealing claim involves the parties' "self-imposed undertakings." *Id.* at 228. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205. A claim of breach of the covenant of good faith is dependent on the parties' having voluntarily entered into a contract, and "does not extend to actions beyond the scope of the underlying contract." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 503 (Minn. 1995). Claims "defined by the contractual obligation of good faith, . . . involve contract interpretation" and "ultimately depend[] upon the terms of the agreement between the parties." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 216, 218 (1985).

Rather than imposing external policies, the requirement that contracts be performed in good faith is a "means of finding within a contract an implied obligation not to engage in [a] particular form of conduct . . . by honoring the reasonable expectations created by the autonomous expressions of contracting parties." *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.); *see* Restatement (Second) of Contracts § 205 cmt. a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party[.]"). "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." *Foley v. Interactive Data Corp.*, 765 P.2d 373,

394 (Cal. 1988). It "is about securing to the parties the sort of good faith performance that, in the particular circumstances of the case at hand, they reasonably thought they were securing at the time they entered the bargain," "not about . . . 'creat[ing] new rights and duties inconsistent with express contractual terms,' or 'achiev[ing] an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.'" *Flood v. ClearOne Comm'ns, Inc.*, 618 F.3d 1110, 1122 (10th Cir. 2010) (citations omitted).[2]

Northwest and the United States note that some scholars and courts have used the term "good faith and fair dealing" to describe the imposition of external notions of fairness. Similarly, some plaintiffs have attached the label "good faith and fair dealing" to their claims when the claims looked to external state or federal policies instead of to the contracts' purpose and parties' expectations. *See, e.g.*, *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir.

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[2] *See also, e.g.*, Uniform Commercial Code (U.C.C.) § 1-304 cmt. 1 ("[T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness . . . ."); E. Allan Farnsworth, *Good Faith Performance & Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 669 (1963) (explaining that there are many varieties of good faith in the law in general but that "good faith performance . . . represents a specific application of the general obligation of good faith—resulting in an implied term of the contract requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations"); *Market St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 596 (7th Cir. 1991) (Posner, J.) (equating the duty of good faith with reading a contract to contain "such implied conditions as are necessary to make sense of the contract").

2007). This case, however, does not present the question whether claims asserting such theories of good faith and fair dealing are preempted because Ginsberg's claim is not based on such theories. It is based on the more common notion of "*contractual* good faith—one that is rooted in respect for the parties' purposes and expectations, understood in the context in which they made their agreement." Steven J. Burton & Eric G. Anderson, *Contractual Good Faith* § 1:1, at 3 (1995); *see also id.* (noting that the other "approaches are not at this time well recognized as law insofar as legislation and judicial practice establish the law"). Ginsberg's complaint specifies that "[u]nder this implied term of the agreements, the good faith requirement precludes an action by the defendants that would contravene the reasonable expectations of the plaintiff and Class members." JA 51. And Minnesota courts recognize that "[c]ourts employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations." *Cardot v. Synesi Grp. Inc.*, 2008 WL 4300955, at *8 (Minn. Ct. App. Sept. 23, 2008) (citation omitted); *Allen v. Thom*, 2008 WL 2732218, at *4 (Minn. Ct. App. July 15, 2008) (citation omitted).[3]

Accordingly, Northwest is incorrect that Ginsberg's covenant-of-good-faith claim "seeks to enlarge the parties' voluntary agreement by enforcing state policies external to the agreement." Pet'r Br. 20. Rather, Ginsberg's claim seeks to construe the agreement into which the parties voluntarily entered, by looking not only to the express terms of the contract but also to the terms that are implied in it. This Court has long recognized that "[w]hat is

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[3]The district court determined, in considering the breach-of-written-contract claim, that Minnesota's law applies. Pet. App. 70.

implied in a . . . contract is as much a part of it as what is expressed." *United States v. Babbitt*, 95 U.S. 334, 336 (1877); *see also Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329 (1927) ("[A] contract includes, not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made."). Requiring parties to perform their contracts in accordance with the contracts' implied terms does not require the imposition of external state policies any more than does requiring parties to perform the express terms of their contracts.

The differences between Ginsberg's claim and a claim of unconscionability help to demonstrate why this case falls within the category of cases that *Wolens* holds is not preempted. The doctrine of unconscionability provides a means for a court to invalidate a contract agreed to by the parties. Under the doctrine, "[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Restatement (Second) of Contracts § 208 (1981). Because the contract is not enforced, even though the parties contemplated all of its terms, the doctrine of unconscionability involves the imposition of external policies.

In contrast, Ginsberg's claim does not seek to avoid enforcement of the contract. Rather, he seeks damages, specific performance, and an injunction—typical breach-of-contract remedies. Moreover, Ginsberg's claim does not try to second-guess the contract or replace it with a state's "'own public policies or theories of competition or

regulation on the operations of an air carrier.'" *Wolens*, 513 U.S. at 229 n.5 (citation omitted). Instead, this case seeks to hold Northwest to its contractual obligations, including those impliedly included in the contract. Accordingly, it is not preempted.

B. Ginsberg's Claim Seeks to Enforce the Contractual Limits on the "Sole Judgment" Language.

Claiming that Ginsberg "quite plainly" seeks to expand the contract, Pet'r Br. 22, Northwest points repeatedly to language in the WorldPerks contract providing that Northwest can revoke a person's membership based on "improper conduct as determined by Northwest in its sole judgment." JA 64. The term "sole judgment," however, is not a trump card. Ginsberg's claim seeks to construe the meaning and limits on that contractual term, not to override it.

