No. 12-462

IN THE
Supreme Court of the United States

NORTHWEST, INC., and DELTA AIR LINES, INC.,
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 AMICI CURIAE AIRLINES FOR AMERICA AND AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Air Transport Association of America, Inc., (d.b.a. Airlines for America and hereafter referred to as A4A) is the trade association of the principal United States airlines. Together with their affiliates, those airlines transport more than ninety percent of U.S. airline passengers and cargo traffic. A4A's airline members are Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; UPS Airlines; US Airways, Inc.; and associate member Air Canada. *See* http://www.airlines.org/Pages/Members.aspx (last visited July 31, 2013).[1]

A4A's mission is to foster a business and regulatory environment that ensures safe and secure air transportation while permitting U.S. airlines to flourish, thereby stimulating economic growth locally, nationally, and internationally. As part of its mission, A4A seeks to identify and challenge laws and policies that impose inappropriate regulatory burdens on airlines. A4A has frequently participated as amicus curiae before this Court and others, including in cases concerning the preemption provision of the Airline Deregulation Act of 1978, or ADA, Pub. L. No. 95-504, § 4(a), 92 Stat. 1705 (codified as amended at 49 U.S.C. § 41713(b)(1)). Be-

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, and its counsel made a monetary contribution intended to fund the preparation of submission of this brief. Petitioners' blanket letter of consent has been filed with the Court. Respondent's written consent accompanies this brief.

cause the proper application of that provision is of critical importance to A4A's members, A4A has a strong interest in the resolution of this case.

American Trucking Associations, Inc., or ATA, is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including on numerous occasions before this Court.

The national trucking industry is an essential pillar of the American economy and lifestyle. To efficiently and competitively undertake the millions of daily—often interstate—shipments on which the economy depends, trucking companies must be free of individualized state regulatory requirements. Federal preemption of such requirements thus allows the trucking industry to meet the needs of the American economy. Congress put such preemption in place in 1994, enacting the Federal Aviation Administration Authorization Act, or FAAAA, Pub. L. No. 103-305, 108 Stat. 1569. As this Court has explained, that Act's preemption provision was "copied" from the ADA. *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008). This Court has thus interpreted the two provisions in parallel. *See id.* For that reason, ATA and its members have a direct and immediate interest in the Court's decision in this case.

SUMMARY OF ARGUMENT

Amici agree with petitioners' arguments for why the Ninth Circuit's judgment in this case should be reversed. In particular, amici agree that respondent's implied-covenant claim seeks to enlarge the parties' contractual bargain and hence does not fall within the narrow exception from preemption for true breach-of-contract claims that this Court recognized in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995). Amici also submit that the Ninth Circuit's decision in *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc), *amended on denial of reh'g*, 169 F.3d 594 (9th Cir. 1999) (en banc)—on which the Ninth Circuit's decision here relied in part—is starkly inconsistent with this Court's ADA precedent.

Amici will focus here, however, on an argument that was not pressed or passed on in the court of appeals but that other courts have recently addressed: that the ADA preempts only positive state laws, i.e., that *all* common-law claims are categorically exempt from preemption by the statute. *See, e.g.*, *Brown* v. *United Airlines, Inc.*, ___ F.3d ___, 2013 WL 3388904 (1st Cir. July 9, 2013) (rejecting such an argument); *Spinrad* v. *Comair, Inc.*, 825 F. Supp. 2d 397, 412-413 (E.D.N.Y. 2011) (Weinstein, J.) (suggesting in dicta that the argument has merit). That argument finds no support in the text of the ADA and gainsays decades of judicial precedent.

I. The relevant portion of the ADA's preemption provision refers to any state "law, regulation, or other provision having the force and effect of law," 49 U.S.C. § 41713(b). That language easily encompasses common-law claims.

If there were any doubt about that conclusion, it would be dispelled by the history of the preemption provision. The pertinent portion of that provision originally read: "any [state] law, *rule*, regulation, *standard*, or other provision having the force and effect of law." 49 U.S.C. App. § 1305(a)(1) (1988) (emphasis added). This language unquestionably encompassed common-law claims, as several courts of appeals held. And when Congress revised the preemption provision in 1994, as part of a general rewrite of the Federal Aviation Act (FAA), it specified that the revisions were not intended to make any substantive change. The current language is thus properly read to encompass common-law claims, as the original version did.

