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

Respondent's Brief in Opposition

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QUESTION PRESENTED

Rabbi S. Binyomin Ginsberg is a long-standing and frequent Northwest passenger who, in 2005, earned the highest level of membership benefits in Northwest's "WorldPerks" customer loyalty program. In 2008, Northwest abruptly revoked his status in the program. Rabbi Ginsberg filed suit alleging, as relevant here, that Northwest breached the implied covenant of good faith and fair dealing in terminating his WorldPerks membership status. The question presented is:

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

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INTRODUCTION

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995), this Court held that although the Airline Deregulation Act's (ADA) preemption provision "bars state-imposed regulation of air carriers," it "allows room for court enforcement of contract terms set by the parties themselves." Such state-law-based contract claims, it explained, involve "privately ordered obligations and thus do not amount to a State's enact[ment] or enforce[ment] [of] any law" within the meaning of the preemption provision. *Id.* at 228-29 (internal quotations and citation omitted). Relying heavily on *Wolens*, the court below held that the ADA does not preempt Rabbi S. Binyomin Ginsberg's claim for breach of the implied covenant of good faith and fair dealing based on Northwest's termination of his status in its WorldPerks customer loyalty program. Although Northwest can choose whether to establish such a program, the court explained, "that economic decision means that the airline has to abide by its contractual obligations, within this deregulated context, pursuant to the covenant of good faith and fair dealing." Pet. App. 16-17.

Northwest and its parent corporation, Delta Air Lines, seek review, contending the lower court's decision is "in conflict with the decisions of other Circuits." Pet. i. But there is no circuit split over whether the ADA preempts contract claims based on the doctrine of good faith and fair dealing. And although petitioners claim the decision below is the culmination of a "trifecta" of cases that have been "the source of significant Circuit conflict," Pet. 12, the other two cases in the purported trifecta involved only the "related to" language in the ADA's preemption provision, not the "enact or enforce a law" language at issue in *Wolens*. Moreover, even looking only at the "related to"

language, Rabbi Ginsberg's claim does not implicate the disagreements some courts have had with the two other cases on which petitioners focus.

The court of appeals correctly held that the ADA does not preempt Rabbi Ginsberg's contract claim based on the implied covenant of good faith and fair dealing. The covenant of good faith and fair dealing is an implied term of the parties' contract. Claims based on the covenant are contract claims, and determining whether the covenant was breached involves contract interpretation and the parties' justified expectations in entering the agreement. Like the contract claims in *Wolens*, good faith and fair dealing claims involve "privately ordered obligations and thus do not amount to a State's enact[ment] or enforce[ment] [of] any law" within the meaning of the preemption provision. *Wolens*, 513 U.S. at 228-29 (internal quotations and citation omitted). Moreover, Rabbi Ginsberg's good faith and fair dealing claim over whether his membership status in a customer loyalty program could be terminated without valid cause is far removed from Congress's deregulatory concerns in enacting the ADA. The petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

Rabbi 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. Dist. Ct. Doc. No. 1, at ¶ 12. Rabbi Ginsberg and his wife travel almost exclusively on Northwest, logging approximately 75 flights with the airline each year. *Id.* ¶ 13.

Since 1999, Rabbi Ginsberg has been a member of Northwest's customer loyalty program, known as WorldPerks. In 2005, because of his extensive travel, he achieved Platinum Elite status in the program. *Id.* ¶ 12.

In June 2008, however, Rabbi Ginsberg received a call from a Northwest representative telling him that Northwest was revoking his Platinum Elite status, purportedly because he had abused the program by complaining to the Customer Care line too many times, allegedly booking reservations on full flights with the purpose of being bumped, and being bumped from flights too often. *Id.* ¶ 15. In fact, Rabbi Ginsberg contacted customer service in only a small percentage of the flights he and his wife took and had no control over the booking policies that led Northwest to "bump" him. *Id.* ¶¶ 33-34.

Rabbi Ginsberg, who was in the car en route from Detroit to Chicago 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. He was told that there was nothing more to discuss, and that he would be receiving a letter from Northwest's Customer Care department officially revoking his status and explaining in detail what he had done to warrant the revocation. *Id.* ¶¶ 15-16. At the time of the call, Rabbi Ginsberg's Platinum Elite card showed an expiration date of February 2009. *Id.* ¶ 15.

Rabbi Ginsberg subsequently contacted Northwest's Legal Department and spoke with a representative who told him that Northwest has the right to terminate his program membership at any time. She added that Northwest also was revoking his wife's Silver Elite WorldPerks status and that Northwest was sending a letter explaining its actions. *Id.* ¶ 17.

