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 the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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Respondent's defense of the Ninth Circuit decision is simple and well illustrates the square conflict between the decision below and precedents of this Court and the other Circuits. Respondent contends that his implied covenant of good faith and fair dealing claim is categorically immune from ADA preemption because it is a "contract claim" and thus does not "enforce" state law. Never mind that respondent's breach of contract claim was rejected; and never mind that his *implied* covenant of good faith claim is a creature of state law, and never mind that his claim expressly attempts to override the parties' voluntary undertakings which allocated the dispute to petitioners' "sole judgment." Never mind all that, respondent suggests that because his claim is a "contract claim," it does not involve an effort to "enforce" state law and is not preempted.

There are two principal problems with respondent's position. First, it misdescribes what the Ninth Circuit actually held. Building on its prior erroneous circuit precedent, the Ninth Circuit found contract claims, including implied covenant of good faith claims, to categorically escape preemption on the misguided theory that such claims never "relate to" airline deregulation, *not* on the equally misguided theory that they never "enforce" state law. Second, and even more fundamentally, respondent's effort to recharacterize the Ninth Circuit's decision does nothing to eliminate the square conflict with this Court's decisions and with other Circuits that follow this Court's direction. In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court made clear that what allowed an ordinary breach of contract claim to escape preemption was that the courts would

enforce only the parties' voluntary undertakings, not state laws that enlarged the parties' bargain. This case amply illustrates the difference: respondent's unsuccessful garden-variety breach-of-contract claim attempted to enforce the parties' voluntary undertaking; respondent's implied covenant claim, which the Ninth Circuit allowed to proceed, attempts to enlarge the bargain by creating a state-law limitation on the contractual "sole judgment" language. The fact that the latter claim may be labeled a contract claim, rather than a tort or statutory claim, makes no difference as this Court expressly noted in *Wolens*. Other Circuits understand this distinction and have rejected simplistic efforts to use state "contract law" to enlarge the parties' bargain well beyond the parties' voluntary undertakings.

The conflict is stark. Indeed, the decision below is not some outlier, but the culmination of a trilogy of Ninth Circuit decisions that are fundamentally inconsistent with this Court's own trilogy of ADA and FAAAA preemption cases. It will take a fourth Supreme Court case to bring the Ninth Circuit into line, and this case presents the ideal vehicle. The difference between voluntary undertakings and the use of state law to enlarge the parties' bargain is perfectly illustrated by the unsuccessful breach-of-contract claim on the one hand and the implied covenant claim on the other. Moreover, the problem with the Ninth Circuit's "relates to" jurisprudence—the actual ground for its decision—is perfectly illustrated by its conclusion that the claims here do not "relate to" prices, routes, or services, even though they involve a frequent flyer program, the precise context of *Wolens*. The need for this Court's review is

acute, and it will not find a better vehicle for that necessary review.

I. Neither The Ninth Circuit's Decision Nor Respondent's Recharacterization Of It Can Be Reconciled With The Precedent Of This Court And Other Circuits

Respondent's primary strategy for avoiding this Court's review is to portray the Ninth Circuit's decision as holding that respondent's implied covenant claim escapes preemption because it does not involve the "enforcement" of state law, not because it does not "relate to" prices, routes and services. This re-characterization of the Ninth Circuit's holding ultimately does nothing to ameliorate the starkness or seriousness of the splits in authority, but it also fundamentally misdescribes the decision below. In reality, the Ninth Circuit unequivocally declared *all* implied covenant of good faith claims *by definition* outside the scope of ADA preemption, App. 19 ("We conclude that a claim for breach of the implied covenant of good faith and fair dealing is not preempted by the ADA."), based on the extraordinary proposition that all "common law contract claims" are categorically unrelated to rates, routes, and services—apparently including not just implied covenant claims, but claims for unjust enrichment, promissory estoppel, quantum merit, and whatever else state law might label a contract claim, App. 5 ("[T]he ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing."). Indeed, district courts, with no incentive to spin the decision in one direction or the other, are already citing *Ginsberg* as controlling precedent for

precisely that holding. *See, e.g., Alim v. Aircraft Service Intern., Inc.*, 2012 WL 3647403, at *2 (N.D. Cal. Aug. 23, 2012) (citing the decision below for the proposition that "while the words 'related to' express the ADA's broad preemptive purpose with regards to proscriptive state statutes, the ADA's preemption provision is not broad enough to displace state common law contract claims.").