The conclusion that the ADA reaches some common-law claims is not altered by the FAA's "saving clause." That clause simply provides that a plaintiff may be able to obtain state-law remedies for violations of certain federal duties or self-imposed obligations. Nothing in it preserves substantive state-law rules of conduct from preemption, including rules derived from the common law.

II. The argument that common-law claims are categorically exempt from preemption under the ADA also contradicts settled precedent. First, in *Wolens* this Court carefully distinguished which common-law claims are preempted by the ADA and which are not. That nuanced line drawing would have made little sense if *all* common-law claims escape ADA preemption.

Second, for over two decades the all-but-universal understanding among the lower courts has been that common-law claims can be preempted by the ADA. The First and Seventh Circuits have so concluded expressly. And numerous other lower courts have held

specific common-law claims preempted by the ADA, albeit without explicitly addressing the issue. Not one court, by contrast, has held that common-law claims categorically escape ADA preemption.

ARGUMENT

I. THE TEXT OF THE ADA'S PREEMPTION PROVISION ENCOMPASSES COMMON-LAW CLAIMS

Through much of the 20th century, airlines were subject to extensive economic regulation by the federal government. *See generally Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); H.R. Rep. No. 95-1211, at 1-2 (1978). In 1978, however, Congress did away with virtually all of that regulation by enacting the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. That act reflected Congress's determination that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices, as well as variety [and] quality … of air transportation services." *Morales*, 504 U.S. at 378 (alterations and omission in original) (internal quotation marks omitted).

In relieving airlines of the burdens of federal economic regulation, Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989). Thus, "to ensure that the States would not undo federal deregulation with regulations of their own, [Congress] included a pre-emption provision" in the ADA. *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (internal quotation marks omitted). That provision commanded (with exceptions not relevant here) that "no State or political subdivision … shall enact or enforce any law, rule, regulation, stand-

ard, or other provision having the force and effect of law relating to rates, routes, or services of any [federally licensed] air carrier." ADA § 4(a), 92 Stat. at 1708. Following a 1994 revision that Congress explicitly labeled non-substantive, the clause now reads: "[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); *see American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 n.1 (1995) ("Congress intended th[is] revision to make no substantive change."). As explained below, this language—even divorced from its history, and certainly when considered in light of that history—reaches not only positive state enactments but also provisions of state common law.

A. Even Viewed In Isolation, The Current Text Of The ADA Preempts Common-Law Claims

1. The ADA's current phrasing encompasses claims brought under state common law. That is because a common-law doctrine "counts as an 'other provision having the force and effect of law' for purposes of" the ADA. *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605, 607 (7th Cir. 2000) (Easterbrook, J.). Indeed, "when read in context, the word 'provision' in the ADA preemption clause can most appropriately be construed to include common law." *Brown* v. *United Airlines, Inc.*, ___ F.3d ___, 2013 WL 3388904, at *7 (1st Cir. July 9, 2013).

To be sure, this Court has held that a preemption clause that referred only to "a [state] law or regulation" did not encompass state common-law. *See Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002). But the ADA also preempts a third category of state law, "other provision[s] having the force and effect of law." Under the

"cardinal rule that, if possible, effect shall be given to every clause and part of a statute," *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012), that additional language must have independent significance. The significance is that "other provision" refers to the third principal source of state law: common law. *See Brown*, 2013 WL 3388904, at *8 (deeming that to be the "most obvious purpose" of the "other provision" language). Such a reading is consistent with this and other courts' use of the word "provision" to refer to the common law. *See, e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 n.3 (1994) ("Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law[.]").[2]

The canon of *ejusdem generis*—i.e., "that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration," *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 223 (2008) (internal quo-