Rabbi Ginsberg later received a letter dated July 18, 2008 from Northwest's Customer Care Coordinator. That letter, however, did not mention revoking his WorldPerks status, nor did it assert that Rabbi Ginsberg had ever abused the program. Instead, it noted that Rabbi Ginsberg had repeatedly contacted the customer care office regarding travel problems, apologized for the many problems Rabbi Ginsberg had encountered with Northwest's services, thanked him for bringing the problems to Northwest's attention, but stated that it would no longer be providing him compensation every time he contacted the airline. *Id.* Exh. A.

Over the following months, Rabbi Ginsberg, who was maintaining his heavy flight schedule on Northwest, continued to try to ascertain his status with the WorldPerks program, but received inconsistent responses. *Id.* ¶¶ 25-27. Finally, on November 20, 2008, in response to an email from Rabbi Ginsberg to the Customer Care Coordinator in which Rabbi Ginsberg sought "clarification as to my Platinum status" and asked if she would "be so kind and inform me of why my status has been removed," the Customer Care Coordinator sent Rabbi Ginsberg an email pointing him towards paragraph 7 of the WorldPerks Terms and Conditions. *Id.* Exh. B. 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 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 actions, as it deems necessary, and to recover damages, attorneys' fees, and court costs.

Id. Exh. C. The email did not state in what way Northwest believed Rabbi Ginsberg had abused the WorldPerks program.[1] As a result of the termination of

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[1]The petition states that Rabbi Ginsberg "speculates that he was dismissed for 'untoward or harassing behavior with reference to [a] Northwest employee,'" Pet. 5, which could be interpreted to mean that he agreed that he had engaged in such behavior. He did not. Rather, in the paragraph of the complaint cited in the petition, Rabbi Ginsberg noted that "Given that plaintiff has neither engaged in, nor been accused of, 'failure to follow program policies and procedures' or 'the sale or barter of awards or tickets and any misrepresentation of fact relating thereto,' plaintiff can only conclude that Northwest was asserting that he had engaged in 'other improper conduct as determined by Northwest in its sole judgment, including, among other things . . . untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions . . . ." Dist. Ct. Doc. No. 1, at ¶ 29 (emphasis removed).

his status, Rabbi Ginsberg lost valuable rights under the program. *Id.* ¶ 40.

B. Proceedings Below

On January 8, 2009, Rabbi Ginsberg filed this case against Northwest and Delta on behalf of himself and all other program members whose program status was revoked without valid cause, alleging breach of written contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation. *Id.* ¶¶ 41-45. The district court granted defendants' motion to dismiss, Pet. App. 61, holding that Rabbi Ginsberg failed to allege sufficient facts to show a material breach of contract and that his other claims are preempted by the ADA, 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." 49 U.S.C. § 41713(b).

Rabbi Ginsberg appealed solely with respect to his claim for breach of the implied covenant of good faith and fair dealing. The court of appeals reversed, holding that "the ADA does not preempt this common law contract claim." Pet App. 3.[2]

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[2]The panel originally consisted of Judges Beezer, Rymer, and Trott. Pet. App. 20. After the decision was filed, but while the case was pending on a petition for rehearing or rehearing en banc, Judge Rymer passed away. Judge Schroeder replaced her on the panel, and the court withdrew the original opinion and filed a new opinion that was authored and approved by Judge Beezer before he passed away. *Id.* at 2. Because the earlier decision has been superseded, this brief focuses on the amended opinion.

The court of appeals began with a general discussion of preemption principles, but the majority of its analysis is in a section of its decision entitled "Supreme Court and Ninth Circuit Precedent." *Id.* at 8-17. After discussing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court's first decision interpreting the ADA's preemption provision, the court of appeals focused on *Wolens*, 513 U.S. 219, which considered whether the ADA preempts state consumer fraud act and breach of contract claims based on the devaluation of credits earned in a frequent flyer program. As the court of appeals explained, *Wolens* held that the ADA preempted the state consumer fraud act claims, but "allowed the breach of contract claim to go forward, making clear that the ADA 'allows room for court enforcement of contract terms set by the parties themselves.'" Pet. App. 10 (quoting *Wolens*, 219 U.S. at 222). "In so doing," the court of appeals noted, "the Court held that Congress did not intend to preempt common law contract claims." *Id.* (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1264 (9th Cir. 1998) (en banc)).

