No. 12-462

In the Supreme Court of the United States

NORTHWEST, INC., ET AL., PETITIONERS

v.

RABBI S. BINYOMIN GINSBERG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, provides, with certain exceptions, that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). The question presented is whether that provision preempts respondent's claim that petitioner's termination of his membership status in petitioner's frequent-flyer program violated an implied covenant of good faith and fair dealing, which arises under the state common law of contract.

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INTEREST OF THE UNITED STATES

The issue in this case is whether 49 U.S.C. 41713(b)(1), a provision of the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, preempts a state-law claim asserting that termination of membership status in an airline's frequent-flyer program violated an implied covenant of good faith and fair dealing under state contract law. Congress enacted the preemption provision to prevent States from undermining federal deregulation of the airline industry and to promote the ADA's goal of fostering "maximum reliance on competitive market forces." 49 U.S.C. 40101(a)(6). The United States has an interest in ensuring that the provision is interpreted and applied in a manner that vindicates the market-oriented purposes of the statute by protecting the

enforceability of privately ordered obligations through the state common law of contract, while preventing States from imposing substantive policies that override the bargained-for choices of contracting parties.

STATEMENT

The ADA preempts any state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). Construing that provision, this Court has held that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 232 (1995). Respondent sued petitioner, claiming, *inter alia*, that petitioner's termination of respondent's membership status in petitioner's frequent-flyer program breached an implied covenant of good faith and fair dealing based on state contract law. Pet. App. 58. The district court granted petitioner's motion to dismiss, holding that the ADA preempts respondent's implied-covenant claim. *Id.* at 61-69. The court of appeals reversed, concluding that the ADA does not preempt "state contract remedies," *id.* at 15, and that respondent's implied-covenant claim does not "relate to" petitioner's prices or services, *id.* at 17-19.

1. a. Before 1978, the federal government extensively regulated air carriers by controlling entry into the industry, the rates an air carrier could charge its customers, the services it could offer, and the routes it could fly. See, *e.g., Western Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 347 U.S. 67 (1954); Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731. The federal government's regulatory authority was not exclusive, and the States also regulated air carriers. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S.

374, 378 (1992). In enacting the ADA in 1978, Congress largely deregulated the airline industry, concluding that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services.'" *Ibid.* (brackets in original) (quoting 49 U.S.C. App. 1302(a)(4) and (9) (1988)) (codified as amended at 49 U.S.C. 40101(a)(6) and (12)). "To ensure that the States would not undo federal deregulation with regulation of their own," *ibid.*, the ADA included a preemption provision, barring any State from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," 49 U.S.C. 41713(b)(1).[1]

b. In *Wolens*, this Court considered that preemption provision in the context of a state-law challenge to an airline's "retroactive changes in terms and conditions" of a frequent-flyer program. 513 U.S. at 222. Participants in the program claimed that the airline's changes violated a state consumer-fraud act and, separately, constituted a breach of contract. *Id.* at 225. The state supreme court had held that the ADA did not preempt plaintiffs' challenges because a frequent-flyer program is not "essential" to the "operation of an airline." *Id.* at 226 (quoting *Wolens* v. *American Airlines, Inc.*, 626 N.E.2d 205, 208 (Ill.

[1] As originally enacted, the provision preempted any state "law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708. When adopting the current language, Congress explained that it intended the revision to be "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994); see § 1(d), 108 Stat. 1143.

1993)). Accordingly, the state court had concluded that the plaintiffs had not asserted claims "relat[ed] to" the air carrier's rates, routes, or services within the meaning of the preemption provision. *Ibid.* (brackets in original) (quoting *Wolens*, 626 N.E.2d at 208).