As then-Judge Scalia explained in evaluating a "sole discretion" clause in *Tymshare*, the "mere recitation of an express power is not always the test" for determining whether a contract leaves "decisions absolutely to the uncontrolled discretion of one of the parties." 727 F.2d at 1153 (citation omitted). Rather, "the reasonably understood effect of an expansive modifier varies from case to case depending upon the nature of the power at issue." *Id.* at 1154. "Where what is at issue is the retroactive reduction or elimination of a central compensatory element of the contract—a large part of the *quid pro quo* that induced one party's assent—it is simply not likely that the parties had in mind a power quite [so] absolute." *Id.*

Thus, when a court relies on the doctrine of good faith to assess the limits of a phrase such as "sole judgment," it

is not looking to external state policies to alter the agreement; it is interpreting the scope of the parties' voluntary undertakings in light of the parties' purposes and reasonable expectations. Moreover, courts recognize that parties are particularly unlikely to have intended a sole discretion clause to give a party absolute power where doing so would render the contract illusory—that is, when it would render the contract unenforceable because one party has not provided consideration. *See, e.g.*, *White Stone Partners, LP v. Piper Jaffray Cos.*, 978 F. Supp. 878, 882 (D. Minn. 1997) (determining that "the Minnesota Supreme Court would require a party to exercise good faith in exercising an unlimited discretionary power over a term of the contract if necessary to effectuate the parties' intent and to save a contract from being held to be illusory"); *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989) (Souter, J.) ("[U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.").

Here, Northwest claims an absolute power not just to eliminate a substantial portion of the agreement's value, but to eliminate all of it; it claims a right to unilaterally terminate a WorldPerks member's membership for any reason or no reason at all and to deprive that member of all of the miles and benefits he had accrued in reliance on the terms of the program contract. Although Northwest and Ginsberg each clearly intended to enter into an enforceable contract—Northwest, for example, repeatedly refers to the "contractual terms" in its brief, *see, e.g.*, Pet'r Br. 22—if

Northwest is right, it will have promised nothing in the contract. Under these circumstances, applying the covenant of good faith to enforce the limits on the term "sole judgment" reflects, rather than overrides, the parties' voluntary undertakings.

Notably, the contract claim at issue in *Wolens* itself involved the interpretation of an express reservation of rights. As discussed above, in *Wolens*, the plaintiffs challenged changes to American's frequent flyer program. The parties agreed that American had expressly reserved the right in its frequent flyer contract to make changes to the program, but they disagreed about whether American was allowed to do so retroactively. 513 U.S. at 225.[4] Relying on the express reservation, American argued (among other things) that even if the ADA did not preempt claims that enforce contractual obligations, the plaintiffs' contract claims would be preempted because they "inescapably depend on state policies that are independent of the intent of the parties." 513 U.S. at 233 (quoting Am. Airlines Reply Br. 3, *Wolens*, No. 93-1286, 1994 WL 455228 (U.S. Aug. 19, 1994)). "The state court cannot reach the merits," the airline contended, "unless it first invalidates or limits [American's] express reservation of the right to change [American's frequent flyer program's] rules contained in [the frequent flyer] contracts." *Id.* at 233-34 (quoting Am. Airlines Reply Br. 3, *Wolens*). Moreover, American made clear that the doctrine that might apply to limit its express reservation of rights was the doctrine of good faith and fair dealing, specifically noting that "[i]n

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[4]The reservation of rights stated that the program's rules, regulations, and awards were "subject to change without notice" and that American reserved the right "to terminate the . . . program at any time." Br. for United States 6 n.4, *Wolens* (citing American Airlines AAdvantage Program Brochure (4/87)).

Illinois [the] 'covenant of fair dealing and good faith . . . implied into every contract' . . . 'imposes a limitation on the exercise of discretion vested in one of the parties to a contract.'" Am. Airlines Reply Br. 18, *Wolens* (citation omitted).

The Court rejected as "unpersuasive" American's argument that the plaintiffs' claims "inescapably" relied on external state policies, stating that American's argument "assume[d] the answer to the very contract construction issue on which plaintiffs' claims turn: Did American, by contract, reserve the right to change the value of already accumulated mileage credits[?]" 513 U.S. at 234. The Court explained that "[t]hat question of contract interpretation has not yet had a full airing" and that it "intimate[d] no view on its resolution." *Id.* It affirmed the judgment of the Illinois Supreme Court to the extent the state court had allowed the contract claim to proceed. In other words, the Court recognized that the scope of the reservation-of-rights provision was an issue of contract interpretation, although no such limits were expressly stated in the contract. Further, although American had explained that the state court might use the covenant of good faith and fair dealing to interpret the limits on the reservation of rights, the Court allowed the claim to proceed, without suggesting that the state court was barred from relying on the covenant in resolving the claim. Likewise, here, the scope of Northwest's ability to terminate a person's WorldPerks membership is an issue of contract interpretation, and this claim should be allowed to proceed.

C. Ginsberg's Decision Not to Appeal His Breach-of-Written-Contract Claim Is Irrelevant to Whether the ADA Preempts His Covenant-of-Good-Faith Claim.

In contrast to Northwest, the United States agrees that when used to "'effectuate the intentions of parties, or to protect their reasonable expectations,'" U.S. Br. 24 (citation omitted), covenant-of-good-faith claims "could constitute one form of adjudicating 'routine breach-of-contract claims'" under *Wolens* and "would not be preempted by the ADA." *Id.* at 26 (quoting *Wolens*, 513 U.S. at 323). Moreover, the United States recognizes that under Minnesota law, a party might be able to "maintain a claim—whether under the rubric of an implied covenant of good faith and fair dealing or otherwise—on the theory that the other party exercised a contractual grant of discretion in a manner not contemplated by the parties at the time of the contract's formation." *Id.* at 19.

