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 OF *AMICUS CURIAE* THE CARGO AIRLINE ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the court of appeals err by holding, in conflict with the decisions of other Circuits, that respondent's implied covenant of good faith and fair dealing claim was not preempted under the ADA because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent flyer program (the precise context of *Wolens*) and manifestly enlarged the terms of the parties' voluntary undertakings, which allowed termination in Northwest's sole discretion.

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BRIEF OF *AMICUS CURIAE* THE CARGO AIRLINE ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Cargo Airline Association (CAA) is the nationwide trade organization for members of the all-cargo air carrier industry and others that depend on air cargo services. It represents the interests of six all-cargo air carrier members: ABX Air, Inc., Atlas Air, Inc., FedEx Express, United Parcel Service Co., DHL Express, and Kalitta Air, LLC. It also has a number of associate members, which include airports that generate a significant amount of air freight and other industry members with a stake in the air cargo marketplace.[2] As the voice of the all-cargo air carrier industry, the CAA represents the industry before federal and state regulatory bodies, the United States Congress and, when necessary, in the state and federal courts.

The all-cargo air carrier industry is a critical component of the nation's economy, a component that differs significantly from the passenger carrier industry. It includes both scheduled and on-demand operators that provide a worldwide network of air

[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] A complete list of CAA's members is available at http://www.cargoair.org/our-members.cfm.

transportation and delivery services. Customers range from individuals and small businesses in small communities to multi-billion dollar corporations shipping packages or heavy freight throughout the world. Among the broad range of services that all-cargo carriers provide are the delivery of time-critical perishables, such as vital medical supplies; human organs and immunization materials; and mission-critical airlift services for government agencies, the military, and nongovernment organizations such as the United Nations and the World Health Organization.

Over its sixty-plus year history, a primary mission of the CAA has been to protect its members from unduly burdensome regulations. The Cargo Airline Association began in 1948 as the Air Freight Forwarders Association, which was formed to protect members of the new air freight forwarding industry from overly burdensome regulation by the Civil Aeronautics Board. Following deregulation of the air carrier industry, the CAA has sought to ensure that Congress' deregulatory objectives are preserved and upheld against re-regulation by states and localities, as provided by the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified, as amended, at 49 U.S.C. § 41713(b)(1)), the statute at issue in this case.[3]

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[3] This Court has recognized that the preemption provision in the subsequently enacted Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-06 (1994) (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)) has the same preemptive effect as the ADA. *See Rowe v. N.H. Motor*

Proper application of ADA preemption is of utmost importance to the CAA's members, who rely on the ADA to prevent all-cargo air carriers from being subjected to a complicated patchwork of state regulations. A uniform system of regulation is critically necessary for all-cargo carriers. Unlike passenger carriers, many all-cargo carriers (FedEx and UPS, for example), provide their services to every zip code in the United States and offer money-back guarantees if service commitments are not met. A patchwork system of state and local regulations necessarily disrupts carriers' ability to meet these service obligations, in addition to their ability to operate efficiently, innovate, plan and make informed decisions about their business relationships. The Ninth Circuit's decision below would allow for such a patchwork and conflicts with both Congress' deregulatory intent and decisions from this Court. Accordingly, a reversal of the Ninth Circuit's decision by this Court is crucial to CAA's members.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below should be reversed because it found not preempted respondent's state-law claim that relates to air carriers' prices, routes, and services, in direct violation of the ADA

Transp. Ass'n, 552 U.S. 364, 370 (2008); *see also* H.R. Conf. Rep. No. 103-677, at 83 (1994) ("The central purpose of [FAAAA preemption] is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes, and services as that originally contained in" the ADA). Some of CAA's members also have motor carrier operations.

and this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). The Ninth Circuit's decision disregards this Court's conclusion in *Wolens* that an airline's administration of its frequent flyer program relates to the airline's prices and services. It also fails to heed *Wolens* by categorically holding that contract-related claims, including claims for breach of the implied covenant of good faith and fair dealing, are not preempted by the ADA, notwithstanding this Court's clear guidance that contract claims avoid preemption only to the extent they are strictly limited to the parties' own bargain. Because a claim for breach of the implied covenant of good faith is not so limited, the Ninth Circuit erred in finding such a claim to be within *Wolens*' limited exception to ADA preemption.

Moreover, claims for breach of the implied covenant implicate precisely the type of unpredictability and non-uniformity that Congress intended to curtail when it enacted the ADA's preemption provision. Because they are not based on the express terms of a contract, implied covenant claims are inherently unpredictable even under the law of a single jurisdiction, resulting in increased transaction costs and fostering litigation. Furthermore, state law regarding claims for breach of the implied covenant is not uniform among the states. Thus, a finding that such claims are not preempted threatens air carriers with a regulatory patchwork that Congress sought to avoid.