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[2] *See also United States* v. *Barnett*, 376 U.S. 681, 699-700 (1964) ("'The power to fine and imprison for contempt … is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law.'" (quoting *Watson* v. *Williams*, 36 Miss. 331 (1858)); *Caribbean Mushroom Co.* v. *Government Dev. Bank for P.R.*, 102 F.3d 1307, 1309 n.2 (1st Cir. 1996) (statute referring to "provisions of the common law"); *Rios* v. *Nicholson*, 490 F.3d 928, 931 (Fed. Cir. 2007) (referring to the "mailbox rule" as a "common law provision"); *Hardin* v. *BASF Corp.*, 397 F.3d 1082, 1085 (8th Cir. 2005), *vacated on reh'g* (June 29, 2005); *Yount* v. *Acuff Rose-Opryland*, 103 F.3d 830, 834 (9th Cir. 1996); *Hanton* v. *Gilbert*, 36 F.3d 4, 6 (4th Cir. 1994); *Resolution Trust Corp.* v. *Miramon*, 22 F.3d 1357, 1360 (5th Cir. 1994); *United States* v. *Woods*, 986 F.2d 669, 678 n.18 (3d Cir. 1993); *Boudin* v. *Thomas*, 732 F.2d 1107, 1114 (2d Cir. 1984).

tations omitted)—does not support reading the ADA's preemption provision to exclude common law. That is because common law *is* "akin" to the specific terms enumerated in the ADA. *See Brown*, 2013 WL 3388904, at *8 ("The trilogy of statutes, regulations, and common law comprises a natural grouping, with each component having roughly equal weight."). Like state laws and regulations, state common law imposes obligations that shape primary conduct. *See Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion) ("'[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959))); *accord Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1269-1270 (2012). Thus, state common law, no less than state statutes and regulations, can undermine Congress's effort to end government economic regulation of airlines and thereby allow market forces to prevail. In any event, this Court has cautioned against applying the *ejusdem generis* canon where it would lead to a result contrary to the overall statutory text and purpose. *See, e.g.*, *Ali*, 552 U.S. at 227; *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991) ("The canon does not control … when the whole context dictates a different conclusion."). That is the situation here.

Nor does any "presumption against preemption" suggest that the ADA should be read not to reach state common law. *See, e.g.*, *Brown*, 2013 WL 3388904, at *4-5. As this Court has explained, "an 'assumption' of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). Again, that is the situation here: The fed-

eral government has long dominated the regulation of interstate air travel. *See, e.g.*, S. Rep. No. 85-1811, at 5 (1958) ("[A]viation is … the only [transportation industry] whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities."). This Court has thus not applied a presumption against preemption in cases involving the ADA.

2. The balance of the ADA's preemption provision is consistent with the conclusion that the provision reaches state common law. For example, the ADA prohibits the "enforce[ment]" of state laws. 49 U.S.C. § 41713(b)(1). Common usage, including by this Court, makes clear that courts "enforce" common-law doctrines by applying them in individual cases. *See County of Sacramento* v. *Lewis*, 523 U.S. 833, 854 n.14 (1998) (referring to "courts enforcing the common law of torts"); *see also Brown*, 2013 WL 3388904, at *4 & n.3 (stating that a common-law "suit is backed by the weight of the state judiciary enforcing state law" and that it "makes no difference that the plaintiffs … are attempting to enforce state common law … in federal court"). There is also no plausible argument that the ADA cannot reach common-law claims because state courts (from which state common law originates) are not part of "a State, political subdivision of a State, or political authority of at least 2 States," 49 U.S.C. § 41713(b)(1). In *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008), this Court held common-law claims preempted by a provision that similarly applied only to a "State or political subdivision of a State," *id.* at 316.

3. Finally, as discussed above in the context of the *ejusdem generis* canon, reading the ADA not to preempt any common-law claims would make little sense. A common-law judgment "can be, indeed is de-

signed to be, a potent method of governing conduct and controlling policy." *Riegel*, 552 U.S. at 324. Thus, state common law may "disrupt[] the federal scheme no less than state regulatory law to the same effect." *Id.* at 325; *accord Brown*, 2013 WL 3388904, at *6 ("[C]ourts adjudicating common-law claims can create just as much uncertainty and inconsistency in a carefully calibrated federal regulatory framework as can state legislatures enacting statutes or state agencies promulgating regulations."). Categorically excepting common-law claims from the scope of the ADA would allow state courts to impose any number of onerous and detailed obligations on airlines, i.e., allow them to "undo federal deregulation with regulation of their own," *Rowe*, 552 U.S. at 368.

