No. 12-462

In the Supreme Court of the United States

NORTHWEST, INC., et al.,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG,

Respondent.

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

BRIEF OF CALIFORNIA, HAWAII, ILLINOIS, INDIANA, IOWA, MAINE, MARYLAND, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, RHODE ISLAND, TENNESSEE, VERMONT, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICI CURIAE

Amici states share a compelling interest in ensuring that the Airline Deregulation Act of 1978 (ADA) does not preempt important common law remedies when airlines fall short on their voluntary undertakings. Contract law historically has been a state concern. As this Court recognized in *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 232 (1995), there is no indication that Congress sought to supplant the traditional state function of providing a forum for resolving contractual disputes concerning the airlines.

The States also share a compelling interest in ensuring that ADA preemption remains properly tied to the airlines' core business of moving passengers and cargo. Overly aggressive judicial interpretation of the ADA stymies states' legitimate regulatory and enforcement efforts. *See, e.g.,* Reporter's Transcript of Proceedings at 20-23, *People v. Delta Air Lines*, No. CGC-12-526741 (Cal. Super. Ct. May 9, 2013) (holding preempted consumer-protective state privacy laws as applied to Delta Air Lines' mobile phone application); *Huntleigh Corp. v. La. State Bd. of Private Sec. Exam'rs.*, 906 F. Supp. 357 (M.D. La. 1995) (holding preempted Louisiana's Private Security Regulatory and Licensing Law as applied to independent contractor performing security screening at airports). This case provides an opportunity for the Court to further refine the line between prohibited and permitted state regulatory efforts in a manner that leaves the States free to regulate functions that bear

too attenuated a connection to prices, routes, and services to fall within the ADA's ambit.

SUMMARY OF ARGUMENT

1. Respondent's implied covenant claim survives preemption because it is not a "law, regulation, or other provision having the force and effect of law," but instead operates to effectuate the contracting parties' intentions with respect to their voluntary undertakings. *See* 49 U.S.C. § 41713(b)(1). This understanding of the doctrine is supported by both its origins and the modern case law applying it. The Court should apply the analysis of *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), to the implied covenant claim and other contract law doctrines that operate to enforce the airlines' contractual agreements.

Variation in the outcome of cases applying the implied covenant is a function not of the covenant, but rather of the differing approaches used by states in pursuing the single goal of divining party intention. Some states rely on the four corners of the agreement. Others use multiple doctrines, such as the implied covenant, that look outside the four corners of the contract to determine the parties' intentions. Eliminating use of the implied covenant in the ADA context would effectively, and inappropriately, take sides on how state courts should construe contracts that implicate airline services.

2. To the extent that Ginsberg's claims are based on the complete revocation of his frequent flyer membership, a premise of the Ninth Circuit's opinion, his claims survive preemption for the independent reason that they do not "relate[ ]" to the "price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Frequent flyer program members commonly accrue, and redeem, substantial mileage credits without ever setting foot on a plane. Through agreements with credit card issuers, mortgage lenders, and various merchants, airlines have created a virtual marketplace in which actual flight mileage plays only a supporting role. The tight nexus that Petitioners posit between frequent flyer programs and airlines' "price, route, or service" does not exist. *Wolens* therefore does not dictate the result here because, unlike this case, it involved exclusively flight-related components of American Airlines' frequent flyer program.

The attenuated relationship between frequent flyer programs, on the one hand, and "rate, route, or service," on the other, should not be controversial to the airlines. The airlines themselves often invoke state law in their own private suits targeting wrongdoing in frequent flyer programs, against both parties with whom they contract and parties with whom they lack contractual privity. But, as this Court has explained, a petitioner invoking preemption "cannot have it both ways" – "[i]t cannot rely on [a state] regulatory framework . . . yet argue that [respondent's] claims, invoking the same state-law regime,

are preempted." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1781 (2013).

In this case, however, remand may be appropriate in light of an ambiguity in the record: while the Ninth Circuit's opinion was premised on total revocation of Ginsberg's membership, there is a suggestion in the record and briefs that only Ginsberg's Platinum Elite status was revoked. Because the record does not show how that status is accrued or what benefits it may bestow, remand may be required to ascertain its nexus with the airline's prices, routes, or services.

ARGUMENT

I. Implied-Covenant Claims Are Not Preempted Under the ADA Because They Operate to Effectuate the Parties' Voluntary Undertakings as Contemplated by *Wolens*

The implied covenant of good faith and fair dealing operates to give effect to the intentions of contracting parties. Claims based on an implied covenant therefore survive ADA preemption under a straightforward application of *Wolens*. Under *Wolens*, enforcing parties' self-imposed contractual obligations is consistent with the ADA's purpose of putting maximum reliance on the competitive marketplace. 513 U.S. at 230.

To be sure, as Petitioners and their amici emphasize, implied-covenant claims may come out different

ways in different states. But such variations result from the different contract interpretation doctrines used by states to determine the parties' intentions rather than from any peculiarity in the implied covenant. And while a few outlier states may have approaches to the implied covenant that differ from the norm, such minimal variation falls well within the limits the Court has prescribed and Congress has sanctioned in ADA and other related doctrinal areas.

