

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**

REPLY BRIEF FOR PETITIONERS

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioners

October 15, 2013

CORPORATE DISCLOSURE STATEMENT

Petitioners hereby incorporate by reference the corporate disclosure statement included in their opening brief on the merits, which remains current.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTi
TABLE OF AUTHORITIES iii
REPLY BRIEF FOR PETITIONERS..... 1
ARGUMENT.....3
I. Respondent’s Claim Is “Related To”
Petitioners’ Prices And Services.....3
II. Respondent’s Claim Seeks To Enlarge The
Parties’ Voluntary Agreement By Enforcing
State Policies External To The Agreement,
And Thus Falls Outside The *Wolens*
Exception For Routine Breach-Of-Contract
Claims. 6
A. Respondent’s Implied Covenant Claim Is
Clearly Preempted..... 8
B. Implied Covenant Claims More Broadly
Seek to Enforce State Law Rather than
the Parties’ Voluntary Undertakings..... 11
C. The Policies Underlying ADA
Preemption Strongly Favor Preemption
Here..... 18
III. Respondent’s Belated Argument That The
ADA Does Not Expressly Preempt Any
Common-Law Claims Is Meritless..... 20
CONCLUSION 25

TABLE OF AUTHORITIES

Cases

<i>14 Penn Plaza LLC v. Pyett</i> , 556 U.S. 247 (2009)	21
<i>A.I.B. Express, Inc. v. FedEx Corp.</i> , 358 F. Supp. 2d 239 (S.D.N.Y. 2004)	15
<i>American Airlines, Inc. v. Wolens</i> , 513 U.S. 219 (1995)	<i>passim</i>
<i>Am. Trucking Ass’n v. City of Los Angeles</i> , 133 S. Ct. 2096 (2013)	22, 23
<i>ATA Airlines, Inc. v. Fed. Express Corp.</i> , 2010 WL 1754164 (S.D. Ind. Apr. 21, 2010)	15
<i>Benedetto v. Delta Air Lines, Inc.</i> , 917 F. Supp. 2d 976 (D.S.D. 2013)	15
<i>Blackner v. Cont’l Airlines, Inc.</i> , 709 A.2d 258 (N.J. Super. Ct. App. Div. 1998)	15
<i>Brown v. United Airlines, Inc.</i> , 720 F.3d 60 (1st Cir. 2013)	21, 22, 23
<i>Buck v. Am. Airlines, Inc.</i> , 476 F.3d 29 (1st Cir. 2007)	7, 15
<i>Centronics Corp. v. Genicom Corp.</i> , 562 A.2d 187 (N.H. 1989)	16
<i>Cipollone v. Liggett Grp., Inc.</i> , 505 U.S. 504 (1992)	23
<i>City of Midland v. O’Bryant</i> , 18 S.W.3d 209 (Tex. 2000)	12
<i>Columbia Cas. Co. v. 3M Co.</i> , 814 N.W.2d 33 (Minn. Ct. App. 2012)	9

<i>CSX Transp., Inc. v. Easterwood</i> , 507 U.S. 658 (1993)	24
<i>DHL Express (USA), Inc. v. Express Save Indus., Inc.</i> , 2009 WL 4110806 (S.D. Fla. Nov. 24, 2009).....	15
<i>Feldman v. United Parcel Serv., Inc.</i> , 2008 WL 800989 (S.D.N.Y. Mar. 24, 2008).....	15
<i>Foley v. Interactive Data Corp.</i> , 765 P.2d 373 (Cal. 1988).....	12
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989)	21
<i>Hanni v. Am. Airlines, Inc.</i> , 2008 WL 1885794 (N.D. Cal. Apr. 25, 2008)	15
<i>Hanson Constr. & Specialty Cabinets, LLC v. Worlein</i> , 2006 WL 2807018 (Minn. Ct. App. Oct. 3, 2006)	10
<i>Heckler v. Campbell</i> , 461 U.S. 458 (1983)	21
<i>Howell v. Alaska Airlines, Inc.</i> , 994 P.2d 901 (Wash. Ct. App. 2000)	15, 18
<i>In re Hennepin Cnty. 1986 Recycling Bond Litig.</i> , 540 N.W.2d 494 (Minn. 1995).....	10
<i>Joseph v. JetBlue Airways Corp.</i> , 2012 WL 1204070 (N.D.N.Y. Apr. 11, 2012)	15
<i>Kurns v. R.R. Friction Prods. Corp.</i> , 132 S. Ct. 1261 (2012)	23