The court of appeals noted that *Wolens* drew a "clear distinction . . . between state laws that regulate airlines and state enforcement of contract disputes." *Id.* Because it viewed this distinction as "crucial," *id.*, the court of appeals quoted "at length" *Wolens*'s explanation of the distinction. *Id.* at 10-12. It then explained that, "[i]n sum, the Court concluded that a state does not 'enact or enforce any law' when it uses its contract laws to enforce private agreements." *Id.* at 12.

After briefly discussing *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), the Court's most recent ADA-related preemption case, the court of appeals ran through numerous additional factors in

support of the conclusion that the ADA does not preempt common law contract claims such as Rabbi Ginsberg's. The court noted that it had concluded in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), that a claim for breach of the covenant of good faith and fair dealing was too tenuously connected to airline deregulation to trigger ADA preemption. Pet. App. 14. It pointed out that the purpose of the preemption clause was to "prevent state interference with the mandate of deregulation." *Id.* It determined that the ADA's savings clause evidenced congressional intent to preserve "state contract remedies that already existed at common law, such as the implied covenant of good faith and fair dealing." *Id.* at 15. And it explained, as this Court did in *Wolens*, that the Department of Transportation "is not equipped to handle contract disputes," contrasting the lack of regulation of contract disputes with the many agency regulations on airline safety. *Id.*

The court concluded the section by explaining that "Northwest is free to invest in a frequent flier program," but "that economic decision means that the airline has to abide by its contractual obligations, within this deregulated context, pursuant to the covenant of good faith and fair dealing." *Id.* at 16-17. "[S]tate enforcement of the covenant is not 'to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption.'" *Id.* at 17 (citation omitted).

In a separate section, the court explained that it disagreed with the district court's conclusion that Rabbi Ginsberg's claim for breach of the covenant of good faith and fair dealing would "relate to" prices and services. *Id.*

Northwest petitioned for rehearing and rehearing en banc. While the motion was pending, Judge Rymer passed

away, and an amended opinion was issued. *See supra* n. 2. The court denied the petition. Pet. App. 2.

REASONS FOR DENYING THE WRIT

I. Resolution of the Question Whether Claims of Good Faith and Fair Dealing Are Unrelated to Prices, Routes, and Services Would Not Affect the Outcome Here.

For a claim to be preempted under the ADA, it must (1) involve the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law," that (2) is "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b). In *Wolens*, 512 U.S. at 228-29, this Court held that the ADA does not preempt claims based on contract terms because they do not involve the "enact[ment] or enforce[ment]" of a law within the first prong of the test.

In their question presented, petitioners depict the decision below as relying solely on the second, "related to" prong and seek certiorari to resolve the question whether the court of appeals erred "by holding . . . that respondent's implied covenant of good faith and fair dealing claim was not preempted under the ADA because such claims are categorically unrelated to a price, route, or service." Pet. i-ii. But the decision below was not based solely on the preemption provision's "related to" language. By the time it noted that it disagreed with the district court on whether Rabbi Ginsberg's claim was related to prices, routes, or services, Pet. App. 17, the court of appeals had already concluded, relying heavily on *Wolens*, that the ADA did not free Northwest from "abid[ing] by its contractual obligations . . . pursuant to the covenant of good faith and fair dealing." *Id.* at 16-17; *see also*, *e.g.*, *id.* at 12 (noting that institutional limitations "demonstrate the

ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing"); *id.* at 14 (finding it "evident" that Congress "did not intend [the ADA] to preempt state common law contract claims"). Indeed, the petition itself recognizes that the court below determined that implied covenant of good faith and fair dealing claims are among the "contract claims saved from preemption in *Wolens*," Pet. 17, which relied on the preemption provision's "enact or enforce a law" language, not its "related to" language.

Because, like the contract claims in *Wolens*, claims based on the implied covenant of good faith and fair dealing do 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), resolution of the question whether good faith claims in general, or Rabbi Ginsberg's claim in particular, are unrelated to prices, routes, and services would not alter the conclusion that Rabbi Ginsberg's claim is not preempted.

II. There Is No Relevant Circuit Split.

A. The Circuits Are Not Split Over Whether the ADA Preempts Contract Claims Based on the Doctrine of Good Faith and Fair Dealing.