Ginsberg's claim is exactly the type of good faith claim that the United States describes. It seeks to effectuate and protect the intentions and expectations of the parties: The complaint specifies that "the good faith requirement precludes any action by the defendants that would contravene the reasonable expectations of the plaintiff," JA 51, and alleges that "even where a party to a contract is given absolute discretion, it must exercise that discretion in good faith in a manner consistent with the reasonable expectations of the other party or parties." *Id.*

Nonetheless, according to the United States, because Ginsberg also brought a breach-of-written-contract claim, and because he did not appeal the loss of that claim, "the district court's holding that petitioner did not breach any obligation undertaken by petitioner under the terms of the contract itself would appear to be controlling here." U.S.

Br. 19. That is, according to the United States, because Ginsberg did not appeal the claim entitled "breach of written contract," his covenant-of-good-faith claim "seeks to impose a non-contractual limitation on petitioner." *Id.* at 10.

The United States' argument misunderstands Ginsberg's claims. The Federal Rules of Civil Procedure allow a plaintiff to set out "two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones." Fed. R. Civ. P. 8(d)(2). Ginsberg's complaint included two separate counts alleging that he breached the contract: one alleging a "breach of written contract," JA 49, and a second alleging a "breach of the duty of good faith and fair dealing . . . implied in the subject contracts." JA 51. In other words, his first claim alleged that Northwest violated the *express* terms of the contract, and his second claim alleged that Northwest violated the *implied* terms of the contract. Minnesota law recognizes that it is appropriate to treat express and implied contract claims as separate claims. *See, e.g.*, *In re Hennepin*, 540 N.W.2d at 503 (considering separate "claims for breach of express and implied contract provisions" and explaining that "[t]o allege an implied covenant claim the bondholders need not first establish an express breach of contract claim—indeed, a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes that the parties did not expressly articulate the covenant allegedly breached"); *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 37 (Minn. App. 2012) (concluding that Minnesota law allows plaintiffs to plead "alternative theories: breach of the express terms of the insurance policies and breach of a provision that is read into most contracts under Minnesota law, namely, the implied covenant of good faith and fair dealing").

Determining that it could not look beyond the contract's "express terms," Pet. App. 71, the district court held that the breach-of-written-contract claim failed because the express terms of the contract stated that Northwest could cancel members' accounts based on "'improper conduct as determined by Northwest *in its sole judgment*.'" *Id.* (quoting JA 64). And it held that the implied contract claim—that is, the good faith claim—was preempted under *Wolens*. *Id.* 69. Because the contract does not contain express limitations on the term "sole judgment"—rather, those limitations are implied contract terms—Ginsberg appealed only the district court's holding with regard to the implied contract claim. But his decision not to appeal the determination that the express terms of the contract do not contain limitations on "sole judgment" does not mean that he accepted or conceded that the contract as a whole does not contain limitations on that term. A contract includes not only "the promises set forth in express words," but also its "implied provisions." *Sacramento Nav. Co.*, 273 U.S. at 329; *see Columbia Cas. Co.*, 814 N.W.2d at 37 ("[I]t is well settled that a contract includes not only the terms set forth in express words, but in addition all implied provisions indispensable to effectuate the intention of the parties and carry out the contract . . . .") (quoting *Watson Bros. Transp. Co. v. Jaffa*, 143 F.2d 340, 348 (8th Cir. 1944)); *Allen*, 2008 WL 2732218, at *2 ("[The plaintiff's arguments] both regard breach of contract, although they are presented in separate terms as breach of contract and breach of the implied covenant of good faith and fair dealing. A breach of the implied covenant is itself a breach of the contract.").

Under the United States' position, whether the ADA preempts covenant-of-good-faith claims would vary by state depending on how such claims are pleaded within the state. In some states, the covenant of good faith is not

treated as a separate claim, but considered as part of a breach-of-contract claim. *See, e.g.*, *Indus. Specialty Chems., Inc. v. Cummins Engine Co., Inc.*, 902 F. Supp. 805, 811 (N.D. Ill. 1995) (applying Illinois law). In such a state, if a district court held that the express terms of the contract provided the defendant with absolute discretion, and that the ADA preempted reliance on the covenant of good faith, a plaintiff who wanted to appeal the determination regarding the covenant of good faith would necessarily appeal the breach-of-contract claim, and the United States' concerns about an unappealed dismissal of the breach-of-contract claim would not arise. Here, however, because the covenant-of-good-faith claim was pleaded separately from the breach-of-written-contract claim, to appeal the ruling that the ADA preempted reliance on the covenant of good faith, Ginsberg appealed only the covenant-of-good-faith claim. Whether the ADA preempts reliance on the covenant of good faith, however, should not depend on whether or not it was pleaded as a separate claim. And it would be nonsensical to require Ginsberg to appeal his claim for breach of the express terms of the contract along with his claim for breach of the implied terms, when his argument is not that the district court erred in its holding with regard to express terms, but that it erred in its holding with regard to the implied terms.