A. The Ninth Circuit's Decision And Respondent's Recharacterization Of The Decision Both Squarely Conflict With This Court's Precedent

As explained in the Petition, this Court's decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), *Wolens*, and *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), collectively interpret the ADA and FAAAA as reflecting Congress's intent to broadly protect the airline and transportation industries from state efforts at reregulation whether via statutory or common-law claims. Pet. 1-4. The Ninth Circuit's conclusion that *all* common law contract claims escape preemption because they are insufficiently related to airline deregulation is a complete outlier. Indeed, it is telling that respondent's brief begins not by defending the decision below, but by recharacterizing it as "relying heavily on *Wolens*" and the logic that contract claims do not "enforce" state laws such that reversal of the "related to" holding "would not alter the conclusion that [respondent's] claim is not preempted." Opp. 9-10.

But the Ninth Circuit did not, as respondent implies, apply *Wolens* to hold that implied covenant of

good faith claims do not involve the enforcement of state law. Such a decision would be equally misguided, but that is simply not the decision the Ninth Circuit wrote. Instead, the decision cites *Wolens* only for the mistaken proposition that *Wolens* somehow supports the Ninth Circuit's previous holdings in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), and *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), that entire categories of common law contract and tort claims are wholly exempt from ADA preemption because they are by definition "too tenuously connected" to airline deregulation. App. 9-16; *see also* App. 40 (Judge Rymer observing that the panel did *not* undertake "the *Wolens* inquiry of whether Ginsberg's claim alleges a violation of a state-imposed obligation or a self-imposed undertaking"). This baffling invocation of *Wolens* does not mitigate the error of the Ninth Circuit's decision, but compounds it by foreclosing any future possibility of the Ninth Circuit correcting its own errors. Not only is *Charas* an en banc decision, but the Ninth Circuit views its doctrine as consistent with *Wolens*.

Moreover, respondent's effort to recharacterize the Ninth Circuit's decision does nothing to eliminate the square conflict with this Court's decisions and those of the other courts of appeals. Of course, any notion that respondent's frequent flyer program claims do not "relate to" prices, routes and services is foreclosed by *Wolens*, which involved frequent flyer program claims. But *Wolens* is equally clear that merely labeling a claim a "contract claim" does not allow it to escape preemption if it, in fact, seeks to enlarge the parties' bargain beyond their voluntary

undertakings. What made garden-variety breach-of-contract claims un-preempted was not that they fell within the rubric of state contract law, but that they involved only the enforcement of the parties' voluntary undertakings, not the enforcement of state law that would enlarge the bargain. Respondent's *implied* covenant claim is, as its name suggests, a paradigmatic effort to expand the airline's obligations beyond its explicit contractual undertakings. Indeed, it is indisputable that respondent invokes state law in an effort to alter those voluntary undertakings, which expressly give Northwest sole discretion to determine whether a member's behavior constitutes abuse warranting dismissal from the program. Pet. 12-19.

Respondent argues the decision below can be defended under *Wolens* because implied covenant of good faith claims "do not involve application of external [] policies" but instead look to the "legitimate expectations of the parties." Opp. 17-18. But respondent's own complaint acknowledges that this supposed duty is "implied" because it is not found in the terms of the agreement but is instead imposed by state law. *See* Dist. Ct. Doc. No. 17, at 12 ("In Minnesota, every contract is subject to an implied covenant known as a covenant of good faith and fair dealing."). If respondent could prevail based on the actual terms of the parties' contractual undertakings, his garden-variety breach of contract claim would have succeeded, not failed. By invoking the Minnesota state-law doctrine of implied covenants to alter the terms of the parties' actual bargain (which assigns the matter to Northwest's "sole judgment"), respondent has made clear beyond all doubt that he seeks to enforce that state law, and not merely the

parties' voluntary undertakings. The fact that state law treats the basis for expanding the bargain as a species of contract law—and not tort or statutory law—matters not in the least.