The petition is replete with references to circuit splits, asserting even in the question presented that the holding below is "in conflict with the decisions of other Circuits." Pet. i. In particular, Petitioners argue that the decision below conflicts with decisions of other circuits by declaring good faith and fair dealing claims "categorically exempt from preemption," whereas other circuits have recognized that "*Wolens* . . . requires an individualized inquiry into the nature of the implied covenant of good faith claim." Pet. 17. But contrary to petitioners' assertions, the decision below

does not hold that whether a claim is preempted depends simply on whether the plaintiff "label[ed]" it a claim for breach of the covenant of good faith and fair dealing. Pet. 13, 14, 33. Rather, it held that claims that actually *are* contract claims based on the doctrine of good faith and fair dealing are not, because of their nature, preempted. Petitioners cite no cases that conflict with that holding.

First, although the petition claims that the lower court's holding that the ADA does not preempt good faith and fair dealing claims is contrary to the holdings of other "courts to address this issue, including the First and Seventh Circuits," Pet. 14, the Seventh Circuit case on which petitioners rely, *Travel All Over the World, Inc. v. Kingdom of Saudia Arabia*, 73 F.3d 1423 (7th Cir. 1996), does not involve a good faith and fair dealing claim, let alone "address" whether such claims are preempted by the ADA. In that case, a travel agency sued an airline for cancelling the agency's clients' tickets, thereby forcing the clients to repurchase the tickets directly through the airline, and for making false statements about the agency to its clients, such as that the agency had not booked seats for many of them. The complaint alleged breach of contract, defamation, slander, fraud, intentional infliction of emotional distress, and tortious interference with a business relationship. *Id.* at 1428. The Seventh Circuit held that the breach of contract claims were not preempted under *Wolens* and that the defamation and slander claims were not related to prices, routes, or services, but that the other tort claims were preempted. *Id.* at 1432-35.

Although *Travel All Over the World* does not involve a good faith and fair dealing claim, the petition suggests it conflicts with the decision below because, in a footnote, the Seventh Circuit noted that it did not "foreclose the possibility that, upon remand and further development of

the case, the district court may find that the plaintiffs are relying on principles of contract law that do not 'seek to effectuate . . . the intent of the parties,' which could be open to preemption under *Wolens*." *Id.* at 1432 n.8. According to the petition, through this footnote, the Seventh Circuit recognized that *Wolens* "cannot possibly support the categorical exemption adopted by the Ninth Circuit." Pet. 17. But the Seventh Circuit's recognition that claims based on *some* contract-law principles may "be open to preemption under *Wolens*" does not conflict with the lower court's holding that claims based on good faith and fair dealing principles are not preempted. Rather, the Seventh Circuit's recognition that claims that do seek to effectuate the parties' intent are not preempted is consistent with the holding below that good faith and fair dealing claims, which look to the parties reasonable expectations in entering the agreement, are not preempted.[3]

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[3]The petition also suggests a circuit split between the decision below and *Travel All Over the World* on the "related to" prong of the preemption test, quoting a district court that stated that the decision below "was decided in large part . . . on the conclusion that the implied covenant of good faith and fair dealing can never 'relate to' prices, routes, or services," and that such a conclusion appeared to be in conflict with a statement in *Travel All Over the World* that the court must look at the facts alleged to determine whether a claim relates to prices, routes, or services. Pet. 29 (quoting *Newman v. Spirit Airlines, Inc.*, No. 12-2897, 2012 WL 3134422, *3-4 (N.D. Ill. July 27, 2012)). But although the section of the decision below that focuses on the "related to" language is titled "the implied covenant of good faith and fair dealing does not 'relate to' prices, routes, or services," Pet. App. 17, that section simply states that the court disagreed with the district court about whether *Rabbi Ginsberg's* claim was sufficiently related to prices, routes, or services to be preempted. *Id.* Given the differences in the facts and claims alleged here and the facts

(continued...)

Likewise, Petitioners suggest a conflict with *Data Manufacturing, Inc. v. United Parcel Service, Inc.*, 557 F.3d 849 (8th Cir. 2009). However, like *Travel All Over the World*, that case did not involve a good faith and fair dealing claim and thus does not speak to whether contract claims based on the doctrine of good faith and fair dealing are preempted.