D. Ginsberg's Claim Furthers the ADA's Policies.

As in *Wolens*, allowing Ginsberg to pursue his contract claim here furthers the ADA's goal of "placing maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(6). As the Court explained, "[t]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time," *Wolens*,

513 U.S. at 230 (quoting Br. for United States 23, *Wolens*)—an observation that applies equally to express and implied contract terms. Moreover, "[t]he good faith performance doctrine may be said to enhance economic efficiency by reducing the costs of contracting." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 393 (Dec. 1980). It decreases the need for "costly defensive expenditures, in the form of overelaborate disclaimers or investigations into the trustworthiness of a prospective contract partner." *Market St. Assocs.*, 941 F.2d at 594.

Northwest and the United States stress the benefits to competition of allowing airlines flexibility to maintain discretion in their airline programs. The issue here, however, is not whether airlines can write contracts in which they maintain significant discretion. Rather, the issue is whether the consumer can enforce limits on that discretion based on the parties' reasonable expectations, the contract's purpose, and the parties' intent to have entered an enforceable contract. The outcome will determine, for example, whether, if an airline maintains the ability to terminate frequent flyer program membership for "improper conduct . . . in its sole judgment," the airline is free to decide that it would be "improper conduct" for a frequent flyer program member ever to try to use his miles.

Northwest points to language in a *Wolens* footnote observing that "contract law is not at its core 'diverse, nonuniform, and confusing,'" 513 at 233 n.8, and thus that the Court saw "no large risk of nonuniform adjudication inherent in '[s]tate-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" *Id.* (citations omitted). Northwest devotes a significant part of its brief to arguing

that "the precise opposite is true with respect to the implied covenant." Pet'r Br. 29. But although there are some differences in how states apply the covenant of good faith, that is also true of other contract-law principles. As the United States noted in *Wolens*, "different courts adjudicating a claim for breach of a contract of carriage or a frequent flyer contract might be called upon to apply background principles of state contract law and might reach different results." Br. for United States 27, *Wolens*.

Moreover, the covenant of good faith *is* a principle at the "core" of contract law. *Wolens*, 513 U.S. at 233 n.8. It is widely accepted by the states and recognized in both the Restatement and the UCC. *See Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010) (recognizing that "[o]f course" every contract imposes a duty of good faith). And courts routinely employ the covenant of good faith where a contract confers discretion on one party, particularly where refusing to apply the covenant would render the contract illusory. *See, e.g.*, Farnsworth on Contracts § 7.17 (4th ed. 2004) ("Courts have often supplied a term requiring a party to exercise good faith when that party has been given a discretionary power over one of the terms of the contract."); *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 542 (4th Cir. 1998) (Luttig, J.) ("[I]t is a basic principle of contract law . . . [that] a party may not exercise contractual *discretion* in bad faith, even when such discretion is vested solely in that party."); *see also, e.g.*, *Cavendish Farms, Inc. v. Mathiason Farms, Inc.*, 792 N.W.2d 500, 506 (N.D. 2010); *Potlatch Educ. Ass'n v. Potlatch Sch. Distr. No. 285*, 226 P.3d 1277, 1281 (Idaho 2010); *Kennedy Assocs., Inc. v. Fischer*, 667 P.2d 174, 180 (Alaska 1983); *Midwest Mgmt. Corp. v. Stephens*, 291 N.W.2d 896, 913 (Iowa 1980).

Northwest cites five cases for the proposition that "many states reject out of hand implied covenant claims where . . . [contractual terms] expressly give one party sole discretion to take particular actions." Pet'r Br. 33. In four of those cases, however, interpreting the contract to provide one party with absolute discretion did not deprive the other party of all benefits of the contract. *See, e.g.*, *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 744 A.2d 1134, 1138 (N.H. 2000) (noting that good faith and fair dealing would apply to protect an agreement that would otherwise be rendered illusory, but finding that the contract at issue was supported by other consideration). And in the fifth case, the court in fact recognized that, despite the grant of "exclusive control, discretion, and judgment" to the defendant, there were acts that, if proved by the plaintiff, would have shown bad faith. *Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66, 82-83 (N.M. 1993).[5]

If the ADA preempted state-law contract claims based on implied terms, there would be no way for consumers to hold airlines to those self-imposed terms. As the Court pointed out in *Wolens*, "DOT has neither the authority nor the apparatus required to superintend a contract dispute

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[5]Northwest also devotes significant attention to employment cases, *see* Pet'r Br. 33-35, but employment is a special context in which, because of the at-will employment doctrine, many states do not apply the covenant at all. *See, e.g.*, James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith & Fair Dealing in American Employment Law*, 32 Comp. Lab. L. & Pol'y J. 773, 773-74 (Spring 2011) (explaining that although the covenant of good faith is "an accepted feature of contractual relations in the United States" most states "have declined to apply Good Faith at all when reviewing disputes between employers and individual employees" and grounding that reluctance in "the robust persistence of the employment-at-will doctrine").

resolution regime." 513 U.S. at 232. "Nor is it plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." *Id.* Northwest devotes significant attention to DOT's ability to investigate unfair or deceptive practices, 49 U.S.C. § 41712, arguing that this authority "stands in stark contrast to its capacity to address 'routine breach-of-contract' claims." Pet'r Br. 40. But that argument is a non sequitur. Although DOT had authority to police unfair and deceptive practices at the time of *Wolens*, the Court recognized that such authority did not replace the need for a system of adjudicating contract disputes. *Wolens*, 513 U.S. at 232. Ginsberg's claim for breach of the covenant of good faith and fair dealing falls within that category. Because he seeks to hold the airline to its voluntary, contractual undertakings, his claim is not preempted under *Wolens*.