This Court's correction is required to remedy the Ninth Circuit's spurning of congressional intent and

this Court's guidance. Accordingly, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. The Ninth Circuit's conclusion that an implied covenant claim regarding a frequent flyer program is unrelated to a carrier's prices, routes, or services directly conflicts with *Wolens* and imposes inappropriate burdens on air carriers.

There are two elements to ADA preemption, and the Ninth Circuit got both of them wrong here. The first element is that the state law or claim at issue must be "related to" an air carrier's price, route, or service. 49 U.S.C. § 41713(b)(1). The Ninth Circuit inexplicably concluded that this element was not met here, in direct contravention of this Court's *Wolens* decision.

In *Wolens*, this Court held that state-law claims based on an airline's conduct in administering its frequent flyer program related to both the airline's prices and services. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) ("Plaintiffs' claims relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates.").[4] In fact, this Court found the

[4] The ADA originally referred to air carrier "rates, routes, or services," but Congress revised it in 1994 to refer to "a price, route, or service of an air carrier." Congress intended this change to have no substantive effect. *See Wolens*, 513 U.S. at

relationship between an airline's frequent flyer program and the airline's rates and services so obvious that it "need not dwell" on the issue. *Id.*

Here, just as in *Wolens*, the challenged conduct involves an airline's administration of its frequent flyer program. Thus, just as in *Wolens*, the relationship to the airline's prices and services is obvious. The district court recognized this link, noting that this Court has made "abundantly clear" that a frequent flyer program relates to air carriers' prices and services. Pet. App. 69. Yet the Ninth Circuit somehow reached the opposite conclusion, finding that the Respondent's claim relates to neither Northwest's prices nor services. *Id.* at 17. The Ninth Circuit recognized that *Wolens* had "a fact pattern similar to this case," yet failed even to acknowledge, much less address, this Court's conclusion that the state-law claims in *Wolens* challenging an airline's administration of a frequent flyer program related to the airline's prices and services. *Id.* at 9, 17-19. Instead, the Ninth Circuit cited pre-ADA congressional testimony from the Civil Aeronautics Board, noting that the "CAB's representatives never suggested that the 'relating to' language created a broad scope for preemption." *Id.* at 18. The Ninth Circuit's reliance on a negative implication from Civil Aeronautics Board representatives' testimony, and other legislative history, rather than on this Court's clear instruction about the scope of the term "related to" in the ADA, is baffling.

222-23 & n.1.

The Ninth Circuit's failure to respect this Court's instructions about the meaning of "related to" not only flouts this Court's precedent, but will also lead to increased litigation and impose unnecessary additional costs on air carriers. Where a relationship between challenged conduct and an air carrier's price, route or service has already been found, air carriers should not have to relitigate that issue every time a new plaintiff asserts slightly different claims. Other circuits have recognized this. For example, the First Circuit recently acknowledged it in *Brown v. United Airlines, Inc.*, __ F.3d __, 2013 WL 3388904 (1st Cir. July 9, 2013). There, the plaintiffs asserted state common law claims arising out of air carriers' imposition of baggage handling fees for curbside service. *Id.* at *1. The First Circuit noted that the issue of whether the claims "related to" the airlines' prices, routes or services was an "open-and-shut matter," because that relationship had already been established in a prior case, albeit one involving different claims. Specifically, the First Circuit had concluded in *DiFiore v. American Airlines*, *Inc.*, 646 F.3d 81 (1st Cir. 2011), that state statutory claims challenging an airline's imposition of baggage handling fees "related to" the airline's prices and services. While the claims in *DiFiore* and *Brown* were different, the First Circuit nevertheless concluded that its "decision in *DiFiore* . . . conclusively resolve[d]" the related-to question because the airline conduct at issue was the same. *Brown*, 2013 WL 3388904, at *3.

Under the Ninth Circuit's approach, however, carriers would have to re-establish the relationship with prices, routes or services each time a plaintiff

brought slightly different claims challenging the same basic conduct. Not only would this add expense and delay to litigation, but it would allow for inconsistent results. The same conduct (here, for example, an air carrier's administration of its frequent flyer program) could be "related to" a carrier's prices, routes, and services for purposes of some claims (consumer fraud and breach of contract, as in *Wolens*), but not for others (breach of the implied covenant of good faith and fair dealing, as under the Ninth Circuit's decision). Such an approach makes no sense and, more importantly, is inconsistent with Congress' express purpose for ADA preemption.