<i>McMullen v. Delta Air Lines, Inc.</i> , 2008 WL 4449587 (N.D. Cal. Sept. 30, 2008).....	15
<i>Morales v. Trans World Airlines</i> , 504 U.S. 374 (1992)	5, 23
<i>Newman v. Spirit Airlines, Inc.</i> , 2012 WL 313442 (N.D. Ill. July 27, 2012)	15
<i>Power Standards Lab, Inc.</i> <i>v. Fed. Express Corp.</i> , 127 Cal. App. 4th 1039 (Ct. App. 2005)	15
<i>Riegel v. Medtronic, Inc.</i> , 552 U.S. 312 (2008)	23
<i>Samica Enters., LLC</i> <i>v. Mail Boxes Etc. USA, Inc.</i> , 637 F. Supp. 2d 712 (C.D. Cal. 2008)	15, 18
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	23
<i>Schultz v. United Airlines, Inc.</i> , 797 F. Supp. 2d 1103 (W.D. Wash. 2011)	15
<i>Shoney's LLC v. MAC East, LLC</i> , 27 So.3d 1216 (Ala. 2009)	17
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002)	21, 22
<i>Tymshare, Inc. v. Covell</i> , 727 F.2d 1145 (D.C. Cir. 1984)	14
<i>White Stone Partners, LP</i> <i>v. Piper Jaffray Cos.</i> , 978 F. Supp. 878 (D. Minn. 1997)	16

Other Authorities

Delta Domestic General Rules Tariff
(Aug. 1, 2013),
<http://tinyurl.com/deltacontract>..... 17

E. Allan Farnsworth, *Good Faith
Performance & Commercial
Reasonableness Under the Uniform
Commercial Code*,
30 U. Chi. L. Rev. 666 (1963) 14

Restatement (Second) of Contracts (1981) 10

REPLY BRIEF FOR PETITIONERS

Respondent purports to agree that this case involves little more than a straightforward application of *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). See Resp. Br. 10. But every argument he makes is either completely or substantially foreclosed by *Wolens*. Nowhere is this more obvious than in Respondent's stunning claim that airline frequent flyer programs do not relate to airline prices, routes, or services. *Wolens*, of course, involved a frequent flyer program, and this Court found the relationship between the program and prices and services so obvious that it did not dwell long on the matter. There is no material difference between this case and *Wolens*; the plaintiffs there complained about lost upgrades and additional blackout dates, while Respondent complains about losing access to such services and effective price discounts entirely. *Wolens* is controlling on the "relates to" question.

Respondent also claims that his implied covenant of good faith and fair dealing claim, unlike some other implied covenant claims, does not involve the enforcement of state law, but rather seeks to enforce the parties' voluntary undertakings. But *Wolens* made clear that some claims that sound in contract could involve the enforcement of state law and thus trigger preemption. Respondent's implied covenant claim is a paradigmatic example. Respondent brought an ordinary, or to use his term "express," contract claim to enforce the parties' voluntary undertakings, and he lost on the merits. The separate implied covenant claim is different; it

seeks to enlarge the parties' voluntary undertakings. As the district court correctly recognized, those implied terms are a product of state law. It is the state law (and not just the parties' voluntary undertakings) that is being enforced, which under *Wolens* means the claim is preempted. And given the varieties and vagaries when it comes to the law of implied covenants, Respondent's position would produce the patchwork and uncertainty the ADA was designed to eliminate.

Finally, respondent contends that no common-law claim—whether for fraud, unfair dealing, negligence, or anything else—is preempted by the ADA. That is an astonishing claim. It would render *Wolens*' entire discussion of breach-of-contract claims unnecessary. Rather than discuss whether such claims relate to prices and services and enforce state law, this Court could have simply observed that they escaped preemption based on their common-law status alone. It would also mean that the countless lower court decisions that have found common-law claims squarely preempted (on the strength of *Wolens*) have all been mistaken. Fortunately, this Court and the lower courts were not wrong all along. Both the text and purpose of the ADA squarely support applying it to state enforcement of common-law standards that relate to prices, routes, or services.

In the end, it is no surprise that Respondent's arguments are foreclosed by *Wolens* and this Court's other precedents. Respondent prevailed below only by virtue of Ninth Circuit precedents that have been widely recognized as inconsistent with this Court's

jurisprudence. Under this Court's precedents, there are only two relevant questions: Does Respondent's claim relate to prices, routes, or services, and does it enforce state law. *Wolens* made clear that claims concerning frequent flyer programs relate to price and service claims. And the very nature of Respondent's implied covenant claim makes plain that he seeks to enforce something other than the parties' express voluntary undertakings, since he tried and failed to prevail on the contract as written. This Court should bring the Ninth Circuit back into the fold and make clear that implied covenant claims relating to prices, routes, or services are preempted.

ARGUMENT

I. Respondent's Claim Is "Related To" Petitioners' Prices And Services.

Wolens held that airline frequent flyer programs relate to prices and services. *See* 513 U.S. at 226. Indeed, the Court did not find the question difficult. *Id.*

Undeterred, Respondent contends that what was true of American's program in *Wolens* is somehow not true of Northwest's program here. That argument is a non-starter. The *Wolens* plaintiffs complained that retroactive changes to American's program deprived them of their full "mileage credits for free tickets and upgrades" and limited their ability to take advantage of the program. The Court found it obvious that the claims related to prices (how much plaintiffs would pay for flights) and services ("*i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates"). *Id.*

Respondent's claims are indistinguishable. Indeed, he claims that his access to cheaper flights and program services was not just impaired, but eliminated altogether. *See* J.A. 49 (alleging that petitioners' revocation of his Platinum Elite status caused him to lose "valuable Program benefits ... including, but not limited to, flight upgrades, accumulated mileage, ... [and] benefits on other airlines"). *Wolens* thus controls the "relates to" question.