II. Common-Law Claims Are Not Based on "a Law, Regulation, or Other Provision."

A. Even apart from *Wolens*, Ginsberg's claim is not preempted because it does not involve the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 41713(b)(1). Since *Wolens* was decided, this Court has unanimously held that statutory language preempting "a law or regulation" did not preempt common-law claims. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting the Federal Boat Safety Act, 46 U.S.C. § 4306). The Court explained that "the article 'a' before 'law or regulation' implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law." *Id.* It noted that "because 'a word is known by the company it keeps,' . . . the terms 'law' and

'regulation' used together in the preemption clause indicate that Congress preempted only positive enactments." *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). And it observed that "[i]f 'law' were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the preemption clause superfluous." *Id.*

For these same reasons, the words "a law [or] regulation" in the ADA do not include common-law claims. As in the Boat Safety Act, the phrase "law, regulation, or other provision" in the ADA is preceded by the article "a," demonstrating a discreteness not present in common law. As in the Boat Safety Act, the doctrine that words are known by the company they keep indicates that "law," like "regulation," includes only positive enactments. And as in the Boat Safety Act, if "law" were read to include common law, it might also be read to include "regulation[s]" and "other provision[s] having the force and effect of law," rendering those terms superfluous.

Indeed, because the words "a law [or] regulation" in the ADA are followed by "other provision having the force and effect of law," it is even clearer here than in *Sprietsma* that "law" and "regulation" do not include common law. In both its everyday and its legal meaning, "provision" refers to a stipulation or specific clause in a law or other legal instrument. *See*, *e.g.*, *Black's Law Dictionary* (9th ed. 2009) (defining provision as "[a] clause in a statute, contract, or other legal instrument . . . [a] stipulation made beforehand"); *Webster's Third New Int'l Dictionary* 1827 (1981) (defining provision as "a stipulation (as a clause in a statute or contract) made in advance; proviso"). It is natural to speak of a provision of a contract, a local health code, or a lease. But the common-law principles on which

Ginsberg relies are not "provision[s]" under the ordinary meaning of that term. Moreover, like "law" and "regulation," "provision" is preceded by the word "a," which involves a discreteness not present in the common law, and if "provision" were interpreted broadly enough to include the common law, the word "regulation," at the least, would be superfluous. *See* 537 U.S. at 63.

Thus, the phrase "other provision having the force and effect of law" does not itself include the common law. Instead, it ensures that a positively enacted or promulgated requirement with the force and effect of law will fall within the scope of the preemption provision, even if the measure is not denominated a statute or regulation. For example, the concession agreement provisions at issue in *American Trucking Ass'n v. City of Los Angeles*, 133 S. Ct. 2096 (2013), were "other provision[s] having the force and effect of law." And by referring to "other provision" after "law" and "regulation," the statute reinforces that the only laws and regulations that are preempted are those that are also contained in "provision[s]"—that is, those that are positively enacted or promulgated, not common-law principles.

B. In *Sprietsma*, the Court noted that its conclusion that the Boat Safety Act's preemption provision does not preempt common-law claims was "buttressed" by the Act's saving clause, which states that ""[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."' 537 U.S. at 63 (quoting 46 U.S.C. § 4311(g)). Likewise, here, when Congress enacted the ADA, it retained the existing saving clause in the Federal Aviation Act, which stated that "[n]othing contained in this [Act] shall in any way abridge or alter the remedies now existing at common law or by statute." 49

U.S.C.App. § 1506 (1988). In 1994, Congress revised the saving clause to provide that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c)). As in *Sprietsma*, this "'saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions.'" 537 U.S. at 63 (quoting *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000)); *cf. Wolens*, 513 U.S. at 232 (recognizing that the saving clause informs interpretation of the preemption clause).

C. The United States notes that until 1994, the ADA preempted "any law, rule, regulation, standard, or other provision having the force and effect of law . . ." and that Congress did not intend to make any substantive change when it revised the language to its current form. U.S. Br. 31-32 (quoting ADA, Pub. L. No. 95-504, § 4(a), 92 Stat. 1708). Based on the pre-1994 language, it argues that there is no reason to conclude that Congress did not intend to preempt common-law claims. The current statutory language, however, should not be stretched beyond its plain meaning based on language deleted by Congress nearly 20 years ago. Moreover, the reason Congress removed the words "rule" and "standard" was because it considered them superfluous, suggesting that it thought they, like law, regulation, and other provision, referred to positive enactments. The House Report on the recodification specifies that Congress removed "rule" because it was "synonymous with 'regulation.'" H.R. Rep. No. 103-180, 103d Cong., 1st Sess. 305 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818. Similarly, the report specifies that Congress removed "standard" because it was "surplus." *Id.* And although the word "standard" can sometimes refer to common-law standards, it can also be used to refer to

statutory or regulatory criteria. *See, e.g.*, ADA, Pub. L. No. 95-504, § 4(a) (providing that the "Administrator, by regulation, shall establish safety standards"); *cf. Geier*, 529 U.S. at 867-68 (holding that an express preemption provision that preempted "any safety standard" did not preempt common-law actions). Thus, the prior version of the statute was ambiguous at best about whether it covered common-law duties. And by amending the language, Congress made clear that the current language best expressed its intent.