II. The Ninth Circuit's conclusion that the ADA does not preempt an implied covenant claim, which imposes requirements other than those a carrier itself has stipulated, directly conflicts with *Wolens*.

The Ninth Circuit's decision is also contrary to the reasoning and decision of *Wolens* on the second element of ADA preemption, which requires the enforcement of a state law. While *Wolens* established that the ADA does not preempt certain breach-of-contract claims, it made clear that this limitation is confined to enforcement of contract terms voluntarily undertaken by the airline. 513 U.S. 219, 228-29, 232-33. The Ninth Circuit's decision improperly expands that limitation to allow a claim unmoored from any term the air carrier voluntarily undertook and based, instead, on state public policy. This result contravenes *Wolens* and imposes precisely the type of

regulatory costs on air carriers that Congress intended the ADA's preemption provision to prevent.

In *Wolens*, this Court carefully delineated the types of contract claims that are protected from preemption under the ADA and those that are not. Specifically, the hallmark of un-preempted contract claims is that they seek to enforce "what the airline itself undertakes," as opposed to "what the State dictates." 513 U.S. at 233. To ensure this distinction was clear, this Court reiterated the fact that, to escape preemption, the airline itself must have embraced the obligation. Thus, this Court explained that the ADA does not preempt claims that:

- "simply give effect to the bargains *offered by the airlines* and accepted by airline customers";
- "alleg[e] no violation of *state-imposed obligations*";
- "seek[] recovery solely for the airline's alleged breach of its *own, self-imposed undertakings*";
- seek to enforce "*terms and conditions airlines offer* and passengers accept";
- do not seek to impose "binding standards of conduct that operate *irrespective of any private agreement*";
- seek a remedy "for a contractual commitment *voluntarily undertaken*";
- are "confined to a *contract's terms*";
- seek to enforce "agreements *freely made*, based on the needs perceived by the contracting parties at that time";
- afford relief for breach of "a term the *airline itself stipulated*"; and

- seek only to enforce "what the *airline itself undertakes*."

Id. at 228-33 (emphases added). Expressly recognizing that state-law contract principles will be preempted if they impose state policies rather than the parties' contract, this Court summed up the applicable standard for ADA preemption of breach-of-contract actions as follows: courts are confined to enforcement of only "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233 & n.8.[5]

The Ninth Circuit failed to heed these plain instructions in this case, however. Rather than analyzing whether the implied covenant claim imposes state policies external to the agreement, as *Wolens* requires, the Ninth Circuit held that the ADA categorically does not preempt any contract-related claims. Pet. App. at 12 ("[T]he ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing."). That is directly contrary to *Wolens*, which rejected a categorical approach to ADA preemption of breach-of-contract claims and instead made clear that the claim being asserted must be examined to determine whether it seeks to enforce the parties'

[5] The ADA's preemption provision originally stated that states may not "enact or enforce any *law, rule, regulation, standard* or other provision having the force and effect of law" related to air carrier rates, routes or services. Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1707-08 (1978) (emphasis added). Congress streamlined the provision in 1994 to refer only to a "law, regulation or other provision having the force and effect of law," but it intended no substantive change. *See Wolens*, 513 U.S. at 222-23 & n.1.

bargain or something external to the contract. 513 U.S. at 233 & n.8.

When the appropriate analysis is undertaken, there is no question that the implied covenant of good faith is an extra-contractual enlargement based on state standards and policy. The first and most basic indication is the claim's title—the covenant is "implied" because it is not found in the agreement. Another indication of the claim's extra-contractual nature in this case is the fact that the district court simultaneously concluded there was no facially plausible claim for breach of contract (a conclusion that was not challenged on appeal). Pet. App. 71-72. Thus, the implied covenant plainly was not a "term the airline itself stipulated" or a "self-imposed undertaking," as *Wolens* requires. 513 U.S. at 228, 232-33.

To the contrary, the implied covenant of good faith and fair dealing is an imposition of state policy, grounded in "community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205. *See also, e.g., Stark v. Circle K Corp.*, 751 P.2d 162, 166 (Mont. 1988) ("The covenant is implied as a matter of law based on the public policy of this State."); *T.D. Bank, N.A. v. Nutmeg Inv., LLC*, 50 Conn. L. Rptr. 714, 2010 WL 4277552, at *6 (Conn. Super. Sept. 29, 2010) (implied covenant of good faith and fair dealing "was created as a matter of public policy to protect the public"). Notably, the Restatement (Second) of Contracts discusses the implied covenant of good faith in the same topical grouping—entitled "Considerations of Fairness and the Public Interest"—as the doctrine of

unconscionability, which the United States expressly noted in *Wolens* "might well be preempted." Br. for the United States at 28, *Wolens*, No. 93-1286 (U.S. June 2, 1994).