A. The Implied Covenant Operates to Give Effect to the Intent of the Parties to a Contract

The implied covenant of good faith and fair dealing is one of several doctrines developed by courts as part of a move away from a formalistic approach to contract construction, which focused exclusively on the text of a contract, toward the modern approach, which seeks to give effect to the contracting parties' true intentions. So understood, the implied covenant is a means for holding parties to the terms of their bargain – the precise goal recognized as surviving preemption under *Wolens*.

Under the formalist approach of the early Nineteenth Century and the First Restatement of Contracts, courts would strictly construe contract language, sometimes even to the detriment of the actual intent of the parties. *See* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 Geo.

L.J. 195, 196-97 (1998); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 Wm. & Mary L. Rev. 1223, 1232-36 (1999). Under criticism from prominent Realists such as Arthur Corbin and Karl Llewellyn, and following the lead of state courts in New York and California, the trend reversed. Ross & Tranen, *supra*, at 200-04. By the end of the Nineteenth Century, courts began to rely increasingly on extrinsic evidence to discern the intent of the parties. Van Alstine, *supra*, at 1236-37. Courts recognized that writings often imperfectly reflect parties' intentions, as it is difficult to anticipate every possible eventuality in writing. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416, 1433 (1989). Many courts therefore abandoned their "absolute confinement to the words of an express contract" and developed methods to address events not contemplated by the parties. *N. German Lloyd v. Guar. Trust Co. of N.Y.*, 244 U.S. 12, 22 (1917). Courts today show "an increasing willingness to 'consider the entire relationship of the parties, and to find that facts and circumstances establish a contract.'" *Foley v. Interactive Data Corp.*, 765 P.2d 373, 386 (Cal. 1988) (citation omitted).

As part of the modern (now more than century-old) approach to contract enforcement, state courts and legislatures have adopted various methods to determine the parties' actual intent. Default rules have been developed for specific contexts in which the parties themselves do not specify terms. For example, the Uniform Commercial Code (U.C.C.) sets out rules

for determining the price of goods, U.C.C. § 2-305 (2012), place of delivery, *id.* § 2-308, time for shipment, *id.* § 2-309, and risk of loss depending on circumstances, *id.* § 2-509, in contracts involving the commercial transfer of goods, when the contract itself does not so specify. Some doctrines excuse performance altogether when circumstances occur that were not within the parties' contemplation, such as "contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing." *N. German Lloyd*, 244 U.S. at 22; *see Chicago, M. & St. P. Ry. Co. v. Hoyt*, 149 U.S. 1, 15 (1893) (doctrine of impossibility); *see generally* Restatement (Second) of Contracts §§ 261-270 (1981). Other doctrines allow the use of extrinsic evidence to show the parties' intent in case of unforeseen circumstances. *See* 30 R. Lord, *Williston on Contracts* § 77:1 (4th ed. 2004) (doctrines of impracticality and frustration of purpose).

States uniformly deploy these doctrines to determine party intent. To be sure, some variation exists among the States as to which doctrines they recognize and how the doctrines are applied. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 Yale L.J. 926, 928 n.1 (2010). Such variation is a healthy product of our federalism, wherein the States may operate, within constitutional and federal constraints, as laboratories for social, political, and legal ideas. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). That such variation exists does not undermine the *unitary purpose* of the pursuit: to

ascertain the intent of the parties to contracts so that they may be held to their bargain.

Like other doctrines developed in the late-Nineteenth Century, the implied covenant was developed to admit evidence outside the four corners of a contract to prove the terms of the bargain, and to ascertain and effectuate the parties' intentions. *See* Steven J. Burton & Eric G. Andersen, *Contractual Good Faith* § 1.1, at 3 (1995). Scholars trace this doctrine's origins in part to then-Judge Cardozo's opinion in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214-15 (1914), which rejected contract law's "primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal . . . ," and instead attempted to divine what "both parties must have intended." *See* Burton & Andersen, *supra*, § 2.2.2.1, at 30; Van Alstine, *supra*, at 1241. The covenant was invoked most often in output and requirement contracts (where a party contracts to consume as much as the other party produces or supply as much as the other party requires); satisfaction contracts (where a party's obligation is conditioned on the other party's satisfaction); and contracts that confer sole discretion on one party, such as the agreement at issue in this case. *See* Burton & Andersen, *supra*, § 2.2.1, at 23-29.

In practical terms, when one party to a contract violates reasonable contractual expectations, the other party may bring suit alleging a breach of the covenant as part of a breach of contract action; an independent cause of action; or, rarely, in the insurance

context, as an action in tort, depending on the circumstances. Burton & Andersen, *supra*, § 4.3.1, at 121 & § 9.1, at 392. However the covenant is pleaded, the vast majority of courts applying the doctrine look to the parties' reasonable expectations based on the context of their agreement, and find the covenant to be violated only when these expectations are not met. *Id.* This, as Respondent explains, is precisely how the implied covenant claim operates in this case – to ascertain the parties' understanding of the meaning of a term, "sole judgment," in their written agreement. Resp. Br. 22-25.