Further this Court has recognized that the ADA's "relating to" language is identical to that in the Employee Retirement Income Security Act of 1974 (ERISA). *Morales*, 504 U.S. at 383-84. Notably, however, in drafting the ADA, Congress did not adopt the threshold language from ERISA's preemption provision, which states that ERISA "supersede[s] any and all State laws," 29 U.S.C. § 1144(a), and specifically defines "State law" as including "all laws, *decisions*, rules, regulations, or *other state action* having the effect of law." *Id.* § 1144(c)(1) (emphasis added); *see* ERISA, Pub. L. No. 43-406, § 514, 88 Stat. 829 (1974). Likewise, although the prior version of the preemption provision was similar to the Federal Railroad Safety Act (FRSA) provision at issue in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), it differed noticeably from that provision by excluding the word "orders."[6]

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[6]The FRSA provision at issue in *CSX Transportation* preempted "any law, rule, regulation, order, or standard relating to railroad safety." *CSX Transportation*, 507 U.S. at 664 (quoting 45 U.S.C. § 434 (1988 & Supp. II)). The United States cites *CSX Transportation* for the proposition that "[t]his Court has construed references to 'standards' in preemption provisions as encompassing state common-law claims." U.S. Br. 32. In its brief in *Wolens*, (continued...)

Congress used both the words "decisions" and "orders" elsewhere in the ADA, but not in the preemption provision. Congress's decision not to include words such as "decisions" and "orders" in the preemption provision, despite their use in ERISA and the FRSA, further suggests that Congress did not intend the prior or current language to preempt common-law claims, and that the current language should be interpreted in accordance with its plain meaning to preempt only positive state enactments.

D. The conclusion that a preemption provision pre-empts only positive state enactments, not common-law claims, "does not produce anomalous results." *Sprietsma*, 537 U.S. at 64. It is "perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." *Id.*; *see also, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions.").

Indeed, given the purposes of the ADA and its preemption provision, it is particularly rational for Congress to have preempted only positive state

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[6](...continued)
however, the United States focused on the word "orders" in FRSA's preemption provision, suggesting that the word "orders" extended the preemption provision to contract claims and made it meaningfully broader than the ADA's preemption provision. *See* Br. for United States 18 & n.10, *Wolens* (noting that *CSX Transportation* "quote[s] [a] statutory reference to preempted state law that includes 'orders'" and pointing out that the ADA's preemption provision does not preempt "'orders' or 'decisions'").

enactments. Congress enacted the ADA to free the airlines from the public-utility-style oversight of the Civil Aeronautics Board (CAB). The House Report accompanying the ADA explained that under the pre-ADA regulatory system, airlines were "subject to extensive economic regulation by the CAB," noting that "airline management does not have the same control over basic operational decisions as management in other industries." H.R. Rep. No. 95-1211, at 2. The purpose of the ADA was to replace this extensive economic regulation with "competitive market forces to determine the quality, variety, and price of air services." Pub. L. No. 95-504, 92 Stat. 1705. The purpose of the preemption provision, in turn, was to prevent conflicts between federal and state regulation and "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. Congress showed no intent to deprive injured people of traditional state-law remedies. It "is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Given the ADA's purpose of preventing states from recreating the CAB's public-utility-style regulation, along with the ADA's language and structure, the ADA's preemption provision should not be read to deprive airline customers of traditional state common-law claims.

III. Ginsberg's Claim Does Not Relate to Air Carrier Prices, Routes, or Services.

Ginsberg's claim is also not preempted because it is not "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1). Unlike in *Wolens*, in which the plaintiffs' claims related to access to and charges for flights and upgrades, Ginsberg's claim relates solely to his membership in the WorldPerks program. The WorldPerks program is not itself a "service" under the ADA, and Ginsberg's claim is not sufficiently related to the "services" that Northwest provides to be preempted.

A. Northwest contends that Ginsberg's claim is preempted because it "directly challenges Northwest's administration of its frequent flyer program." Pet'r Br. 17. But the WorldPerks program is not a "service" under the ADA, and thus Ginsberg's claim is not preempted simply because it involves that program.

The word "service" does not encompass very activity undertaken by an air carrier. If an airline owned a restaurant, ran a dry cleaner, or managed a sports team, it would not be immunized from following state laws relating to those activities simply because it is an airline. Rather, the "service" referred to in the ADA is the service customers are buying when they buy their airline ticket: the service of "provid[ing] air transportation." 49 U.S.C. § 41713(b)(1).[7]

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[7] As Northwest's petition notes (at 26-27), the courts of appeals are split over whether the "service" of providing air transportation within the meaning of the ADA includes only "the provision of air transportation to and from various markets at various times," *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir.

(continued...)

Thus, in *Dan's City Used Cars*, the Court held that claims related to the storage and disposal of a towed car "survive preemption under [the FAAAA] because they are unrelated to a 'service' a motor carrier renders its customers." 133 S. Ct. at 1779. Although the conduct on which the claims were based was performed by a motor carrier, and although the claims involved the treatment of a towed car, the Court recognized that the claims did not relate to services in the relevant sense because they did not have the requisite connection to "any *transportation* services a motor carrier offers its customers." *Id.* (emphasis added).[8]

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[7](...continued)
1998) (en banc), or whether it includes other "features of air transportation" that are "appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline," such as "ticketing, boarding procedures, provision of food and drink, and baggage handling." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (citation omitted). Because Ginsberg's claim does not relate to any aspect of air transportation—neither to the point-to-point transportation itself nor to any other services necessarily included within the contract of carriage—this split need not be resolved in this case. *Cf. Dan's City Used Cars*, 133 S. Ct. at 1779 ("We need not venture an all-purposes definition of transportation 'service[s]' in order to conclude that state-law claims homing in on the disposal of stored vehicles fall outside [the FAAAA's] preemptive compass.").