Indeed, in implicit recognition that common-law contract doctrines that expand the bargain are logically indistinguishable from common-law tort doctrines with the same impermissible effect, respondent takes the extreme position that not just implied covenant claims, but all common-law claims escape preemption because they do not involve a "law, regulation, or other provision having the force and effect of law." Opp. 18. Although respondent suggests that "the Ninth Circuit's decision was not based on this ground," *id.*, the notion that all common law claims are exempt from the ADA appears to be exactly what *West, Charas,* and *Ginsberg* collectively hold. Pet. 21-32. That holding is both enormously significant and profoundly wrong. As the district court explained, *Wolens* makes no distinction between state common law and state statutes, but instead distinguishes "between terms an airline itself stipulates on the one hand, and *any* 'enlargement or enhancement based on state laws or policies external to the agreement.'" App. 45 (quoting *Wolens*, 513 U.S. at 233).

Finally, respondent makes a half-hearted attempt to distinguish *Wolens* on the ground that respondent's claim does not relate to prices, routes, or services because it arises out of a dispute over frequent flyer *membership* as opposed to the frequent flyer program *modifications* at issue in *Wolens*. Opp. 18-19. But not even the Ninth Circuit found this distinction material.

See App. 9 (recognizing the similarity in fact pattern to *Wolens*). Rather than focus on such microscopic differences, the Ninth Circuit embraced a categorical exemption of implied covenant claims.

B. The Ninth Circuit's Decision And Respondent's Recharacterization Of It Both Squarely Conflict With The Decisions Of Other Courts of Appeals

The Ninth Circuit's erroneous decision in this case flows directly from its holding that its previous decisions in *West* and *Charas* remain good law and require the conclusion that all implied covenant claims—indeed, all common law contract claims—categorically escape ADA preemption because they do not "relate to" airline deregulation. As the Petition explains, in affirming and relying on *West* and *Charas*, the decision below positioned itself squarely within the already existing circuit conflict arising from the Ninth Circuit's persistent refusal to abide by this Court's ADA jurisprudence. *See* Pet. 21-32.

Respondent does not contest that *West* and *Charas* are the source of significant circuit conflict, or even that those decisions are plainly wrong under this Court's precedent. Instead, respondent argues that *West* and *Charas* are distinguishable from this case. Opp. 14-16. But the Ninth Circuit viewed *West* and *Charas* as *controlling*, not distinguishable. *See* App. 14-17; *see also* App. 39 (Judge Rymer observing that the decision in case is compelled by *West*, even though *West* "seems out of step" with *Wolens*). The problem is not the impossibility of identifying factual distinctions between this case and *West*/*Charas*, but that the Ninth Circuit has embraced a misguided categorical

approach to ADA preemption that renders such factual distinctions irrelevant.

Indeed, the panel's categorical exemption of common law contract claims is a direct product of *West* and *Charas*—or more precisely, a direct product of the Ninth Circuit's failure to recognize that *West* and *Charas* do not survive this Court's decisions in *Wolens* and *Rowe*. The Ninth Circuit's renegade approach to ADA preemption originated in *West*, which held globally that "'the state contract and tort laws under which [the plaintiff sought] relief'" are too tenuously related to routes, rates, and services to trigger preemption, without looking to the specific underlying allegations for the "related to" inquiry. Although *Wolens* subsequently made clear *West*'s analytical errors, the Ninth Circuit refused to adjust course in *Charas*, instead declaring all common law tort claims not "'relate[d] to' prices, routes, or services." *See* Pet. 24-29. And in the decision below, the Ninth Circuit extended *West* and *Charas* to treat all common law contract claims as too tenuously connected to airline deregulation to trigger ADA preemption. App. 14-17.