This case provides a good example. As noted, Congress enacted the ADA in part to promote the "quality … of air transportation services." *Morales*, 504 U.S. at 378 (omission in original). One of the most innovative and consumer-friendly of those services are frequent-flyer programs like the one at issue here, which reward the loyalty of an airline's most valuable customers. Although actions to terminate a program participant are exceedingly rare, airlines—in order to provide the benefits of the programs and to keep them fair to all participants—must be able to address the unusual situation in which a customer abuses a program. Common-law actions like this one interfere with airlines' ability to do so, subjecting airlines to a patchwork of state laws (backed by the possibility of jury awards). It should not "lightly be presumed" that Congress intended a result that would so frustrate the "very purposes" of the ADA. *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989).

B. The History Of The ADA's Preemption Clause Confirms That The Clause Encompasses Common-Law Claims

If there were any doubt about whether the ADA reaches common-law claims, the preemption provision's history would dispel it. *See Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001) ("We are aided in our interpretation by considering the predecessor preemption provision and the circumstances in which the current language was adopted.").

As originally enacted in 1978, the preemption clause read: "[N]o State … shall enact or enforce any law, *rule*, regulation, *standard*, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." 49 U.S.C. App. § 1305(a)(1) (1988) (emphasis added), *quoted in Wolens*, 513 U.S. at 222-223. That language plainly encompassed common-law claims, which embody state-law "rules" and "standards." Indeed, this Court has held that a nearly identical phrase in the Federal Railroad Safety Act—specifically, "law, rule, regulation, order, or standard"—includes "[l]egal duties imposed … by the common law." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).[3] Similarly, in *Riegel* the Court

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[3] A fuller excerpt of the preemption provision interpreted in *CSX Transportation* is as follows:

> Congress declares that laws, rules, regulations, orders, and standards shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

45 U.S.C. § 434, *quoted in CSX Transp.*, 507 U.S. at 662 n.2.

held that reference to a state's "requirements," a term synonymous with "rules," "includes [the state's] common-law duties." 552 U.S. at 324.

In line with these decisions, several lower courts held prior to 1994 that the ADA preempted common-law claims. The Seventh Circuit, for example, explained that the ADA prevented states from regulating airlines "by common law or by statute." *Statland* v. *American Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993). Other courts reached similar conclusions, though without extensive discussion. *See, e.g.*, *West* v. *Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993) ("We find that, under the reasoning in *Morales*, the ADA preempts West's claim for punitive damages under state contract and tort law[.]"); *O'Carroll* v. *American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989) ("O'Carroll's common law claims are preempted by section 1305[.]"); *Anderson* v. *USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987) ("A state [common-]law obligation to give courteous service… is expressly preempted by [the ADA.]"). To amici's knowledge, no court held to the contrary, i.e., that the ADA did not preempt any common-law claims.

In 1994, Congress effected a wholesale re-codification of Title 49, which included removing the words "rules" and "standards" from the relevant portion of the ADA's preemption provision. Congress explicitly stated, however, that the changes made in the re-codification (including to the ADA) were not substantive:

> Certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted by subsections (c)–(e) of this section *without substantive*

> *change* as subtitles II, III, and V–X of title 49, United States Code, "Transportation".

Pub. L. No. 103-272, § 1(a), 108 Stat. 745, 745 (1994) (emphasis added). This Court subsequently recognized Congress's "inten[t] … to make no substantive change" from the prior version of the ADA. *Wolens*, 513 U.S. at 223 n.1.

Because Congress did not substantively alter the ADA in 1994, the preemption provision's reach is defined by the original language. As explained, that language manifestly encompasses common-law claims. Even if it were otherwise, the fact that courts had construed the original language to encompass common-law claims means that the recodified statute does so. "Congress is presumed to be aware of a[] … judicial interpretation of a statute *and to adopt that interpretation* when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009) (emphasis added); *see also, e.g.*, *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1795-1796 (2010) (finding that Congress intended to incorporate the unanimous holding of the courts of appeals in subsequently enacted legislation).