[8]In *Dan's City Used Cars*, the Court also discussed language that is in the FAAAA but not in the ADA—the qualification that the FAAAA preempts state laws related to prices, routes, or services only "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Court held that the claims there were not preempted because they did not concern a motor carrier's "transportation of property." 133 S. Ct. at 1779. However, the Court then stated that "Pelkey's claims *also* survive preemption
(continued...)

Here, the operation of the WorldPerks program is not an air transportation service. The WorldPerks contract between an airline and a customer is separate from any contract the parties enter into regarding the purchase of airline tickets. *See*, *e.g.*, *Hodges*, 44 F.3d at 336 (defining services as matters "necessarily included with the contract of carriage"). People can buy tickets on airlines without having any involvement with a frequent flyer program. And people can become members of frequent flyer programs without ever buying an airline ticket. *See* Delta, *Create an Account*, https://www.delta.com/profile/enrollLanding.action (last visited Sept. 10, 2013) (website for enrolling in Delta's SkyMiles program).

Indeed, frequent flyer program benefits can be accrued and spent on many things besides flights and upgrades. Delta's SkyMiles program, for example, into which WorldPerks merged, boasts of over 100 different partners through which the program's members can earn "miles," including credit cards, check cards, financial services, hotel chains, car rental companies, flower delivery services, and

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[8](...continued)
under [the FAAAA] because they are unrelated to a 'service' a motor carrier renders its customers," because the "transportation service Dan's City provided . . . ended months before the conduct on which Pelkey's claims are based." *Id.* (emphasis added). In other words, even apart from the "with respect to the transportation of property" language, the Court recognized that the term "service" in the FAAAA refers solely to "transportation services." *See also id.* at 1778 (agreeing that Pelkey's claims were "'related to' neither the 'transportation of property' nor the 'service' of a motor carrier").

natural gas suppliers.[9] Likewise, miles can be used to subscribe to magazines and newspapers, to see Broadway shows, to bid on items such as front-row seats at sporting events and the opportunity to mingle with celebrities, and to buy merchandise such as alarm clocks and toaster ovens.[10] Thus, a SkyMiles member does not have to buy an airline ticket or travel on an airplane to participate actively in the program. *See* Misty Harris, *Airlines Getting More Creative with Rewards Programs*, Montreal Gazette (Apr. 11, 2012), at B1 ("[A]irlines are expanding redemption options to meet the needs of more people—including those who've never flown a day in their life."). The customer may use the program to subscribe to Glamour, Time, or the Wall Street Journal, to receive tickets to The Phantom of the Opera, Wicked, or Annie, or to buy a watch, jewelry, or a clothes iron. And the customer may earn the miles by using an American Express credit card, opening a Fidelity brokerage account, or buying tools and electronics on Sears.com.

Furthermore, although Northwest (at 37) stresses the role of frequent flyer programs in enhancing customer loyalty, the programs are often profit-making enterprises for airlines apart from their role in attracting customers. In a special report on frequent flyer programs the

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[9] *See* Delta, *Earn Miles with Partners*, http://www.delta.com/content/www/en_US/skymiles/earn-miles/earn-miles-with-partners.html (last visited Sept. 10, 2013).

[10] *See* Delta, *Use Miles*, https://www.delta.com/content/www/en_US/skymiles/use-miles.html; Delta, *SkyMiles Online Auction*, https://www.delta.com/skymiles/use_miles/redemption_partners/skymiles_online_auction/index.jsp (last visited Sept. 10, 2013); Delta, *SkyMiles Marketplace*, https://marketplace.delta.com/ (last visited Sept. 10, 2013).

International Air Transport Association (IATA) explained that "[m]ost airlines have recognized that the programs could be operated as profit centers in their own right." IATA, *Special Report—The Price of Loyalty* (Aug. 2012);[11] *see also id.* (stating that when United filed for bankrupcy in 2002, its frequent flyer program was the only part of its operations that was making money). IATA notes, for example, that Delta generates more than $1 billion annually in payments from companies with which it partners. *Id.*; *see also*, *e.g.*, Delta Airlines Inc., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2012* (Form 10-K), at 39[12] (explaining that, in 2011, Delta "amended [its] American Express agreements and agreed to sell $675 million of unrestricted SkyMiles to American Express in each December from 2011 through 2014"). In other words, what began "as a way to win the loyalty of travelers has turned into a lucrative business for the airlines," apart from their role of providing air transportation. Susan Stellin, *Airlines' new cash cow: Frequent flier programs,* N.Y. Times (Apr. 1, 2008).

B. Of course, in addition to operating WorldPerks, Northwest offers air transportation "services" within the

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[11] Available at www.iata.org/publications/airlines-international/august-2012/Pages/loyalty.aspx (last visited Sept. 10, 2013). The IATA report also makes clear that unredeemed miles can be counted as a liability for an airline. *See id.* That unredeemed miles are a liability for the airline can help explain why an airline may have an incentive to remove members who have accrued many miles from the program when the airline is in the process of merging with another airline.

[12] Available at http://www.delta.com/content/dam/delta-www/pdfs/about-financial/DeltaAirLines_10K_2012.pdf (last visited Sept. 10, 2013).

meaning of the ADA. Ginsberg's claim, however, is not sufficiently related to those services to be preempted.