This Court affirmed in part and reversed in part. *Wolens*, 513 U.S. at 235. The Court explained that it "need not dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services.'" *Id.* at 226 (brackets in original). Their claims related to "rates" because they involved the airline's "charges in the form of mileage credits for free tickets and upgrades." *Ibid.* The claims related to "services" because they concerned "access to flights and class-of-service upgrades unlimited by retrospectively applied" terms limiting that access. *Ibid.*

Although the plaintiffs' claims were related to the rates, routes, or services of an air carrier, the Court explained, the ADA preempted those claims only if they sought to "enforce any [state] law." *Wolens*, 513 U.S. at 226. The Court determined that the plaintiffs' claims based on the state consumer-fraud statute did seek to enforce a state law within the meaning of the preemption provision. *Id.* at 227. The state statute "[was] prescriptive; it control[led] the primary conduct of those falling within its governance"; and it "serve[d] as a means to guide and police the marketing practices of the airlines." *Id.* at 227-228. Accordingly, the statute "typified" state legislation having "the potential for intrusive regulation of airline business practices" of the sort Congress intended to fore-

close through the ADA, and so it was preempted by the federal statute. *Id.* at 227; see *id.* at 228.

The Court held, by contrast, that the plaintiffs' contract claims were not preempted because they "alleg[ed] no violation of state-imposed obligations, but [sought] recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. The ADA's preemption provision bars a State from "enact[ing] or enforc[ing]" certain "law[s], regulation[s], or other provision[s] having the force and effect of law." 49 U.S.C. 41713(b)(1). Those terms, the Court reasoned, "connote[] official, government-imposed policies" and "binding standards of conduct that operate irrespective of any private agreement." *Wolens*, 513 U.S. at 229 n.5 (quoting U.S. Amicus Br. at 16 (No. 93-1286)). Because "[a] remedy confined to a contract's terms simply holds parties to their agreements," *id.* at 229, the Court held that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims," *id.* at 232. That understanding, the Court continued, was buttressed by Congress's retention of a saving clause, which preserved "the remedies now existing at common law or by statute." *Id.* at 232 (quoting 49 U.S.C. App. 1506 (1988)) (codified as amended at 49 U.S.C. 40120(c)).

2. a. Petitioner maintained a frequent-flyer program. Respondent was a member of that program between 1999 and 2008. Pet. App. 56-57. A clause in the contract between petitioner and program members provided: "Abuse of the [frequent-flyer] program (including * * * improper conduct as determined by [petitioner] in its sole judgment * * *) may result in cancellation of the member's account."

J.A. 64-65. In June 2008, petitioner notified respondent that it had terminated his "Platinum Elite" status in the program. Pet. App. 57. When respondent asked for an explanation, petitioner invoked the clause quoted above. *Id.* at 58.

Respondent filed a putative class action against petitioner, alleging that it had improperly determined that he had abused the frequent-flyer program, J.A. 39-44, and that petitioner's termination of his status "was nothing more than a pretext for cost-cutting in advance of" a merger with another airline, J.A. 45. Respondent asserted four claims: breach of contract, breach of an implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation. Pet. App. 58-59.

The district court granted petitioner's motion to dismiss. Pet. App. 56-73. The court held that respondent's claims for breach of an implied covenant, negligent misrepresentation, and intentional misrepresentation were preempted by the ADA. *Id.* at 61-69. Those claims, the court reasoned, sought to enforce state law, *id.* at 62-67, and related to an air carrier's prices and services, *id.* at 67-69. With respect to respondent's implied-covenant claim, the district court explained that the duty allegedly imposed "does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." *Id.* at 65 (footnote omitted). The district court dismissed without prejudice respondent's breach-of-contract claim, concluding that the language of the contract left the determination of valid cause for termination to petitioner's "sole judgment." *Id.* at 71-72; see *id.* at 72 ("[Respondent] in effect asks that the Court replace [petitioner's] judgment with his own

regarding what counts as 'abuse' of [the frequent-flyer program].").[2]

b. Respondent appealed, challenging only the district court's dismissal of his claim for breach of an implied covenant. Pet. App. 5. The court of appeals reversed, holding that the ADA does not preempt such a claim. *Id.* at 3.[3]