Respondent gamely suggests that changes in the nature of frequent flyer programs since *Wolens* somehow alter the calculus. But no amount of credit-card partnerships or ability to redeem miles for Broadway tickets changes the basic nature of Respondent's claim. If Respondent's beef was with a theater over the location of seats purchased with miles or with a credit-card company for the number of miles associated with purchases, it would be another matter. But Respondent's beef is with an airline for exercising the airline's contractual right to terminate his membership in its frequent flyer program with the attendant consequence that he lost his claim to free flights and access to the program's services. That claim relates to prices and services in the precise same way as the claims in *Wolens*. Indeed, Respondent is not someone who claims to have accumulated his miles from unrelated credit-card purchases or to want to use them for unrelated purchases. He complains that he went out of his way to fly Northwest, obtained elite status, and then was deprived of access to upgrades and free flights, not theater tickets. *See* J.A. 34 (alleging that Respondent achieved elite Status because he "travels

extensively,” and that Respondent and his wife “readily qualif[y] as ‘frequent fliers’”).

Ignoring the obviously controlling holding of *Wolens*, Respondent cobbles together selective quotes from other ADA and FAAAAA preemption decisions to suggest that a claim relates to prices, routes, or services only when it “directly regulates,” “expressly references,” or “has a forbidden significant effect” on an airline’s prices, routes, or services. Resp. Br. 41 (citations, brackets, and quotation marks omitted). But, of course, this Court has taken a far broader view of the “‘deliberately expansive’” language in the ADA’s preemption provision, *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992), including in *Wolens*. See Pet’r Br. 17. Indeed, Respondent’s argument is little more than a reprise of the Illinois Supreme Court’s reasoning rejected in *Wolens* to the effect that “relates to” only captures “‘essential’” services. See 513 U.S. at 226.

Respondent alleges (at 43) that the “absence of DOT regulations related to frequent flyer program contracts or membership” somehow underscores the purported disconnect between his claim and petitioners’ services and prices. And he notes that DOT instead advises consumers to consider legal action if they are dissatisfied with the administration of the frequent flyer program. But the absence of DOT regulation of the details of frequent flyer programs is simply a reflection of Congress’ deregulatory intent in passing the *Airline Deregulation Act*. And the very fact that DOT, as opposed to the Commerce Department or the FTC’s Bureau of Consumer Protection, provides advice on

frequent flyer programs (and suggests flyers consider pursuing contract claims preserved by *Wolens*) underscores the relationship between frequent flyer programs and airline prices and services. Indeed, DOT indisputably has the authority to police unfair or deceptive practices regarding frequent flyer programs. *See* Pet'r Br. 38-40; U.S. Br. 21-22.

II. Respondent's Claim Seeks To Enlarge The Parties' Voluntary Agreement By Enforcing State Policies External To The Agreement, And Thus Falls Outside The *Wolens* Exception For Routine Breach-Of-Contract Claims.

Respondent concedes that "some scholars and courts" have described the implied covenant of good faith and fair dealing as imposing "external notions of fairness," and that "some plaintiffs" alleging implied covenant claims have "looked to external state or federal policies instead of to the contracts' purpose and parties' expectations." Resp. Br. 15. Respondent insists, however, that *his* implied covenant claim is different; it purportedly "seeks to construe the agreement into which the parties voluntarily entered, by looking not only to the express terms of the contract but also to the terms that are implied in it." *Id.* at 16.

Respondent's concession that some implied covenant claims by some litigants are preempted is significant for two reasons. First, it makes clear that Respondent is abandoning the Ninth Circuit's reasoning in the decision below. The Ninth Circuit concluded that all implied covenant claims were categorically precluded based on reasoning that

cannot be squared with this Court's precedents. *See* Pet'r Br. 12-14. Respondent wisely declines to defend that holding.

Second, Respondent's concession that some courts look to "external notions of fairness" in adjudicating implied covenant claims is an admission that adopting his view will guarantee the patchwork of results that the ADA's preemption clause is designed to avoid. Some states candidly admit that they impose their own "external notions" on the parties, while others disclaim such efforts while still ensuring that "reasonable expectations" based on "community standards" are protected. Worse still, as Respondent admits, some litigants even in states that disclaim resort to external policies nonetheless seek to impose them, and courts would have precious few tools to sort through what kind of implied covenant claim is really at issue. Respondent glibly dismisses other implied covenant claims as ones looking to external policies, Resp. Br. 15 (citing *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007)), without ever explaining how they are different.