Although some early cases used the covenant to apply state public policies, courts soon retreated from this approach, using the covenant merely as a tool to reconstruct the parties' intentions, and thereby, the meaning of the contract. Despite some outliers, as the only treatise on the covenant explains: "The now-considerable case law . . . regularly construe[s] good faith to protect and serve the parties' justified expectations arising from their agreement." Burton & Anderson, *supra*, § 2.1, at 21; *see also* Van Alstine, *supra*, at 1275-76 ("[T]here is now substantial agreement that the doctrine of good faith performance protects the 'reasonable' or 'justified' expectations of the contracting parties."). A multistate survey confirms that, with few exceptions,[1] state courts anchor

[1] Only one state appears to be an outlier, explicitly using the covenant to effectuate public policy. *See Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 844 (Alaska 2010) (While the covenant

(Continued on following page)

the covenant to the contract and the parties' expectations. *See* App. A (collecting cases).

B. The Implied Covenant Does Not Cause Disuniformity That Would Undermine the ADA's Purposes

1. Variation in outcomes among states in cases involving the implied covenant is not a product of the covenant but occurs, rather, because different states take different approaches to ascertaining party intent, even as they agree that party intent controls construction of contracts. Thus, some courts adopt a formalist approach, focusing exclusively on the four corners of the written agreement. Others use doctrines, such as the implied covenant, to allow context to give meaning to the agreement's text when ambiguities and disputes arise. As the covenant rises and falls with these other doctrines, disallowing application of the covenant in the ADA context would effectively impose a single rule for all state courts on how to construe contracts whenever airline services are involved.

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is based on the parties' bargain, "[a]n employer also breaches the objective component of the covenant by terminating an employee on unconstitutional grounds or for reasons that violate public policy."). Certain other states apply only statutorily defined good faith in limited contexts. *See, e.g.*, *Niedojadlo v. Cent. State Moving & Storage Co.*, 715 A.2d 934, 937 (Me. 1998). As explained below, the existence of a few outliers do not establish a basis for broad preemption.

State courts treat the implied covenant as they would any other tool to reconstruct party intentions. Thus, in jurisdictions where courts take a more formalist approach, they reject many doctrines, including the implied covenant, which otherwise would permit the court to look beyond the contract's express language in determining parties' intent. *Compare Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 857-58 (Minn. 1986) (covenant not read into employment contracts) *with Hruska v. Chandler Associates, Inc.*, 372 N.W.2d 709, 712-14 (Minn. 1985) (rejecting the use of parol evidence to determine meaning of employment contract). Other jurisdictions, such as California, where courts look beyond the four corners of the contract to determine meaning, are more receptive to implied covenant claims that reasonable expectations have been violated. *Foley*, 765 P.2d at 386-87.

Thus, when Petitioners and the United States target implied covenant cases in different states for yielding different outcomes, their quarrel is with any doctrine that considers context relevant in ascertaining and effectuating the parties' intentions. For example, the varying outcomes in the at-will employment cases, which Petitioners and the United States so roundly criticize, result not from the implied covenant but from the differing evidence different courts use to divine party intent in the absence of a written agreement. *See* Pet. Br. 33-34; Brief of the United States as Amicus Curiae Supporting Reversal (U.S. Br.) at 27. California courts, among many others,

"consider the entire relationship of the parties . . . [F]actors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement." *Foley*, 765 P.2d at 386-87 (internal quotation marks omitted). As a result, when no written contract exists, rather than conclude that the employee is at-will, California courts may take into account contextual information, such as termination conditions set forth in an employment manual, to conclude that the employer's discretion to terminate is limited. *Id.* By contrast, the Alabama Supreme Court has held that an employee handbook distributed by the employer does not alter the at-will nature of employment under the common law when no written contract exists. *White v. Chelsea Indus., Inc.*, 425 So. 2d 1090 (Ala. 1983). It is these different approaches to interpreting employment terms in the absence of a written contract, and not the implied covenant, that produces the varying outcomes in this context. *See* Theresa Ludwig Kruk, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R.4th 120 (1984).

Thus, targeting the implied covenant "assumes the answer to the very contract construction issue," by seeking to bind the state courts to a particular approach to interpreting the intentions of the parties in the ADA context that some courts (including this Court) have rejected. *Wolens*, 513 U.S. at 234; *see Whitney v. Wyman*, 101 U.S. (11 Otto) 392, 396 (1880) ("Words are merely the symbols [contracting parties]

employ to manifest their purpose. . . .”). The better view is that the ADA leaves states with the responsibility to develop doctrine for “sensible construction” of contracts. *Wolens*, 513 U.S. at 230.

2. In any event, this Court has never required unwavering uniformity of state interpretative methods, whether in this context, or in the context of the Employee Retirement Income Security Act (ERISA), upon whose judicial precedents this Court’s ADA preemption analysis has frequently relied. In the ADA context, despite the States’ varying approaches to contract construction, *Wolens* concluded that “contract law is not at its core ‘diverse, nonuniform, and confusing.’” 513 U.S. at 233 n.8 (citation omitted). In the ERISA context, this Court has differentiated between unworkable diversity in state laws designating beneficiaries of an intestate plan participant, and relatively uniform state laws prohibiting a person who has killed a plan participant from inheriting from the participant. The Court explained that slayer statutes “have been adopted by nearly every State . . . and are more or less uniform nationwide,” *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001), even though there are at least “three approaches” to addressing the problem. Michael G. Walsh, *Homicide as Precluding Taking Under Will or by Intestacy*, 25 A.L.R.4th 787 (1983).