First, the court of appeals held that an implied covenant of good faith and fair dealing was not the sort of state law preempted by the ADA. Pet. App. 8-17. The court observed that, in *Wolens*, this Court "drew a clear distinction * * * between state laws that regulate airlines and state enforcement of contract disputes." *Id.* at 10. The court's own precedent had held that the ADA's saving clause preserved "state tort remedies that already existed at common law, provid[ed] that such remedies do not significantly impact federal deregulation." *Id.* at 15 (quoting *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998)). In the court's view, that reasoning applied equally to existing state common-law-contract remedies, such as the implied covenant of good faith and fair dealing. *Ibid.* The court held that allowing respondent's implied-covenant claim to proceed would not "interfere with the deregulatory mandate" of the ADA but would, instead, enforce petitioner's "contractual obligations." *Id.* at 15-16. Accordingly, respondent's implied-covenant claim did not seek to enforce state law within the meaning of the ADA. *Id.* at 16-17.

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[2] The district court denied respondent's motion for reconsideration. Pet. App. 41-55.

[3] The court of appeals withdrew an initial opinion. Pet. App. 2; see *id.* at 20-40.

The court of appeals further held that respondent's implied-covenant claim does not relate to the prices or services of an air carrier. Pet. App. 17-19. It believed that this Court had construed the ADA's preemption provision "narrow[ly]." *Id.* at 9 (discussing *Morales*, 504 U.S. at 390). In the court of appeals' view, under this Court's precedent, only "those [state] laws that actually have a direct effect on rates, routes, or services" are preempted by the ADA. *Id.* at 8. The court held that because an implied-covenant doctrine does not directly regulate prices or services, "the link" between respondent's claim and air carrier prices or services "is far too tenuous, and effectively would subsume all breach of contract claims." *Id.* at 17.

SUMMARY OF ARGUMENT

A claim is preempted under the ADA if it seeks to enforce a state law related to an air carrier's prices, routes, or services. 49 U.S.C. 41713(b)(1). There is little question that respondent's claim relates to petitioner's prices or services. And because respondent's claim seeks to impose an extra-contractual obligation on petitioner, the ADA preempts it.

A. This Court has repeatedly held that by preempting state law "related to" an air carrier's prices, routes, or services, Congress demonstrated a broad intent to preclude state-law claims "having a connection with, or reference to" prices, routes, or services. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), the Court held that claims challenging the retroactive change in the terms and conditions of a frequent-flyer program "relate to" air carrier prices "in the form of mileage credits for free tickets and upgrades" and to air carrier services such as

"flights and class-of-service upgrades." *Id.* at 226. Respondent's claim that petitioner improperly terminated his membership status in petitioner's frequent-flyer program, which gave him access to those rates and services, is no different.

Respondent argues (Br. in Opp. 19) that because he does not directly challenge petitioner's rates or services but instead contests only petitioner's termination of his status, his claim is too tenuously related to petitioner's prices or services to be "related to" them within the meaning of the statute. However, the ADA preempts claims even if "the effect is only indirect." *Morales*, 504 U.S. at 386. A frequent-flyer program provides specialized rates and services to its members, and respondent's claim that his membership status was improperly terminated thus has an obvious "connection with" an air carrier's prices and services. *Id.* at 384. Respondent further argues (Br. in Opp. 19-20) that his claim does not "relate to" an air carrier's prices or services because Congress did not intend to preempt claims based on the state common law of contract. But that argument is foreclosed by *Wolens*, which held that state contract claims "relate to" prices and services, 513 U.S. at 226, and it conflates the question of whether a claim is related to an air carrier's price or service with the separate question of whether the claim seeks to enforce the type of state law that Congress intended to preempt.