In reality, the far better approach is to recognize, consistent with *Wolens*, that once a litigant looks beyond the express terms of the parties' voluntary undertakings, he is seeking to enlarge the parties' bargain and is enforcing state law relating to prices, routes, or services. That is certainly the case here. Having brought his breach-of-contract claim and failed on the merits, Respondent's effort to enforce Minnesota law regarding the implied covenant to enhance that bargain is preempted.

A. Respondent’s Implied Covenant Claim Is Clearly Preempted.

As the district court concluded, the “parties’ bargain” here, *Wolens*, 513 U.S. at 233, could not be more clear. Respondent entered into the WorldPerks agreement with Northwest, which promised Respondent numerous benefits but also expressly stated that Northwest could remove any member for abuse of the program, including “improper conduct as determined by Northwest in its sole judgment.” Northwest subsequently exercised its contractual right to remove Respondent after concluding that he had abused the program in numerous ways. The district court correctly held on the merits that given the agreement’s straightforward language—*i.e.*, the “term[s] [Northwest] itself stipulated,” *id.* at 232-33—Northwest did not breach the agreement, and Respondent did not challenge that ruling on appeal.

Respondent’s failure to appeal that breach-of-contract ruling is significant not because it is some sort of forfeiture or procedural default, but because his own pleading and litigation tactics demonstrate the difference between the parties’ voluntary undertakings (embodied in the breach-of-contract claim) and Respondent’s effort to enlarge that bargain based on state law (the implied covenant claim). Respondent suggests his case is like *Wolens* because American Airlines invoked implied covenant arguments in its reply brief there. But *Wolens* dismissed American’s efforts as “assum[ing] the answer to the very contract construction” question at issue and emphasized that this “question of contract interpretation has not yet had a full airing.” *Id.* at

234. Here, by contrast, Respondent's breach-of-contract claim has very much received a full airing. It was fully litigated, and respondent lost on the merits. The separate implied covenant claim does not assume the answer to the breach-of-contract claim; it offers a state-law theory for why Respondent wins even though he lost his breach-of-contract claim. As Respondent's own authorities observe, the "obvious reason to plead an implied-covenant claim in addition to a breach-of-contract claim" is that "the claimant may not prevail on the breach-of-contract claim." *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 38 (Minn. Ct. App. 2012).

What Respondent's separate implied covenant claim plainly seeks is an "enlargement or enhancement" of the agreement. *Wolens*, 513 U.S. at 233. Whereas the agreement unambiguously allows Northwest to remove individuals who have abused the program, Respondent would engraft additional requirements onto the agreement, including that Northwest may exercise its unfettered contractual right only if there is "valid cause" and an adequate explanation. *See, e.g.*, J.A. 46-47, 52. In other words, the agreement itself gives Northwest complete discretion; Respondent's implied covenant claim would impose a series of procedural and substantive constraints on that discretion. It is hard to imagine a more blatant example of enlarging or enhancing the parties' bargain. *See* U.S. Br. 19-20 (stating that Respondent invokes the implied covenant to "trump the terms of the contract").

That "enlargement or enhancement," moreover, would indisputably be accomplished by "state laws or

policies external to the agreement.” *Wolens*, 513 U.S. at 233. As the district court aptly put it, the implied covenant of good faith and fair dealing “does not appear *ex nihilo*, and is not imposed by the contract itself.” Pet. App. 65 (footnote omitted). Rather, it is “implied *by state law*.” *Id.* (emphasis added). It is no answer to suggest that the implied covenant simply ascertains the reasonable expectations of the parties based on the express terms of the contract. It is still state law that dictates what expectations are reasonable and which contracts are subject to implied covenants.

That is particularly clear under the law of Minnesota. Respondent’s implied covenant claim alleges that in exercising its contractual right to remove him for abuse, Northwest did not act “consistent with [his] reasonable expectations” or apply the Agreement “in a reasonable manner.” J.A. 51. Under Minnesota law, as in many states, a judge or jury would determine the nature of Respondent’s “reasonable expectations,” and whether Northwest acted “reasonably,” by reference to “community standards of decency, fairness or reasonableness.” Restatement (Second) of Contracts § 205 cmt. a (1981); *e.g.*, *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502-03 (Minn. 1995); *Hanson Constr. & Specialty Cabinets, LLC v. Worlein*, 2006 WL 2807018, at *4 (Minn. Ct. App. Oct. 3, 2006); Pet’r Br. 24-25. The very source of those standards—the “community”—underscores that the covenant reflects not the parties’ “own, self-imposed undertakings” but “policies external to the agreement.” *Wolens*, 513 U.S. at 228, 233; *see also* U.S. Br. 30 (stating that “applications of the implied-

covenant doctrine seeking to enforce ‘fundamental notions of fairness’ or ‘community standards’ external to the contract are preempted by the ADA”).¹

B. Implied Covenant Claims More Broadly Seek to Enforce State Law Rather than the Parties’ Voluntary Undertakings.

There is no question that Respondent’s own implied covenant claim is an effort to use state law to enlarge the parties’ agreement. As the United States contends, that conclusion is sufficient to reverse the decision below and reject the Ninth Circuit’s misguided ruling that implied covenant claims are categorically unpreempted. But although the way in which Respondent’s claims were litigated makes preemption particularly plain here, this Court should provide guidance to the lower courts by making clear that implied covenant claims—like unconscionability arguments—seek to enlarge the parties’ bargain based on state law external to the agreement. To use Respondent’s own dichotomy, what escapes preemption under *Wolens* is the terms of the parties’ express agreement, not any additional terms implied by state courts applying state law.