That the implied covenant is a state-imposed obligation rather than a term the air carrier itself has specified is further demonstrated by the fact that parties generally cannot waive it. As the United States emphasized in *Wolens*, a primary reason the ADA does not preempt "purely voluntary" contract terms "of the parties' own making" is because the airline is always free to change those terms. *Id.* at 21. "[I]f an airline's experience proves that particular terms are unprofitable or burdensome, the airline is free not to agree to such terms in the future." *Id.*

That is not true for the implied covenant of good faith and fair dealing, however, which in many states cannot be waived. *See, e.g.*, Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 Hastings L.J. 585, 625 (1996) ("Of the courts that have addressed the issue, most . . . have agreed that the covenant cannot be waived."); *Stark*, 751 P.2d at 166 (implied covenant of good faith and fair dealing not subject to contractual waiver); *T.D. Bank*, 2010 WL 4277552, at *6 (party "cannot waive the duty of good faith and fair dealing as it was created as a matter of public policy to protect the public"); *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1159 (Utah 2003) ("[T]he implied covenant of good faith and fair dealing cannot be waived . . . ."). As a leading

commentator has explained, "[o]ur unwillingness to allow people to disclaim the obligation of good faith shows that the obligation cannot be implied, but is law imposed." Arthur L. Corbin, 3A Corbin on Contracts § 654A, at 106 (Lawrence A. Cunningham & Arthur J. Jacobsen eds., Supp. 1999), *quoted in Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 436 n.4 (Ariz. Ct. App. 2002). Because the implied covenant is imposed regardless of the parties' intent, it is anything but the type of self-imposed, voluntarily undertaken term that this Court held not preempted in *Wolens*.

III. The Ninth Circuit's conclusion that the ADA does not preempt an implied covenant claim imposes non-uniformity costs on carriers that violate Congress' deregulatory purpose.

Imposition of the extra-contractual good-faith covenant conflicts with Congress' purposes for the ADA because it results in unpredictability and non-uniformity, contrary to the fundamental deregulatory objective of boiling things down to a predictable, nationwide regime unhindered by variable state regulation.

To start, the implied covenant imposes significant costs of unpredictability, even within a single jurisdiction. Because the covenant is not based on the express terms of the contract, there is no uniform approach for determining what conduct violates it. As a result, application of the implied covenant "has been ad hoc, yielding inconsistent results and depriving parties of the ability to predict

what conduct will violate" it. Diamond & Foss, 47 Hastings L.J. at 586. Courts end up resolving implied covenant cases based on intuition and without clear guidelines, which increases transaction costs and fosters litigation. *Id.* at 590-600.

Without a definitive understanding of what the covenant requires, parties are unable to accurately assess their contractual rights. This can lead to parties being saddled with unexpected contractual obligations to which they would not have agreed, which is plainly contrary to this Court's instruction in *Wolens* that contractual enforcement against air carriers must be limited to "the parties' bargain." 513 U.S. at 233. Alternatively, to avoid such unexpected obligations, parties may have to expend time and resources attempting to bargain around all the potential obligations that might be imposed through the implied covenant. Diamond & Foss, 47 Hastings L.J. at 591-92 & n.29. To the extent that is even possible, it increases transaction costs and is contrary to Congress' goal of preventing states from foisting such costs on air carriers. *See, e.g.*, H.R. Conf. Rep. No. 103-677, at 87 (the purpose of identical preemption for air and motor carriers was to avoid "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ment] of expansion of markets" caused by state regulation).

These considerations are significant to all-cargo air carriers, which rely on contracts granting them discretion over certain aspects of the shipping relationship. *See, e.g.*, Atlas Air Tariff and Information by Carrier, AtlasAir.com,

http://www.atlasair.com/aa/pdfs/AtlasAirTACT.pdf; FedEx Express Terms and Conditions, FedEx.com, http://images.fedex.com/us/services/pdf/SG_TermsCond_US_2013.pdf; United Parcel Service (UPS) Terms and Conditions of Service, UPS.com, http://www.ups.com/media/en/terms_service_us.pdf. Such provisions are important because they relieve the parties from having to attempt to exhaustively address every possible contingency that might come up, while providing a clear-cut line regarding the parties' mutual rights and obligations. If, however, these provisions can be limited or changed on an ad hoc basis by the implied covenant, then carriers and those with whom they contract will face significant uncertainty about their rights under their contracts.