Accepting reasonable variations among state laws reflects a common-sense understanding that slight differences will often occur, and be tolerable, when Congress enacts federal laws. Unless the Court

wishes "to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, . . . contract claims relating to airline rates, routes, or services," *Wolens*, 513 U.S. at 232, it should leave to state courts the task of interpreting the parties' intentions.

II. An Airline's Decision to Revoke a Customer's Membership in a Frequent Flyer Program Does Not "Relate" to the "Price" or "Service" of an Airline Carrier

The Ninth Circuit's holding that a claim based on "revocation" of "membership" in a frequent flyer program does not "relate" to price, routes or services, provides an independent ground for Ginsberg's claim to proceed. Pet. App. 3. The accrual and redemption of "points" or "miles" in frequent flyer programs is too attenuated from airline transportation to implicate the ADA's deregulatory concerns. Petitioners' and their amici's suggestions that frequent flyer programs are wholly within the ADA's preemptive scope are wrong; those arguments misread *Wolens* and fail to account for the evolution in and expansive reach of modern frequent flyer programs.

We note, however, that the briefing in this Court indicates that Northwest's action may have been limited to terminating Ginsberg's Platinum Elite status, rather than complete termination of his membership or revocation of his accrued points. Pet. Br. 2, 7. If that is the case, and should this Court also hold that

the implied covenant is regulatory in nature (*see* Part I, *supra*), then remand may be appropriate so that the lower courts can consider the relationship of the Platinum Elite status to airline rates, routes and services.

A. The Ninth Circuit's Holding, Which Was Premised on "Revocation" of Respondent's WorldPerks' Membership, Is Correct

The Ninth Circuit correctly held that, as a general matter, revocation of frequent flyer membership is insufficiently connected to the price, route, or services of an airline carrier to be preempted. The premise of the Ninth Circuit's holding was total membership revocation: "Northwest revoked Ginsberg's WorldPerks membership on June 27, 2008." Pet. App. 3. Because modern frequent flyer programs have only a tenuous connection to airline prices, routes, and services, this holding was correct. *See Pelkey,* 133 S. Ct. at 1778.

1. The market for airline points has evolved in the 18 years since *Wolens* was decided. Frequent flyer programs have changed from plans centered on air travel to free-floating businesses that may not involve flights at all.

Northwest was one of the first airlines to launch a frequent flyer program in 1981 – the Orient Free Flight Plan, known as WorldPerks from 1986 onwards. *The Big 2-5 – Celebrating 25 Years of Frequent*

Flyer Programs, InsideFlyer (Apr. 24, 2006).[2] When they were first introduced, frequent flyer programs – including Northwest's early program – centered around airline travel and often had restrictive rules for that travel. *Id.* For example, in the first major program offered by American Airlines, tickets were only discounted, and not offered free; miles were non-transferable. *Id.* Airlines developed award relationships with other travel-related entities such as hotels and car rental agencies, such that purchases at these entities would garner miles. But, at least until the late 1980s, customers earned miles primarily when they traveled. *Id.*

The close ties between airline services and frequent flyer programs began to unravel when frequent flyers began to earn many of their miles without setting foot on an aircraft, and the proportion of miles spent on flights decreased. In the late 1980s, airlines began developing relationships with non-travel-related entities, such as credit card companies, to allow members to earn miles without traveling. *Credit Card Competition*, InsideFlyer (Jan. 2011).[3] Northwest, for example, began offering miles for credit card purchases in 1988. *Bank One, Northwest Airlines Offer Visa Card To Worldperks Members*, PR Newswire (Feb. 22, 1988). Later that year, signing up with MCI for phone services would also garner members WorldPerks

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[2] *Available at* http://www.insideflyer.com/articles/o2.php?key=89.

[3] *Available at* http://www.insideflyer.com/articles/article.php?key=6670.

miles. *Northwest Joins With MCI In Frequent-Flier Venture*, The Associated Press (June 14, 1988).

At first these alternate sources offered limited miles, but today they are the dominant means by which miles are obtained. For example, in the late 1980s, one obtained only 5,000 bonus miles for obtaining a new credit card. *Credit Card Competition, supra*. However, by 2009, credit cards were offering up to 100,000 miles to sign up. Today, "[t]he majority of airline frequent flier miles are now earned outside an airplane, by frequent buyers [rather] than frequent flyers. Airline miles are earned for the use of credit cards, hotel stays, car rentals, retail purchases[,] dining out, and even for mortgage and real estate agents. . . . [T]hree times more airline miles are being generated than are being consumed." Pankaj Narayan Pandit, Infosys, *Perspective: Airline Loyalty Programs* 1 (2009).[4] Indeed, "if you pay by credit card you can earn miles for hospital surgery, income-tax payments and funerals." Special Report, *Frequent-Flyer Miles: Funny Money*, The Economist (2005).[5] As one promotion proclaims, "[a]ccumulating miles is no longer reserved for individuals who

[4] *Available at* http://www.infosys.com/industries/airlines/Documents/frequent-flyer-programs.pdf (accessed July 25, 2013) (copy on file with counsel). Most of the sources Petitioners cite, that discuss the relationship between frequent flyer programs and air travel do not date past the early 1990s. *See* Pet. Br. *passim*.