Implied covenant claims inherently seek to go beyond express voluntary undertakings. Even the cases Respondent invokes in his attempt to minimize the role of state law acknowledge that the covenant of good faith and fair dealing is “read into contracts.”

¹ Even Respondent’s *amicus*, who disagrees with the Restatement standard, *see* Burton Br. 10 n.3, has acknowledged that it “implies a ground for judicial decision that lies outside of and may take precedence over the agreement of the parties.” *See* Pet’r Br. 26 (quotation marks omitted).

Resp. Br. 14-15 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988)). And the “reading in” is done by state judges and juries interpreting and applying state law.

The existence of the covenant with respect to any contract is the result of a conscious decision by a state’s judiciary to read the covenant into that type of agreement, a point underscored by other States’ decisions not to “read” the implied covenant into every contract. *See, e.g., City of Midland v. O’Bryant*, 18 S.W.3d 209, 215 (Tex. 2000) (“We have specifically rejected the implication of a general duty of good faith and fair dealing in all contracts.” (quotation marks omitted)); Pet’r Br. 33-34 (citing cases rejecting implied-covenant challenges to at-will employment agreements).² So while, for example, the covenant may be implied into the WorldPerks Agreement under Minnesota law, that simply reflects that state’s policy choice with respect to that type of contract. And as a result of that policy choice, the covenant constitutes a “binding standard[] of conduct that operate[s] irrespective of [the] private agreement” between Respondent and Northwest. *Wolens*, 513 U.S. at 229 n.5. In this respect, implied covenant claims are materially indistinguishable

² Respondent has no real response to the at-will employment cases except to assert that employment is a “special context” in which “many states do not apply the covenant at all.” Resp. Br. 28 n.5. But it is state judges in some States, but not others, who decided that the at-will employment context is “special.” Thus, the at-will cases underscore that implied covenant claims involve both the imposition of state law external to the agreement and the risk of non-uniform results. *See* Pet’r Br. 33-35.

from claims alleging unconscionability, which as Respondent concedes also “involves the imposition of external policies.” Resp. Br. 17.³

State law and policy determine not only whether the covenant *exists* with respect to a particular contract, but also *how* the covenant would affect the parties’ agreement. Again, Respondent’s claim confirms this point and demonstrates not just the infirmity of his own case but also why implied-covenant claims in general are preempted under the logic of *Wolens*. Respondent asserts that some implied-covenant claims escape preemption because they seek to ascertain “the scope of the parties’ voluntary undertakings in light of the parties’ purposes and reasonable expectations.” Resp. Br. 19. As an example, he cites his own complaint, which alleges that “the good faith requirement precludes an action by the defendants that would contravene the reasonable expectations of the plaintiff and Class members.” *Id.* at 16 (citing J.A. 51). But the determination of *what* it was reasonable for Respondent—or any plaintiff—to expect and *whether* the conduct of Northwest—or any defendant—“contravene[d]” those expectations would be determined by a judge and jury applying “community standards” of fairness, decency, morality, or reasonableness—in short, “view[s] of fairness, equity, or other policy considerations external to an air carrier’s actual undertakings.” U.S. Br. 20.

³ Respondent does not dispute that where it is applicable, the covenant generally cannot be waived, underscoring that like the unconscionability doctrine, it operates “irrespective of any private agreement.” *See* Cargo Airline Ass’n Br. 12-13.

Indeed, even Respondent's own authorities acknowledge that determinations of parties' "reasonable expectations" "rely directly upon considerations of morality and public policy." *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.); *see also* E. Allan Farnsworth, *Good Faith Performance & Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 671 (1963) (stating that "good faith performance" is measured "based on the decency, fairness or reasonableness of the community ... of which one is a member"). Most (but not Respondent, *see* Part III, *infra*) would concede that the ADA preempts a negligence claim relating to prices, routes, or services, because allowing a jury to determine the reasonableness of an airline's conduct relating to those subjects is antithetical to the ADA's intent. Congress did not deregulate at the federal level only to have state-court juries fill the gap by adjudicating the reasonableness of airline conduct. But allowing a jury to adjudicate reasonableness in considering an implied covenant claim is no different. Whether for purposes of a negligence or an implied covenant claim, a jury applying state-law reasonableness requirements based on community standards is enforcing state law, not the parties' voluntary undertakings.