C. The FAA's "Saving Clause" Does Not Support A Categorical Exemption From ADA Preemption For Common-Law Claims

The conclusion that the ADA encompasses common-law claims is not altered by the Federal Aviation Act's "saving clause," which provides that "[a] remedy

under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c).[4]

The saving clause was not enacted as part of the ADA and is not specifically directed to it. It is, rather, part of the sprawling and multifaceted FAA (i.e., "this part"). That statute (which now spans sections 40101 to 46507 of Title 49) addresses topics as diverse as airmail, labor-management relations, insurance, safety regulation, security, airport fees, and aircraft-noise regulation. Until 1978, the FAA contained a precursor to the saving clause but had no preemption provision; the ADA was added as an amendment to the FAA.

This Court thus explained in *Morales* that "the 'saving' clause is a relic of the pre-ADA/no pre-emption regime," and "cannot be allowed to supersede the specific substantive pre-emption provision." 504 U.S. at 385. In other words, the saving clause cannot justify giving the ADA's preemption provision a narrow construction, particularly given that it is not even directed at the preemption provision and retains abundant application outside that provision's scope.

Refusing to read the saving clause as dictating a categorical preemption exemption for common-law claims still leaves the clause with substantial significance. For one, the clause clarifies that, insofar as provisions in the FAA create "remedies," courts should not infer that those federal remedies automatically displace "any other remedies provided by law," 49 U.S.C.

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[4] Like the ADA's preemption provision (and the rest of Title 49), the saving clause was revised in 1994. The original version read: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1976).

§ 40120—including remedies arising under state common law. The saving clause thus continues to preserve, for example, state-law remedies that pertain to aviation but are not "related to a price, route, or service of an air carrier" within the meaning of the ADA's preemption provision (and are not otherwise preempted).

Moreover, the saving clause may preserve state *remedies* for violations of duties derived from other sources. This Court suggested as much in *Wolens*, stating that the ADA's preemption provision, "read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." 513 U.S. at 232-233.

Neither *Sprietsma* nor *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), dictates a different conclusion regarding the import of the FAA's saving clause. Although both cases relied in part on the presence of a saving clause in holding common-law claims not to be preempted, *see Sprietsma*, 537 U.S. at 63; *Geier*, 529 U.S. at 867-868, the provisions at issue in those cases were materially different from those here. In particular, neither *Sprietsma* nor *Geier* involved the application of a generally applicable saving clause to a later-added and more specific preemption provision. Each instead applied a saving clause enacted together with the relevant preemption provision. *See Geier*, 529 U.S. at 868; *Sprietsma*, 537 U.S. at 57-58, 63. Here, in contrast, the saving clause was enacted decades before the ADA's preemption provision, applies to a much broader field than the one addressed by the ADA, and thus—as this Court held in *Morales* (*see* 504 U.S. at 385)—reveals little about the meaning of the ADA. *See*

Brown, 2013 WL 3388904, at *9 (distinguishing *Sprietsma* and *Geier* on this basis).

II. EXEMPTING ALL COMMON-LAW CLAIMS FROM ADA PREEMPTION WOULD CONTRADICT SETTLED PRECEDENT

A holding that the ADA does not preempt any common-law claims would derogate not only the statutory text but also established case law. To begin with, this Court's decision in *Wolens*—which carefully parsed which common-law claims are subject to ADA preemption and which are not—makes clear that there is no categorical exception for such claims. In addition, since adoption of the ADA, the uniform understanding of the lower courts has been that common-law claims do not always escape preemption. There is no reason to upend that settled view.

A. *Wolens* Demonstrates That The ADA Includes No Blanket Exception For Common-Law Claims

In *Wolens* this Court considered whether the ADA preempted a state common-law claim for breach of contract. *See* 513 U.S. at 226, 228-229. Although the Court held that the claim was not preempted, nothing in its opinion suggests that this holding rested on the view that *all* common-law claims escape ADA preemption. To the contrary, the Court explained that the reason the claim could proceed was that the ADA "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." *Id.* at 222. Underscoring this distinction, the Court stressed that the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancements based on state laws

or policies external to the agreement." *Id.* at 233. *Wolens* thus recognized only a narrow exception from ADA preemption, for claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228.