In determining whether a state law relates to prices, routes, or services, the Court has looked to whether the law "directly regulate[s]," *Rowe*, 552 U.S. at 373, "express[ly] reference[s]," *Morales*, 504 U.S. at 388, or has a "forbidden significant effect" on them. *Id.* Here, Ginsberg's claim neither expressly references nor regulates Northwest's provision of air transportation, and his claim would not have a significant effect on it. Northwest states that its frequent flyer program *in general* affects the prices it charges and the services it offers. Pet'r Br. 18. But the question is not whether the existence of the *frequent flyer program* affects prices, routes, and services, but whether this *specific action* would significantly affect prices, routes, and services. *See Morales*, 504 U.S. at 390. It is highly improbable, and certainly not demonstrated, that the determination of whether airlines can terminate customers' elite memberships in their frequent flyer programs without valid cause will have a significant effect on the services airlines provide or the amount air carriers charge for those services.

Despite Northwest's insistence (at 16) that they arise in "precisely the same context," the distance between Ginsberg's claim and the price, route, or service of air travel distinguishes this case from *Wolens*. In *Wolens*, the Court held that claims regarding American Airlines' devaluation of mileage credits, particularly its imposition of "limits on seats available to passengers obtaining tickets with [frequent flyer] credits" and "restrictions on dates credits could be used," were related to prices, routes, or services. *Wolens*, 513 U.S. at 225. Specifically, the Court held that the claims related 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.* at 226. In contrast, Ginsberg's claim does not relate to charges for tickets or seat upgrades, access to flights, or anything else concerning air carriage. It relates solely to his membership in the WorldPerks program.

To be sure, mileage and other benefits accrued through WorldPerks can be used in ways related to air transportation, such as to obtain tickets or upgrades. As Northwest and the United States note (at 18 and 15, respectively), the desire to receive these benefits is the reason Ginsberg cares about his WorldPerks membership. The ability to use benefits on air transportation, however, does not make claims regarding WorldPerks membership related to air transportation prices, routes, and services. Money, like miles, can be spent to procure air transportation, but a claim regarding the opening or operation of a bank account would not be preempted under the ADA, even when the customer was saving specifically to buy an airline ticket. And as discussed above, frequent flyer miles may be used on many goods and services other than tickets or upgrades. As a Delta SkyMiles webpage explains, "We often think miles are just for traveling, but they can be used for so much more." Delta, *Use Miles*, http://www.delta.com/content/www/en_US/skymiles/use-miles.html.

Northwest also notes (at 18) that the WorldPerks program is a means through which it attracts and maintains passengers. Although state laws concerning promotion of air travel may be preempted when they regulate, reference, or significantly affect air transportation prices, routes, and services, *see Morales*,

504 U.S. at 388 (holding that guidelines regulating fare advertising were preempted where they "express[ly] reference[d]" and had a "forbidden significant effect" on fares), they are not preempted where they do not regulate, reference, or affect such prices, routes, or services. In other words, even if they concern a program used to promote air travel, state laws are not preempted where, as here, they do not relate to air transportation.

The absence of a relationship between claims regarding membership in a frequent flyer program and the price, route, or service of air transportation is highlighted by the absence of DOT regulations related to frequent flyer program contracts or membership. As the Department's fact sheet on frequent flyer program notes, the "Department of Transportation does not have rules applicable to the terms of airline frequent flyer program contracts." DOT, *Frequent Flier Programs: How to Make the Right Decision*, http://www.dot.gov/airconsumer/frequent-flier-programs (updated July 23, 2013) (last visited Sept. 10, 2013).[13] Rather, the Department advises consumers to complain directly to the airline about problems with frequent flyer programs. And it tells consumers that "[i]f such informal efforts to resolve the problem are unsuccessful, [the consumer] may wish to consider legal action through the appropriate civil court." *Id.*

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[13] Until shortly before the United States filed its brief in this case, DOT's website more broadly stated that it "does not regulate airline frequent flyer programs." DOT, *Frequent Flier Programs*, http://web.archive.org/web/20130323044558/http://www.dot.gov/airconsumer/frequent-flier-programs (updated Sept. 18, 2012) (archived March 2013) (last visited June 2013).

Because frequent flyer programs reach into numerous different industries, Northwest's position that all state-law claims related to frequent flyer programs are preempted would, if adopted, disable states from protecting consumers who were earning or using miles for non-transportation services or merchandise. For example, credit card purchases reportedly account for 19.7 percent of accrued miles, and telephone companies account for another 9.3 percent of miles. Frequent Flyer Services, *Top 10 Mileage Earnings Methods* (Sept. 10, 2013);[14] *see also In Terminal Decline,* The Economist (Jan. 6, 2005) (stating that "half of all miles are now earned not in the air, but on the ground, notably on credit-card payments"). American Express reported that in 2012 its "Delta SkyMiles Credit Card co-brand portfolio account[ed] for approximately 5 percent of [American Express's] worldwide billed business." American Express Co., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2012* (Form 10-K), at 105.[15] Thus, if all claims regarding frequent flyer programs were preempted, states would not be able to enforce laws protecting consumers who were denied promised mileage from their credit card or phone companies. Particularly given that frequent flyer programs as we know them did not exist at the time of the ADA, it is unimaginable that, when it deregulated the airline industry, Congress intended to deny states the ability to regulate in these areas far outside the field of

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[14] Available at http://www.frequentflyerservices.com/press_room/facts_and_stats/top_ten.php (last visited Sept. 10, 2013).

[15] Available at http://ir.americanexpress.com/Cache/1500047528.PDF?Y=&O=PDF&D=&FID=1500047528&T=&IID=102700 (last visited Sept. 10, 2013).

transportation. The scope of frequent flyer programs extends far beyond airline prices, routes, and services, and claims related to membership status in a frequent flyer program are not preempted by the ADA.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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