For good reason, then, so far as petitioners are aware, *every* court to address the question—except for the Ninth Circuit below—has held that the ADA preempts implied-covenant claims that relate to an airline's prices, routes, or services. *See, e.g., Benedetto v. Delta Air Lines, Inc.*, 917 F. Supp. 2d 976, 983-84 & n.5 (D.S.D. 2013) (observing that "a

good faith claim will require application of state law in such a manner to incorporate state public policies”); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 253 (S.D.N.Y. 2004) (preempting claim “because it seeks to add to the terms of [defendant’s] contractual obligations”); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash. Ct. App. 2000) (stating that plaintiffs “do not seek to enforce the contract according to its terms” but “are attempting to enlarge or enhance their agreements with [defendant] based on the laws or policies of this state that are external to the agreements”).⁴ Respondent does not cite a single case holding otherwise.

Respondent cites several authorities for the proposition that in some circumstances, some states have expressed a willingness to apply the implied covenant to limit the absolute discretion a contract confers on one of the parties, lest a contract be found

⁴ *Accord Buck*, 476 F.3d at 36; *Newman v. Spirit Airlines, Inc.*, 2012 WL 3134422, at *4 (N.D. Ill. July 27, 2012); *Joseph v. JetBlue Airways Corp.*, 2012 WL 1204070, at *6 (N.D.N.Y. Apr. 11, 2012); *Schultz v. United Airlines, Inc.*, 797 F. Supp. 2d 1103, 1107 (W.D. Wash. 2011); *ATA Airlines, Inc. v. Fed. Express Corp.*, 2010 WL 1754164, at *4 (S.D. Ind. Apr. 21, 2010); *DHL Express (USA), Inc. v. Express Save Indus., Inc.*, 2009 WL 4110806, at *6 (S.D. Fla. Nov. 24, 2009); *Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.*, 637 F. Supp. 2d 712, 720 (C.D. Cal. 2008); *McMullen v. Delta Air Lines, Inc.*, 2008 WL 4449587, at *5 (N.D. Cal. Sept. 30, 2008); *Hanni v. Am. Airlines, Inc.*, 2008 WL 1885794, at *7 (N.D. Cal. Apr. 25, 2008); *Feldman v. United Parcel Serv., Inc.*, 2008 WL 800989, at *17-18 (S.D.N.Y. Mar. 24, 2008); *Power Standards Lab, Inc. v. Fed. Express Corp.*, 127 Cal. App. 4th 1039, 1046 (Ct. App. 2005); *Blackner v. Cont’l Airlines, Inc.*, 709 A.2d 258, 260 (N.J. Super. Ct. App. Div. 1998).

“illusory.” Resp. Br. 18-20. But that argument is doubly flawed.

First, Respondent cites no cases for the dubious proposition that a frequent flyer agreement is the type of contract that is rendered illusory if a contractually conferred grant of discretion is not cabined. After all, a frequent flyer program provides gratuitous bonuses to customers to reward their loyalty. The members have already received full, non-illusory performance for any consideration paid for the underlying flights.

Second, as Respondent’s own authorities demonstrate, the threshold determination of whether a contract would be rendered “illusory” is a state-law question, and any such limitations on contractually conferred discretion would derive from community standards of morality, decency, fairness, or reasonableness, *i.e.*, “state laws or policies external to the agreement.” *Wolens*, 513 U.S. at 233.⁵ And even then, many states emphatically do *not* permit the implied covenant to cabin one party’s absolute

⁵ For example, in *White Stone Partners, LP v. Piper Jaffray Cos.*, 978 F. Supp. 878, 881-82 (D. Minn. 1997), the federal court predicted that the Minnesota Supreme Court would apply the implied covenant to cabin contractual grants of unfettered discretion. Even assuming that *Erie* prediction was correct (the Minnesota Supreme Court has never addressed the question), Minnesota courts would employ the Restatement’s “community standards” rubric when applying the implied covenant. *See* pp. 10-11, *supra*. And in *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193-94 (N.H. 1989) (Souter, J.), the court held that *whether* the “defendant’s exercise of discretion exceeded the limits of reasonableness” required an application of “community standards of honesty, decency and reasonableness.”

discretion, particularly where, as here, the terms of the contract are unambiguous. *See* Pet'r Br. 32-33; U.S. Br. 26 & n.7.⁶

The problem with state-law interference with airlines' exercise of contractually-reserved discretion is well-illustrated by an airline's comparable reservation in its contract of carriage to refuse to transport (or continue to transport) a passenger when refusal "is reasonably necessary in [its] sole discretion" for the safety of others or the aircraft. *E.g.*, Delta Domestic General Rules Tariff, R. 35 § F (Aug. 1, 2013), <http://tinyurl.com/deltacontract> (petitioner Delta's contract of carriage). The prospect of a state-court jury evaluating the extent to which the airline's removal decision frustrated the unruly passenger's "reasonable expectations" is not a happy one. For good reason, then, the United States correctly observes that it would be "wholly inconsistent with Congress's deregulatory purposes to allow claims based on *any* theory under state contract law that would cabin discretionary decisions that air carriers have expressly reserved to themselves concerning prices, routes, or services." U.S. Br. 20-21 (emphasis added).