[5] *Available at* http://www.economist.com/node/5323615.

travel." *Frequent Flyer Miles: Turning Mortgages Into Miles*, Business Week Special Advertising Section.[6]

Not only are most miles *earned* without consuming airline services, many miles are *spent* without consuming airline services, and most miles are *not spent at all* because of the very practices this Court encountered in *Wolens*. Pandit, *supra*, at 1. Through airlines' own actions, the spending of miles on the flight-related services that the ADA protects has been discouraged. "Airline revenue management is programmed to discourage sale of free seats or upgrades using redemption of miles." *Id.* at 2. "[O]n stingier airlines like Northwest," the redemption rate is even lower – "the average success rate of getting an upgrade or free ticket using miles" is 37 percent. *Id.* (citing *Funny Money*, *supra*). At the same time, frequent flyer programs provide marketplaces in which customers may obtain rewards that do not comprise airline services: Northwest-Delta's program allows consumers, for example, to buy Omaha steaks or tickets to Broadway shows, or to contribute to charities, among hundreds of other options. *See* Delta, SkyMiles Marketplace.[7]

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[6] http://www.businessweek.com/adsections/extravel/frequent/mortgages_flyer.htm (last accessed Aug. 25, 2013).

[7] https://marketplace.delta.com/ (last accessed July 30, 2013). After the merger of Northwest and Delta airlines, WorldPerks miles were converted into Delta SkyMiles. Charline King, *Delta and Northwest Skymiles and WorldPerks Merge*, Examiner.com

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In turn, airlines earn profits from their mileage program, not through providing airline services, but rather by selling their miles to partners, who in turn award the miles to frequent flyer members in connection with various non-travel-related transactions. Airlines may earn one or two cents per mile awarded, which can amount to four cents for each dollar a consumer spends when multiple miles are awarded per dollar. *See* Chase, United MileagePlus Explorer Credit Card.[8] One 2005 estimate put the revenue from non-airline-service-related sales at $10 billion. *Funny Money*, *supra*. Thus, "airline loyalty programs [are] . . . run as independent profit centers." Pandit, *supra*, at 1. The independence is not just figurative – airlines have begun spinning off their programs as separate businesses altogether from that of providing air services. Evert de Boer, Carlson Marketing, *Spinning of Frequent Flyer Programs in Turbulent Times* (2009).[9]

To be sure, some program benefits are still tied to flights. For example, some programs offer elite program status that may only be accrued through miles flown (i.e., rather than through credit card use or the

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(Oct. 9, 2009), *available at* http://www.examiner.com/article/delta-and-northwest-skymiles-and-worldperks-merge.

[8] *Available at* https://creditcards.chase.com/credit-cards/united-airlines-credit-card2.aspx?unitedmileageplussplit=2&iCELL=6ZJ4 (last accessed July 29, 2013).

[9] *Available at* http://loyalty360.org/images/uploads/spinning_off_frequent_flyer_programs_in_turbulent_times.pdf.

purchase of merchandise, meals, or services). *See*, *e.g.,* Delta, Skymiles Medallion Program Details.[10] In some programs, the benefits of elite status relate solely to flight services, such as upgrades, or reduced fees for checking baggage. *See, e.g.,* Delta, Skymiles Medallion Benefits.[11] Thus, disputes involving elite programs may require a different preemption analysis than those involving membership in general frequent flyer programs. The record on Northwest's elite program in this case is undeveloped.

2. Given the attenuated nexus between mileage points accrual and redemption on the one hand, and actual flights on the other, it cannot be said that simple membership in a frequent flyer program – or termination of that membership – is so tied to an airline's core business that it necessarily falls within the ADA's deregulatory purposes.

The ADA's preemption provision is broad, but limited. On one hand, the term "related to" is "'expansive.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987)). On the other, "the breadth of the words 'related to' does not mean the sky is the limit," "else 'for all practical purposes pre-emption

[10] www.delta.com/content/www/en_US/skymiles/about-skymiles/medallion-program/program-details.html/#mqms (last accessed Aug. 27, 2013).

[11] www.delta.com/content/www/en_US/skymiles/about-skymiles/medallion-program/medallion-benefits.html (last accessed Aug. 27, 2013).

would never run its course.'" *Pelkey*, 133 S. Ct. at 1778 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995)). State regulation that has only a "tenuous, remote, or peripheral" effect on airline prices, routes, or services survives preemption. *Id.* (internal quotations omitted).

Multiple factors confirm that regulation of frequent flyer program membership has too "tenuous, remote, or peripheral" a relationship to airline flights or services to create a preemption problem. As noted above, airline loyalty programs constitute virtual marketplaces that trade in a wide variety of goods unconnected specifically to flights (indeed, Delta calls part of its program the SkyMiles Marketplace). Airlines earn commissions from merchants such as credit card companies to whom they grant access to this marketplace. In that sense, regulating use of airline frequent flyer programs is analogous to regulating use of physical marketplaces through the general zoning laws approved in *Pelkey*, 133 S. Ct. at 1780, rather than regulating the airlines' rates, routes or services. That is, the ADA should not prevent a state from regulating marketplaces, whether physical *or* virtual, regardless of who sets them up, so long as that regulation does not encompass the airlines' core function of providing flights and associated services. "Quality standards . . . set by the State" on, say, the credit lending practices through which points are gained, or the television sets that can be purchased with the points, are not preempted, even if regulation

of these unrelated areas may "affect the relative cost of providing other[ ]" services, such as flights. *Travelers*, 514 U.S. at 660. The link between the program and airline services is too indirect to support ADA preemption of a state law that regulates program access.