In contrast to *Travel All Over the World* and *Data Manufacturing*, the First Circuit decision on which the petition relies, *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), at least involves a good faith and fair dealing claim. Nonetheless, it, too, does not conflict with the decision below. In *Buck*, customers who had bought non-refundable tickets that they did not use sued several airlines for failing to refund various taxes and fees that did not become due until the travel took place. The plaintiffs alleged "multitudinous statements of claim," *id.* at 32, one of which was for breach of a covenant of good faith and fair dealing, but the crux of their argument was that they were seeking to enforce federal policy. The court first rejected the arguments that there was an implied right of action under ADA regulations, that plaintiffs' state-law claims were outside the ambit of preemption because they were using state remedies to enforce federal policy, and that plaintiffs' claims were unrelated to prices. *Id.* at 34-36. The court then addressed the argument that the contract-based claims were free from preemption under *Wolens*. The court held that claims based on allegations of implicit

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[3](...continued)
and claims alleged in *Travel All Over the World*, there is no conflict between the conclusions that Rabbi Ginsberg's claim is not preempted but that some of the claims alleged in *Travel All Over the World* are preempted.

contract terms failed, including the claim labeled good faith and fair dealing, because the terms the plaintiffs argued were part of the contract were provisions from a federal regulation, and the federal regulation could not "be read as an implied contract provision" because doing so would be an "evasion of the implied right of action doctrine." *Id.* at 37.

Thus, *Buck* does not hold that contract claims based on the doctrine of good faith and fair dealing are preempted; it holds that plaintiffs cannot evade the implied right of action doctrine by trying to enforce federal regulations under the guise of a contract law claim, and thus that the plaintiffs had failed to establish such a claim. That issue is not relevant here, and *Buck* presents no conflict with the decision below.

B. This Court Should Not Grant the Petition to Resolve Circuit Splits Not Implicated by this Case or to Review the Ninth Circuit's Jurisprudence Generally.

Unable to show a circuit split on the question of whether the ADA preempts contract claims based on the implied covenant of good faith and fair dealing, petitioners assert that the Court should grant certiorari because "the Ninth Circuit has repeatedly strayed from this Court's teaching about the ADA." Pet. 33. According to the petition, the decision below is part of a "trilogy of seminal ADA preemption cases," Pet. 21; the other two cases in the "trifecta" have engendered conflict; and the decision below "entrench[ed] and perpetuat[ed] the already existing conflict." Pet. 12-13. But the grounds on which courts have disagreed with the other two cases are not implicated by this petition, and this Court should not grant the

petition generally to review "the Ninth Circuit's jurisprudence." Pet. App. 22.

First, petitioners focus on *West v. Northwest Airlines, Inc.*, 995 F.2d 148, devoting almost four pages of their petition to the case. In *West*, the Ninth Circuit, relying on *Morales*, held that a claim for compensatory damages for breach of the covenant of good faith and fair dealing, based on the airline's having bumped the plaintiff from a flight for which he had a ticket, did not meet the "related to" prong of the preemption test. The court based its decision largely on federal regulations that explicitly allow passengers who are bumped to seek relief in court. *See* 14 C.F.R. 250.9(b). As the petition notes, in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995), the Fifth Circuit disagreed with *West*, stating that it considered "a lawsuit for overbooking . . . [to] 'relate to' the airline's contract for 'services' with its passenger." But whether a claim for breach of the covenant of good faith and fair dealing based on overbooking is sufficiently related to prices, routes, or services to be preempted given federal regulations on overbooking is irrelevant here. This case does not involve an overbooking claim, and Rabbi Ginsberg's claim, based on the termination of his status in a customer loyalty program, is far more tenuously related to airline prices, routes, or services than an overbooking claim. Moreover, contrary to petitioners' claim, there is no indication that the decision below read *West* to "*requir[e]* the conclusion" that Rabbi Ginsberg's claim was not related to prices, routes, or services. Pet. 28 (emphasis added).

Petitioners also devote significant attention to *Charas v. Trans World Airlines, Inc.*, 160 F.3d at 1266, which which held that "Congress used 'service' in [the ADA] in the public utility sense—i.e., the provision of air

transportation to and from various markets at various times." Petitioners note that other circuits have adopted broader definitions of "services." Pet. 26-27. But petitioners do not show that differences in the circuits' definitions of "services" would make a difference in *this* case. And the decision below does not rely on *Charas*'s definition of "services."

Thus, this case does not implicate the disagreements some courts have had with various aspects of *West* and *Charas*. Moreover, *West* and *Charas* involved only the "related to" prong of the preemption test. As the petition notes, however, the court of appeals below concluded that breach of covenant of good faith and fair dealing claims were among the "breach of contract claims saved from preemption in *Wolens*," Pet. 17, which involves the "enact or enforce a law" prong of the preemption provision. Because the claims here do not involve the "enact[ment] or enforce[ment] [of] a law" within the meaning of the ADA's preemption clause, resolution of any disagreements about only the "related to" language in the preemption provision would not alter the outcome of this case.