⁶ These cases do not turn on the purportedly distinguishing characteristics Respondent asserts (at 28); their holdings are categorical. *See, e.g., Shoney's LLC v. MAC East, LLC*, 27 So.3d 1216, 1223 (Ala. 2009) (rejecting reliance on implied covenant because "an unqualified express standard such as 'sole discretion' is ... to be construed as written").

C. The Policies Underlying ADA Preemption Strongly Favor Preemption Here.

Respondent's contention (at 25-29) that the ability to bring implied-covenant claims relating to an airline's prices, routes, or services "furthers the ADA's goal[s]" gets matters backwards. Permitting implied-covenant claims to proceed would open the door to a deluge of fairness-based challenges to contractual terms and the exercise of contractually-conferred discretion, all contrary to the intent of those agreements to promote certainty, efficiency, and reliability. See Chamber Br. 14-23; e.g., *Samica Enters.*, 637 F. Supp. 2d at 720 (preempting challenge to "unreasonable" price modifications where agreement "gave [defendant] the discretion to modify those prices"); *Howell*, 994 P.2d at 905 (preempting challenge to airline's refusal to refund nonrefundable ticket where contract "authorized the airline" to refuse). The "stability and efficiency of the market," *Wolens*, 513 U.S. at 230, is hardly enhanced when a carrier cannot "know ahead of time whether a particular exercise of its expressly reserved contractual discretion would be found 'unreasonable' or 'unfair.'" Chamber Br. 11. And that is just in the domestic sphere; Respondent has no answer to the instability such claims would wreak on international carriage. See IATA Br. 16-18.⁷

⁷ Respondent's suggestion (at 26) that implied-covenant claims would "reduc[e] the costs of contracting" and decrease the need for "overelaborate disclaimers" is implausible. If incontrovertibly clear language like that in the WorldPerks Agreement is not sufficient to describe the parties' rights, then

Likewise, Respondent has no real answer to the fact that DOT, the ADA’s “experienced administrator,” *Wolens*, 513 U.S. at 827, indisputably has the authority to investigate and determine whether an airline has engaged in unfair practices (including with respect to frequent flyer programs), it has exercised such authority, and it has promulgated regulations concerning aspects of frequent flyer programs not implicated here. *See* Pet’r Br. 38-40; U.S. Br. 21-22. As the United States correctly observes, “[i]t would be inconsistent with that regulatory scheme, and the ADA’s larger deregulatory purpose, for courts to apply contract principles ‘based on state laws or policies external to the agreement’” like the implied covenant—particularly where, as here, “DOT has chosen not to directly regulate [this aspect of] frequent-flyer programs.” U.S. Br. 22.

Respondent acknowledges that there are “some differences in how states apply the covenant of good faith” but nevertheless contends that that the implied covenant “is a principle at the ‘core’ of contract law” and therefore there is “no large risk of nonuniform adjudication” of claims asserting a breach of the implied covenant. Resp. 26-27 (quoting *Wolens*, 513 U.S. at 233 n.8). But Respondent’s own concession that some implied covenant claims avowedly seek to impose “external policies” while others purport only to protect “reasonable expectations” highlights the patchwork that his

additional, “overelaborate disclaimers” would almost certainly be necessary—if such disclaimers are even permissible. *See* n.3, *supra*.

argument invites. Beyond that, whether a particular state even implies the covenant into a specific contract is far from uniform. And even in states that agree that the implied covenant protects “reasonable expectations” based on “community standards,” the amorphous nature of those standards all but guarantees nonuniform results. Suppose, for example, that pursuant to the conferral of unfettered discretion provided in its contract of carriage, petitioner Delta refused to transport a passenger it believed to be intoxicated. A jury in one state, applying its own views of fairness and decency, might conclude that Delta’s conduct was not reasonable, but rather pretextual (as Respondent claims here). By contrast, a jury in another state, applying those same amorphous standards, might conclude that Delta’s conduct was eminently reasonable. The ADA was enacted to prevent such non-uniform regulation-by-jury-verdict filling the gap created by federal deregulation.

III. Respondent’s Belated Argument That The ADA Does Not Expressly Preempt Any Common-Law Claims Is Meritless.

In a last-ditch attempt to salvage the Ninth Circuit’s judgment, Respondent argues that the ADA does not preempt *any* common-law claims. Not one court has accepted this far-reaching contention. This Court should not be the first.

1. This Court should not address this issue because it was neither raised by Respondent below nor addressed by either the district court or the Ninth Circuit. “[T]his Court will affirm on grounds that have not been raised below only in exceptional

cases.” *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989)) (quotation marks omitted). This is by no means an “exceptional case[].” See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 (2002) (declining to address respondent’s argument “not raised below”); *Nordberg*, 309 U.S. at 39 (same); *Heckler v. Campbell*, 461 U.S. 458, 469 (1983) (same). Indeed, that reluctance should apply with special force when the unargued theory sweeps far more broadly than the reasoning of the decision below and would undermine well-settled jurisprudence in other circuits.