The relationship is also attenuated by the negligible effect regulation would have on airline "prices, routes and services." Frequent flyer suits concern access to the (often separate) frequent flyer businesses the airlines run. Protecting access to the programs, however, does not equate to access to *flights.* As *Wolens* held, the airlines retain carte blanche under state law (within contractual limits), to limit how, when, and whether members can spend their frequent flyer points to redeem the flight services that the ADA protects.

3. Petitioners' arguments stretch *Wolens* beyond its reasonable bounds. While *Wolens* indisputably involved a frequent flyer program, it does not support Petitioners' argument that any and all claims regarding frequent flyer programs are preempted by the ADA. Pet. Br. 17-20; U.S. Br. 12-16.

The preemption analysis in *Wolens* turned in part on facts distinctive to that case. In *Wolens*, respondents' claims were based on program changes that impacted the number and availability of needed miles specifically *to purchase flights*. 513 U.S. at 226. There, respondents disputed imposition of capacity controls (limits on eligible seats on flights) and blackout

dates (restrictions on dates for which miles could be redeemed for flights). *Id.* at 225. Thus the claims implicated "rates" because they related to what the airline "charge[d] in the form of mileage credits for free tickets," and the claims implicated "services" because they limited "access to flights." *See id.* at 226.

The factual context of *Wolens* therefore involved only those aspects of a frequent flyer program that were specifically flight-related, and its holding must be understood in that context. Because program membership is not necessarily flight-related, claims based on loss of program membership are not necessarily preempted.

B. Fairness and Law Enforcement Considerations Support a Finding of No Preemption Where the Challenged Conduct Bears Only a Tenuous Connection to an Airline's Core Services

States, their residents, and even airlines themselves, benefit from a careful construction of the ADA that does not overly displace state law. States and their residents share an interest in the viability of state regulation in areas such as environmental protection, transportation for emergency services, professional licensing, privacy, employment discrimination, and contract, that have been challenged as preempted

under the ADA.[12] Reasonable limits upon ADA preemption are necessary to protect diverse and important areas of state law.

Indeed, contrary to the positions they are taking in the present case, the airlines themselves rely on the availability of state law remedies for abuses of their frequent flyer programs, often suing defendants with whom they do not even share a contractual relationship. In these suits, they have invoked breach of contract, tortious interference with business relations, unfair competition, misappropriation, and fraud claims, among other theories, in their efforts to prevent the sale or bartering of mileage credits and other practices involving frequent flyer miles that they deem abusive.[13]

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[12] *See respectively Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 208 (2d Cir. 2011); *Eagle Air Med Corp. v. Colo. Bd. of Health*, 570 F. Supp. 2d 1289, 1290 (D. Colo. 2008); *Huntleigh Corp. v. La. State Bd. of Private Security Exam'rs*, 906 F. Supp. 357 (M.D. La. 1995); *People v. Delta Air Lines*, No. CGC-12-526741, 2013 WL 1951360 (Cal. Super. Ct. May 9, 2013); *Delta Air Lines v. New York State Div. of Human Rights*, 689 N.E.2d 898 (N.Y. 1997).

[13] *See, e.g.*, *Alaska Airlines Inc. v. Carey,* No. 09-35979, 2010 WL 3677783 (9th Cir. Sept. 16, 2010); *American Airlines, Inc. v. American Coupon Exchange, Inc.*, 721 F. Supp. 61 (S.D.N.Y. 1989); *American Airlines, Inc. v. Platinum World Travel*, 717 F. Supp. 1454 (D. Utah 1989), *order modified*, 737 F. Supp. 627 (D. Utah May 7, 1990); *Frequent Flyer Depot, Inc. v. American Airlines, Inc.*, 281 S.W.3d 215 (Tex. Ct. App. 2009), *cert. denied*, 559 U.S. 1036 (2010); *Luxury Travel Source v. American Airlines*, 276 S.W.3d 154 (Tex. Ct. App. 2008).

Some of these claims have been permitted to proceed in the face of preemption challenges on the theory that state law is only "regulatory" in nature when it is being invoked *against*, rather than *by* the airlines. *See, e.g., Alaska Airlines,* 2010 WL 3677783, at *2; *Frequent Flyer Depot,* 281 S.W.3d at 221. This one-sided approach to ADA preemption interpretation is, among other things, inconsistent with this Court's observation in *Pelkey* that:

> [Petitioner] cannot have it both ways. It cannot rely on New Hampshire's regulatory framework as authorization for the sale of Pelkey's car, yet argue that Pelkey's claims, invoking the state-law regime, are preempted.

133 S. Ct. at 1781.

Accordingly, as in *Wolens*, this Court should be wary of invalidating state law doctrines that serve important remedial purposes without challenging or undermining the deregulatory purpose of the ADA.