Respondent has no response to any of this, beyond suggesting correctly that *West* and *Charas* involved the "related to" inquiry, and incorrectly suggesting this case involved the "enforcement" inquiry. Opp. 14-17. In reality, the panel's adherence to and application of *West* and *Charas* explain why the Ninth Circuit, in fact, viewed this as "related to" case, and not an "enforcement" case. But either way, the Ninth Circuit unambiguously treats all contract claims as escaping preemption, and that treatment

unambiguously conflicts with this Court's precedents and the law of other circuits.

Indeed, respondent cannot seriously contest that the precise holding in this case—that common law contract claims including implied covenant claims, are categorically exempt from the ADA—is itself the source of circuit conflict *regardless* whether the rationale relies on the "enforcement" prong or the "related to" prong. As Judge Rymer observed, the Seventh Circuit's decision in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), specifically rejects what the Ninth Circuit did in this case—i.e., developing "broad rules concerning whether certain types of common-law claims are preempted by the ADA." App. 39. It makes no difference that *Travel All Over the World* did not involve an implied covenant claim—the point is that the Seventh Circuit has (correctly) recognized that *Wolens* requires a case-by-case analysis of the underlying allegations to determine whether a contract claim is preempted by the ADA, thus foreclosing the Ninth Circuit's categorical rule. The conflict has been recognized not just by Judge Rymer, but by courts within the Seventh Circuit as well. *See, e.g., Newman v. Spirit Airlines, Inc.*, 2012 WL 3134422, *3-4 (N.D. Ill. July 27, 2012).

Likewise, the Eighth Circuit's decision in *Data Manufacturing, Inc. v. United Parcel Service, Inc.*, 557 F.3d 849 (8th Cir. 2009), squarely forecloses the Ninth Circuit's exemption for implied covenant claims. The Eighth Circuit specifically found preempted the plaintiff's claim that there is an "implicit" state-law prohibition on charging unlawful penalties in all

shipping contracts. *Id.* at 853-54. Although the claim was not labeled an implied covenant claim as such, the Eighth Circuit's reasoning—that an "implicit" contractual obligation by definition requires the enforcement of extra-contractual state law—cannot be squared with the Ninth Circuit's categorical rule.

Moreover, as respondent concedes, the First Circuit's decision in *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), specifically dismisses an implied covenant claim as preempted under the ADA, in direct conflict with the Ninth Circuit's categorical rule. The *Buck* plaintiffs challenged an airline's failure to refund various fees and taxes after they were unable to use nonrefundable tickets. Attempting to avoid ADA preemption, the plaintiffs argued that under *Wolens* they could bring contract-based state law claims alleging that the airline's failure to refund the fees violated their contracts of carriage. The First Circuit rejected this argument, explaining that because the plaintiffs could not point to any material breach of the actual contractual terms, they could not rely on *Wolens*. *Id.* at 36. Respondent attempts to distinguish *Buck* on the ground that the *Buck* plaintiffs pointed to federal regulations as the source for the implicit contractual duty to refund the fees and taxes. Opp. 13-14. But the fact that the *Buck* plaintiffs, unlike respondent, had a theory of how recognition of their implied covenant claims would not create a patchwork of conflicting state-law rules, hardly helps respondent. The First Circuit rejected even those quasi-federal implied covenant claims, while the Ninth Circuit applied a categorical rule to allow respondent's implied covenant claims, despite

the very real prospect of conflicting state rules. *See* Pet. 29.

II. The Decision Below Warrants This Court's Review

Respondent does not contest the importance of the issues raised in this case, nor could he. Those involved in the airline and trucking industries recognize the grave threat posed by the decision below. As their amici curiae brief explains, the Ninth Circuit's decision "create[s] a loophole that threatens to swallow the ADA preemption provision," leaving "juries throughout the vast Ninth Circuit . . . free to apply their own form of regulation to airline prices, routes, and services (and, by extension, to those of motor carriers)" and resulting in the exact "patchwork of local regulation that Congress prohibited when it deregulated the airline industry." Amici Curiae Br. 8-9. Moreover, the decision below makes clear that the Ninth Circuit will double and triple down on its blatant refusal to conform its ADA jurisprudence to this Court's precedent. This Court's intervention is sorely needed and this case provides the perfect vehicle for that intervention.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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