These unpredictability costs are compounded by the fact that the law regarding the implied covenant of good faith and fair dealing is not uniform from state to state. Thus, carriers who operate in more than one state or nationwide, like CAA's members, will potentially be subject to a patchwork of state laws. Preventing such a patchwork was one of Congress' primary objectives for ADA preemption. *See* H.R. Conf. Rep. No. 103-677, at 87 (noting Congress' purpose for the ADA when enacting a parallel preemption provision for motor and intermodal carriers); *see also Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) (a "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace").

Part of this Court's rationale for finding the breach-of-contract claim not preempted in *Wolens* was its observation that there was minimal risk of inconsistency, since it merely allowed for the enforcement of express contract terms that were identical nationwide. "Because contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" 513 U.S. at 233 n.8 (internal citation omitted). The same is not true for claims asserting breach of the implied covenant of good faith and fair dealing, however. In fact, "the covenant of good faith and fair dealing can create liability in some states but not others for the exact same acts by a contracting party." Leon Silver, *Choice of Law and the Covenant of Good Faith and Fair Dealing*, For the Defense (DRI – The Voice of the Defense Bar), Feb. 2013, at 25. The variety of approaches the states have taken with respect to the implied covenant illustrates its amorphous and uncertain nature.

Arizona, for example, takes an expansive view of the implied covenant, allowing a claim for its breach separate and apart from any breach of the express contract. Thus, a party can be liable for failure to perform a condition nowhere specified in a contract. *See, e.g.*, *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 29-31 (Ariz. 2002) (although contract imposed on bank no obligation to volunteer information, the bank could still be liable for breach of the implied covenant if its failure to

provide the information deprived the other party of a primary benefit of the agreement); *see also id.* at 29 ("[A] party may . . . breach its duty of good faith without actually breaching an express covenant in the contract.").

In Delaware, the implied covenant applies only in a "narrow band of cases." *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009). It does not apply "when the subject at issue is expressly covered by the contract," but only when "the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer." *Id.* Likewise, California does not allow the implied covenant to "be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000) (internal citation omitted). Illinois "essentially use[s the implied covenant] as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions." *Resolution Trust Corp. v. Holtzman*, 618 N.E.2d 418, 424 (Ill. Ct. App. 1993). Unlike many other states, however, Illinois also allows parties to waive the implied covenant. *See, e.g., Bass v. SMG, Inc.*, 765 N.E.2d 1079, 1090 (Ill. Ct. App. 2002) ("Illinois recognizes a 'covenant of good faith and fair dealing' in every contract as a matter of law, absent an express disavowal.").

New York has a broader view of the implied covenant. While it will not allow the implied covenant to impose obligations inconsistent with the express contract terms, the implied covenant does encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 773 N.E.2d 496, 500-01 (N.Y. 2002) (quoting *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E. 2d 566 (1978)). Thus, unlike in Delaware, New York courts can look beyond the express intent of the parties as stated in the contract. Meanwhile, Texas imposes "no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 52 (Tex. 1998).

The result of these types of state-law differences if implied covenant claims are not preempted by the ADA is a patchwork effect that Congress intended to prevent. Conduct by carriers will be permissible—or not—depending on the particular state law that applies. Thus, for example, an airline whose contract gives it sole discretion regarding membership in its frequent flyer program may be able to terminate membership for any reason or no reason at all as to a customer in one state, but not as to a customer in another state, even if both customers are subject to the identical contract terms. All-cargo air carriers like the CAA's members would face the same challenge. They may be forced to treat customers or vendors in different states differently, even under a uniform, nationwide contract. Alternatively, they may be forced to enter into state-

specific contracts or, in the interest of uniformity, revise their nationwide contract to comply with the most restrictive state's requirements or attempt to work around it through a choice-of-law provision.

Congress enacted the ADA's preemption provision precisely because of concerns that such a patchwork of state rules would impose heavy burdens on air carriers and restrict their ability to make business decisions and enter contracts guided by notions of competition and innovation rather than state-imposed limitations. *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (Congress determined 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") (internal alterations omitted). Accordingly, the Ninth Circuit's conclusion that the ADA does not preempt claims for breach of the implied covenant is contrary to Congress' intent.

CONCLUSION

The Ninth Circuit's decision is unfaithful to both this Court's instruction and Congress' intent for ADA preemption. Accordingly, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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