C. Remand May Be Appropriate Based on Uncertainty in the Record Regarding the Scope of Respondent's Claims and the Characteristics of Northwest's Program

Because the record and briefs suggest that Ginsberg's claim may be more limited than total loss of membership in Northwest's WorldPerks program, remand may be appropriate. The record is uncertain on this potentially outcome-determinative issue.

According to Ginsberg, during the dispute, "he did not know if he had been relegated to a lesser status in the Program, or removed from it entirely." J.A. 41, n.4. However, the last communication from Northwest in the record suggests that Ginsberg remained a member of WorldPerks. *See id.* at 62 (threatening "termination of your WorldPerks account"). The distinction may be material if, for example, the terms of the elite program relate to the airline's price, routes or service in ways that membership in Northwest's general frequent flyer program do not. Accordingly, should the Court not hold the implied covenant exempt from ADA preemption, it should consider remanding the case for further factfinding.

* * *

Enforcement of private contracts is a classic state function that, under principles of federalism and state sovereignty, should not be casually displaced. In this case, Respondent seeks, through his implied-covenant claim, to enforce the bargain he believed he had struck with the airline. As such, his claim does not offend the ADA's deregulatory purposes and should be permitted to proceed. Further, to the extent his claim is premised on revocation of his membership status, it has far too tenuous a connection to the airline's prices, routes, or services, to be preempted. Petitioners' suggestion that all aspects of airline frequent flyer programs, which now bear only a highly attenuated connection to actual flights, are entirely

beyond state regulation is unsupported by the text and purposes of the ADA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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APPENDIX A

Multistate Survey of State Cases Describing the Covenant of Good Faith and Fair Dealing

- *Sellers v. Head*, 73 So.2d 747, 751 (Ala. 1954) ("Where a contract fails to specify all the duties and obligations intended to be assumed, the law will imply an agreement to do those things that according to reason and justice the parties should do in order to carry out the purpose for which the contract was made.").
- *Wagenseller v. Scottsdale Mem'l Hosp*., 710 P.2d 1025, 1040 (Ariz. 1985) (in applying the covenant, "the relevant inquiry always will focus on the contract itself, to determine what the parties did agree to"), *superseded by statute on other grounds*.
- *Guz v. Bechtel Nat'l*, *Inc*., 8 P.3d 1089, 1110 (Cal. 2000) ("The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*.").
- *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1996) (en banc) ("The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations.").
- *Magnan v. Anaconda Indus., Inc*., 479 A.2d 781, 788-89 (Conn. 1984) ("Although we endorse the applicability of the good faith and fair dealing principle to employment contracts, its essence is

the fulfillment of the reasonable expectations of the parties.").

- *Allworth v. Howard Univ.*, 890 A.2d 194, 201 (D.C. 2006) ("'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" (quoting Restatement (Second) of Contracts § 205 cmt. A (1981))).
- *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1185 (Fla. Dist. Ct. App. 2000) ("'[T]he implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations.'" (citation omitted)).
- *Simmons v. Puu*, 94 P.3d 667, 673 (Haw. 2004) ("'[E]very contract contains an implied covenant of good faith and fair dealing that neither party will do anything that will deprive the other of the benefits of the agreement.'" (citation omitted)).
- *Stuart Enters. Int'l, Inc. v. Peykan, Inc.*, 555 S.E.2d 881, 884 (Ga. Ct. App. 2001) ("The implied covenant of good faith modifies, and becomes part of, the provisions of the contract itself. As such, the covenant is not independent of the contract.").
- *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 863 (Idaho 1991) ("No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties.").
- *Voyles v. Sandia Mortg. Corp.*, 751 N.E.2d 1126, 1131 (Ill. 2001) ("'This principle ensures that

parties do not try to take advantage of each other in a way that could not have been contemplated at the time the contract was drafted. . . .'" (citation omitted)).

- *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 34 (Iowa 2012) ("[T]he covenant does not 'give rise to new substantive terms that do not otherwise exist in the contract.'" (citation omitted)).
- *Estate of Draper v. Bank of Am., N.A.*, 205 P.3d 698, 712 (Kan. 2009) (the covenant prohibits behavior "inconsistent with the justified expectations" of the parties).
- *RAM Eng'g & Constr., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 586 (Ky. 2003) ("Courts often interpret good faith based on the parties' reasonable expectations of the meaning of the provisions of the contract.").
- *Fontenot's Rice Drier, Inc. v. Farmers Rice Milling Co.*, 329 So. 2d 494, 500 (La. Ct. App. 1976) ("[G]ood faith" forbids "deception and a disappointment of the just expectation and confidence" of the parties).
- *Questar Builders, Inc. v. CB Flooring, LLC*, 978 A.2d 651, 675 (Md. 2009) ("[T]he obligation of good faith and fair dealing requires a party exercising discretion to do so in accordance with the 'reasonable expectations' of the other party." (citing Steven J. Burton & Eric G. Anderson, *Contractual Good Faith: Formation, Performance, Breach, Enforcement* § 2.3.3 (1995))).