B. In *Wolens*, this Court held that the ADA's preemption provision does not preclude "routine breach-of-contract claims." 513 U.S. at 232. The statute prevents States "from imposing their own substantive standards with respect to rates, routes, or services" but does not preclude claims based on "the parties'

bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 232-233. The court of appeals construed *Wolens* as authorizing all contract claims against air carriers. Pet. App. 10. But that understanding overlooks the fact that this Court held that the ADA permits a contract claim only insofar as it seeks recovery "for the airline's alleged breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. In rejecting respondent's breach-of-contract claim, the district court interpreted the contract as giving petitioner complete discretion to determine whether valid cause existed to terminate respondent's status. Respondent did not appeal from that decision. His reliance on an implied-covenant theory thus seeks to impose a non-contractual limitation on petitioner and is therefore preempted.

Petitioner asks the Court to reverse the court of appeals' judgment on the broader ground that implied-covenant claims always are preempted by the ADA. While we agree with petitioner that such claims have the potential to undermine the ADA's deregulatory purpose and to interfere with Congress's intent to entrust the Department of Transportation (DOT) with responsibility for investigating claims that air carriers are acting unfairly, we do not believe that it is necessary for the Court to adopt a categorical rule. The generic term "implied covenant of good faith and fair dealing" does not denote a single doctrine with a specific meaning. Some States use the rubric of the implied covenant to "rechristen[] fundamental principles of contract law." *Tymshare, Inc.* v. *Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.). Claims based upon such an application of the doctrine

likely would require only "adjudication of routine breach-of-contract claims," *Wolens*, 513 U.S. at 232, and so would not be preempted by the ADA. Other States, however, employ the doctrine to impose extra-contractual obligations. The ADA preempts claims based on such policies external to the agreement. *Id.* at 233.

Respondent, by contrast, argues that the ADA does not preempt any common-law claims, because that statute precludes only state "law[s], regulation[s], or other provision[s] having the force and effect of law." Br. in Opp. 18 (quoting 49 U.S.C. 41713(b)(1)). Relying on *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), respondent suggests that such terms indicate a congressional intent to preempt only positive state enactments. The existing preemption provision codified an earlier version "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As originally enacted, the ADA's preemption provision precluded any "law, rule, regulation, *standard*, or other provision having the force and effect of law," § 4(a), 92 Stat. 1708 (emphasis added), and this Court has construed references to "standards" in preemption provisions as encompassing state common-law claims, see *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Construing the ADA's preemption provision as precluding common-law-contract claims imposing requirements external to the contract is consistent with that precedent and this Court's decision in *Wolens*.

ARGUMENT

RESPONDENT'S IMPLIED-COVENANT CLAIM IS PRE-EMPTED BECAUSE IT RELATES TO THE PRICES AND SERVICES OF AN AIR CARRIER AND SEEKS TO ENFORCE AN EXTRA-CONTRACTUAL OBLIGATION

A. Respondent's Implied-Covenant Claim Relates To The Prices And Services Of An Air Carrier

1. To be preempted under the ADA, a claim must seek to enforce state law "related to a price, route, or service of an air carrier." See 49 U.S.C. 41713(b)(1). As in *Wolens*, this Court "need not dwell" on whether respondent's implied-covenant claim is one "relating to [air carrier] rates, routes, or services." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 226 (1995) (brackets in original) (quoting 49 U.S.C. App. 1305(a)(1) (1988), codified as amended at 49 U.S.C. 41713(b)(1)). In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court explained that "[t]he ordinary meaning" of "relating to" is "a broad one." *Id.* at 383; see *ibid.* (defining the words as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with") (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). The Court also observed that it had "repeatedly recognized," in interpreting "the similarly worded pre-emption provision of the Employee Retirement Income Security Act of 1974," 29 U.S.C. 1144(a), that the words "express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383. Consistent with that precedent, the Court construed the ADA's pre-emption provision as precluding state-law claims "having a connection with, or reference to, airline 'rates, routes, or services.'" *Id.* at 384.