III. The Decision Below Is Consistent With This Court's Case Law and Correct.

The court of appeals correctly held that the ADA does not preempt Rabbi Ginsberg's claim for breach of the covenant of good faith and fair dealing.

First, Rabbi Ginsberg's claim does not involve the "enact[ment] or enforce[ment]" of a law within the meaning of the ADA. In *Wolens*, the Court considered whether the ADA preempted consumer fraud act and contract claims based on retroactive modifications in a frequent flyer program that devalued frequent flyer credits already accumulated. The Court determined that

the contract claims were not preempted because they did not involve the enactment or enforcement of a law. "[T]he ADA's preemption prescription," it held, "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 222.

The Court recognized that the term "enforce" could be read to include state-court enforcement of private agreements. *Id.* at 229 n.5. However, it did "not read the ADA's preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's breach of its own, self-imposed undertakings." *Id.* at 228. It noted that the ADA was "designed to promote 'maximum reliance on competitive market forces,'" and explained that "[m]arket efficiency requires effective means to enforce private agreements." *Id.* at 230 (citation omitted). It pointed out that the Department of Transportation has no administrative process for adjudication of private contract disputes. And it found it not "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 rates, routes, or services." *Id.* at 232. Finally, it concluded that allowing adjudication of contract claims made sense of the Federal Aviation Act's (FAA) savings clause. Overall, it explained that the "ADA's preemption clause, . . . read together with the FAA's savings 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 the term the airline itself stipulated." *Id.* at 232-33.

Like the contract claims at issue in *Wolens*, Rabbi Ginsberg's covenant of good fath and fair dealing claim

involves a contract into which the airline entered voluntarily, not state-imposed "substantive standards with respect to rates, routes, or services." *Id.* at 232. Just as the airline, in agreeing to the contract, was agreeing to its explicit terms, it was also agreeing to perform those terms with good faith. "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. "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." *Id.* comment a. Determining whether the covenant of good faith and fair dealing has been breached does not involve application of external state policies on prices, routes, and services; it involves contract construction and evaluation of the legitimate expectations of the parties. Here, Rabbi Ginsberg's claim seeks to have the airline perform the WorldPerks contract in a manner consistent with his reasonable expectations. Dist. Ct. Doc. No. 1, at ¶¶ 56-57. This claim relates to "privately ordered obligations 'and thus do[es] not amount to a State's 'enact[ment] or enforce[ment] [of] any law'" within the meaning of the ADA's preemption provision. *Wolens,* 513 U.S. at 228-29 (citation omitted).

Moreover, although the Ninth Circuit's decision was not based on this ground, Rabbi Ginsberg's claim also is not preempted because it arises under the common law and does not involve a "law, regulation, or other provision having the force and effect of law." *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting "a law or regulation" in an express preemption provision to encompass only positive enactments).

Finally, Rabbi Ginsberg's claim does not involve enactment or enforcement of a law "related to a price,

route, or service of an air carrier." 49 U.S.C. § 41713(b). Petitioners assert that Rabbi Ginsberg's claim must relate to prices, routes, and services because this Court determined that the claims at issue in *Wolens* related to prices and services, and, like those claims, Rabbi Ginsberg's involves a frequent flyer program. Pet. 20. But Rabbi Ginsberg's claim here is far more tenuously related to prices, routes, and services than those at issue in *Wolens*. *Wolens* involved specific frequent flyer program modifications that reduced the value of mileage credits earned when they were exchanged for tickets or upgrades, such as new limits on seats available to passengers obtaining tickets with mileage credits and restrictions on when credits could be used. The Court determined that the claims challenging these modifications "relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Wolens*, 513 U.S. at 226. Rabbi Ginsberg's claim, in contrast, does not relate to the value of WorldPerks credits in general in obtaining tickets or upgrades, but to whether Northwest could terminate his membership status in a customer loyalty program without valid cause.

In enacting the ADA, Congress sought to promote "maximum reliance on competitive market forces." *Morales*, 504 U.S. at 378 (citation omitted). The purpose of the preemption provision was to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* Rabbi Ginsberg's claim is not based on any state regulation of air carriers, but on the covenant of good faith found in every contract. Requiring air carriers to perform contractual obligations into which they voluntarily

enter in good faith is far removed from Congress's deregulatory goals, and the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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