- *Chokel v. Genzyme Corp.*, 867 N.E.2d 325, 329 (Mass. 2007) ("The purpose of the implied covenant is to ensure that neither party interferes with the ability of the other to enjoy the fruits of the contract . . . and that, when performing the obligations of the contract, the parties 'remain faithful to the intended and agreed expectations' of the contract." (citations omitted)).

- *Allen v. Thom*, No. A07-2088, 2008 WL 2732218, at *4 (Minn. Ct. App. July 15, 2008) ("This covenant forbids a party to unjustifiably prevent its performance of the contract. . . . '[C]ourts employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations.'" (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 371 (1980))).

- *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992) ("Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party.").

- *Farmers' Elec. Co-op., Inc. v. Missouri Dep't of Corr.*, 977 S.W.2d 266, 272 (Mo. 1998) (en banc) ("It is assumed in every contract that the parties will not avoid their obligations under the contract.").

- *Hardy v. Vision Serv. Plan*, 120 P.3d 402, 405 (Mont. 2005) ("We measure the nature and extent of the obligations of good faith and fair dealing by the parties' justifiable expectations." (citation omitted)).

- *RSUI Indem. Co. v. Bacon*, 810 N.W.2d 666, 674 (Neb. 2011) ("The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties." (footnote omitted)).
- *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1016 (Nev. 2004) ("[W]hen 'the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing.'" (citation omitted)).
- *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193-94 (N.H. 1989) (Souter, J.) ("[U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting. . . . [¶] in furtherance of which community standards of honesty, decency and reasonableness can be applied.").
- *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1127 (N.J. 2001) ("[T]he task here is to identify in that context the parties' reasonable expectations.").

- *Sanders v. FedEx Ground Package Sys., Inc.*, 188 P.3d 1200, 1203 (N.M. 2008) ("The implied covenant is aimed at making effective the agreement's promises.").
- *Wieder v. Skala*, 609 N.E.2d 105, 109 (N.Y. 1992) ("'What courts are doing [when an omitted term is implied]', . . . 'whether calling the process "implication" of promises, or interpreting the requirements of "good faith", as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations'" (citation omitted)).
- *Cavendish Farms, Inc. v. Mathiason Farms, Inc.*, 792 N.W.2d 500, 506 (N.D. 2010) ("When one party to a contract 'has the power to make a discretionary decision without defined standards,' the implied covenant of good faith and fair dealing applies to protect the parties' reasonable expectations." (citation omitted)).
- *Andrew v. Power Mktg. Direct, Inc.*, 978 N.E.2d 974, 985 (Ohio Ct. App. 2012) (duty to act in good faith "is 'generally used to effectuate the intentions of the parties or to honor their reasonable expectations' and 'applies when one party has discretionary authority to determine certain terms of the contract.'" (citations omitted)).
- *First Nat'l Bank & Trust Co. v. Kissee*, 859 P.2d 502, 509 (Okla. 1993) ("The common law imposes this implied covenant upon all contracting parties, that neither party, because of the purposes

of the contract, will act to injure the parties' reasonable expectations nor impair the rights or interests of the other to receive the benefits flowing from their contractual relationship.").

- *Hampton Tree Farms, Inc. v. Jewett*, 892 P.2d 683, 693 (Or. 1995) ("[D]uty of good faith and fair dealing. . . . serves to effectuate the objectively reasonable expectations of the parties.").
- *Lajayi v. Fafiyebi*, 860 A.2d 680 (R.I. 2004) (applying covenant of good faith and fair dealing to "'satisfy[ ] the primary intent of the parties'" (citation omitted)).
- *Commercial Credit Corp. v. Nelson Motors, Inc.*, 147 S.E.2d 481, 484 (S.C. 1966) ("'In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.'" (citation omitted)).
- *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 194 (S.D. 2007) ("Ultimately, the duty 'emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' . . . [¶] 'The implied obligation "must arise from the language used or it must be indispensable to effectuate the intention of the parties."'" (citations omitted)).
- *Dick Broad. Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 666 (Tenn. 2013) ("[W]hile the implied covenant of good faith and fair dealing 'does not create new contractual rights or obligations,

it protects the parties' reasonable expectations as well as their right to receive the benefits of their agreement.'" (citation omitted)).

- *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1046 (Utah 1989) ("The scope of the implied covenant is determined by the factual setting in which it is found. Indeed, where the reasonable expectations of the parties are met, there is no breach" of the covenant).
- *Southface Condo. Owners Ass'n v. Southface Condo. Ass'n*, 733 A.2d 55, 58 (Vt. 1999) ("The purpose of the implied covenant of good faith and fair dealing is to ensure that parties act with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" (citation omitted)).
- *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991) (en banc) ("[T]he duty arises only in connection with terms agreed to by the parties.").
- *Beidel v. Sideline Software, Inc.*, ___ N.W.2d ___, 2013 WL 4511373, at *13 n.26 (Wis. 2013) ("'Whether the duty to act in good faith has been met in this case should be determined by deciding what the contractual expectations of the parties were.'" (quoting standard Wisconsin jury instruction regarding breach of covenant)).
- *City of Gillette v. Hladky Constr., Inc.*, 196 P.3d 184, 196 (Wyo. 2008) ("It requires the parties to act in accordance with their agreed common purpose and each other's justified expectations.").