2. While not raised below, Respondent’s eleventh-hour argument was raised and rejected by the First Circuit in *Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013), and anticipated by the brief of *amici curiae* Airlines for America (“A4A”) and American Trucking Associations, Inc. *Brown* and the A4A brief thoroughly demonstrate the flaws in Respondent’s belated argument, and yet Respondent simply ignores them. Thus, if this Court is inclined to address it, this Court need not dwell long before rejecting Respondent’s sweeping and meritless theory.

The first problem with Respondent’s argument is that it is inconsistent with the reasoning of *Wolens* and the holdings of countless lower court cases finding common-law claims—from fraud to negligence to intentional infliction of emotional distress—preempted by the ADA. If Respondent’s argument is to be credited, this Court’s careful analysis of how contract claims related to prices and

services but did not enforce state law was all a fool's errand. The Court should have simply noted that contract claims are non-statutory and moved on.

The broader problem with Respondent's argument is that it ignores a critical difference between the text of the ADA and the statutory language at issue in the case on which Respondent primarily bases his sweeping theory, *Sprietsma*. There, the Court held that a provision preempting a "law or regulation" did not preempt common-law tort actions. 537 U.S. at 62-64. But the ADA also preempts "other provision[s] having the force and effect of law," which every court to address the question has concluded is "elastic enough to encompass common law." *Brown*, 720 F.3d at 67; A4A Br. 6-7 & n.2.

Respondent implausibly suggests (at 31) that the expansive phrase "other provision having the force and effect of law" covers only the minuscule category of "positively enacted promulgated requirement[s] with the force and effect of law ... not denominated a statute or regulation." But "it is hard to imagine" that in drafting the ADA's broad preemption clause, Congress "would have focused on such relatively obscure possibilities while ignoring common law," especially when common-law claims pose a massive risk of frustrating Congress' deregulatory intent. *Brown*, 720 F.3d at 69 n.5.

American Trucking Ass'n v. City of Los Angeles, 133 S. Ct. 2096 (2013), does not aid Respondent. There, the Court held that the contractual arrangements in question were preempted because they implicated the government's "exercise of

regulatory authority,” which “counts as action ‘having the force and effect of law.’” *Id.* at 2102-03. But as the Court has long recognized, common-law doctrines also implicate the state’s “exercise of regulatory authority,” and do so much more dramatically and consistently than provisions in government contracts. *See, e.g., Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1269 (2012) (observing that “state regulation can be effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy” (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (brackets, ellipsis, and quotation marks omitted))); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992) (plurality opinion); *see also Brown*, 720 F.3d at 65.⁸

3. The history of the ADA’s preemption clause—from which Congress removed the words “rule” and “standard” in 1994 without intending any substantive change, *see* Pet’r Br. 3-4 & n.1—further repudiates Respondent’s argument. Before 1994, not one court held that common-law claims were categorically removed from the ADA’s purview, and many courts found common-law claims preempted, a unanimity Congress is presumed to have left

⁸ *Morales* and A4A thoroughly refute Respondent’s passing contention (at 31-32) that the savings clause of the Federal Aviation Act of 1958 permits *all* common-law claims to proceed. *See Morales*, 504 U.S. at 385 (characterizing savings clause as “a relic of the pre-ADA/no pre-emption regime” that “cannot be allowed to supersede the specific substantive pre-emption provision”); A4A Br. 13-16 & n.4.

undisturbed when it recodified the provision without substantive effect. *See* A4A Br. 11-13. And since 1994, not one court has held that the ADA does not preempt any common-law claims, and courts have found a wide variety of common-law claims preempted. *See id.* at 18-19.

Respondent concedes (at 33) that “standard” in the pre-1994 text could refer to common-law standards and that this Court has construed “similar” language in the Federal Railroad Safety Act’s preemption provision to extend to common-law claims in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). But Respondent has an answer: the FRSA, and not the ADA, includes “orders” as well as “rules” and “standards.” There are two problems with that argument. First, it was the “broad phrases” of the FRSA—and not the word “order”—that *CSX* held to preempt common law. *Id.* at 664. Second, and more important, the notion that Congress would defeat its manifest deregulatory intent and allow common-law juries to fill the gap created by federal deregulation through the remarkably subtle stratagem of omitting the word “order” from an otherwise broadly-worded preemption provision strains all credulity. Congress understood its deregulatory intent could be just as thoroughly undermined by state-court juries wielding reasonableness tests as by state regulators with their own notion of what is just and reasonable. This Court should conclude that common-law claims seeking to enforce state law relating to prices, routes, or services, including Respondent’s implied covenant claim, are preempted by the ADA.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

PAUL D. CLEMENT

Counsel of Record

GEORGE W. HICKS, JR.

BANCROFT PLLC

1919 M Street NW

Suite 470

Washington, DC 20036

(202) 234-0090

pclement@bancroftpllc.com

Counsel for Petitioners

October 15, 2013