If common-law claims categorically escaped preemption under the ADA, *Wolens* would not have needed to draw such a nuanced line. The Court could simply have stated that the breach-of-contract claim was not preempted because it arose under the common law. Similarly, the Court would not have needed to explain that other breach-of-contract claims *would* be preempted to the extent that applicable common-law rules imported "state … policies external to the agreement." 513 U.S. at 233. The Court's opinion thus clearly rests on the assumption that there are some state common-law claims—including some breach-of-contract claims—falling outside the exception the Court recognized. In short, *Wolens* is fundamentally at odds with the argument that all common-law claims are exempt from ADA preemption.

B. A Phalanx Of Lower Court Precedent Is Inconsistent With The Assertion That No Common-Law Claims Are Preempted By The ADA

The argument that no common-law claims are preempted by the ADA also founders on more than twenty years of lower-court precedent. As explained above (*see* Part I.B.), prior to 1994 all lower courts that considered the question found (explicitly or implicitly) that the ADA's preemption provision encompassed common-law claims. That understanding has not changed since 1994. To the contrary, the two circuits that have directly confronted the issue both held that

"[s]tate common law counts as an 'other provision having the force and effect of law.'" *Mesa Airlines, Inc.*, 219 F.3d at 607; *see also Brown*, 2013 WL 3388904, at *4 ("The plaintiffs … say that … the term 'other provision[]' … does not include common law. We do not agree.").

Seven other circuits, while not explicitly rejecting the categorical-preemption question, have also held common-law claims preempted by the ADA. *See, e.g.*, *Onoh* v. *Northwest Airlines, Inc.*, 613 F.3d 596, 599 (5th Cir. 2010) ("Any state law, including state common law, having a connection with or reference to airline prices, routes, or services is preempted unless the connection or reference is too tenuous, remote or peripheral." (internal quotation marks omitted)); *Weiss* v. *El Al Israel Airlines*, 309 F. App'x 483, 484 (2d Cir. 2009) ("The parties agree that a common law tort action is a 'law, regulation, or other provision having the force and effect of law[.]'"); *Weber* v. *USAirways, Inc.*, 11 F. App'x 56, 57-58 (4th Cir. 2001) (common-law fraud claim held preempted); *Musson Theatrical, Inc.* v. *Federal Express Corp.*, 89 F.3d 1244, 1247, 1251 (6th Cir. 1996) (state common-law fraud claims held preempted); *Sanchez* v. *Aerovias De Mex., S.A. De C.V.*, 590 F.3d 1027, 1031 (9th Cir. 2010) (similar); *Koutsouradis* v. *Delta Air Lines, Inc.*, 427 F.3d 1339, 1344 (11th Cir. 2005) (similar); *Anderson*, 818 F.2d at 57 (similar). Of the remaining circuits, none has held all common-law claims exempt from ADA preemption. *See Brown*, 2013 WL 3388904, at *6 ("The only reported circuit court decision that squarely addresses the question of whether

the 'other provision' language extends to state common law answers that question in the affirmative.").[5]

Many of these cases admittedly did not explicitly address the categorical-exemption argument. Yet in considering the proper scope of the ADA, it is surely relevant that the judges and litigants in dozens of cases decided over a period of roughly two decades have uniformly assumed (if not affirmatively concluded) that the ADA does not categorically except common-law claims from preemption.

Finally, it is true some circuits have found individual common-law claims *not* preempted by the ADA. But those claims were deemed not to "relate to" an airline's prices, routes, or services, which is a prerequisite for ADA preemption. *See, e.g.*, *Taj Mahal Travel, Inc.* v. *Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998). These cases thus provide no support for the notion that state common-law claims categorically escape ADA preemption. As explained herein, they do not.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[5] There are likewise numerous lower-court decisions holding common-law claims preempted by the FAAAA. *See, e.g.*, *S.C. Johnson & Son, Inc.* v. *Transport Corp. of Am.*, 697 F.3d 544, 561 (7th Cir. 2012); *Data Mfg., Inc.* v. *United Parcel Serv., Inc.*, 557 F.3d 849, 853 (8th Cir. 2009); *see also supra* p.3 (explaining that the FAAAA and ADA are interpreted identically for preemption purposes).

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