Morales rejected the contention that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." 504 U.S. at 385. Such a construction, the Court reasoned, "simply reads the words 'relating to' out of the statute" and replaces it with the word "regulate." *Ibid.* Accordingly, the ADA preempts a state law "even if the law is not specifically designed to affect" air carrier rates, routes, or services, and even if "the effect is only indirect." *Id.* at 386; see also *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370-371 (2008) (similarly interpreting the preemption provision in Section 601(c) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1606 (49 U.S.C. 14501(c)(1)), which was modeled on the ADA's preemption provision). The Court recognized, however, that although the ADA's preemption provision is broad, it has limits: "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Morales*, 504 U.S. at 390 (brackets in original) (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

The Court applied that standard in *Wolens* to a challenge to an airline's retroactive application of modified terms and conditions of a frequent-flyer program, brought under a state consumer-fraud statute and the state common law of contract. 513 U.S. at 225. The Court held that the "[p]laintiffs' claims relate[d] to 'rates,' *i.e.*, [the airline's] charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Id.* at 226.

Under *Morales* and *Wolens*, there is little question that respondent's implied-covenant claim is one "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). Respondent's claim that petitioner breached an implied covenant in terminating his status in petitioner's frequent-flyer program has "a connection with, or reference to," *Morales*, 504 U.S. at 384, the prices petitioner charges "in the form of mileage credits for free tickets and upgrades," *Wolens*, 513 U.S. at 226. It similarly relates to petitioner's services, insofar as the program affords its members access to flights, upgrades, and other benefits. See *ibid.* The court of appeals reached a contrary conclusion because it misunderstood this Court's precedents as holding "narrow[ly]" that the ADA preempts only those state laws "that actually have a direct effect on rates, routes, or services." Pet. App. 8, 9; see *id.* at 17-19. But this Court expressly rejected that interpretation in *Morales*. See 504 U.S. at 386 (holding that the ADA preempts state law even if "the effect is only indirect"); see also Pet. Br. 17-20.

2. Respondent's contrary arguments lack merit. Respondent contends that his claim "is far more tenuously related to prices, routes, and services than those at issue in *Wolens*" because it does "not relate to the value of [frequent-flyer] credits in general in obtaining tickets or upgrades, but to whether [petitioner] could terminate [respondent's] membership status in a customer loyalty program without valid cause." Br. in Opp. 19. That contention ignores the fact that membership in petitioner's frequent-flyer program is the very basis on which a customer obtains favorable rates and services from the airline.

Immediately following deregulation of the industry, airlines established frequent-flyer programs as a promotional device to encourage customer loyalty, principally among business travelers, who comprise the most lucrative segment of the market. See generally, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, DOT, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems* 31-35 (Feb. 1990) (*Airline Marketing Practices*). Membership in a frequent-flyer program gives an individual access to lower rates, in the form of mileage credits, unavailable to other customers. *Id.* at 32. Respondent's complaint alleged that petitioner improperly deprived him of "accumulated mileage," the currency used to pay the rates charged under a frequent-flyer program. J.A. 45. Membership also gives a person access to air carrier services, such as air carriage and class-of-service upgrades, *Airline Marketing Practices* 32, and respondent's complaint alleged that petitioner improperly deprived him of access to "flight upgrades" and other services. J.A. 45. Claims like respondent's, involving membership in a frequent-flyer program, thus have a manifest "connection with, or reference to" air carrier prices and services, and so "quite obviously" "relat[e] to" those prices and services. *Morales*, 504 U.S. at 384, 387.

Respondent nevertheless suggests (Br. in Opp. 19-20) that his claim is not related to petitioner's prices or services because allowing his contract claim to proceed would not interfere with Congress's deregulatory goal. See *Rowe*, 552 U.S. at 371 ("[P]re-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and preemp-

tion-related objectives.") (quoting *Morales*, 504 U.S. at 390). But that argument is foreclosed by *Wolens*, which held that the plaintiffs' common-law-contract claims and statutory claims were both related to an airline's prices and services. 513 U.S. at 226. And it conflates the question of whether a claim is related to an air carrier's prices or services with the separate issue of whether the claim seeks to enforce the type of state "law" that is preempted by the ADA, an issue to which we now turn.

B. Respondent's Implied-Covenant Claim Seeks To Enforce An Extra-Contractual Obligation

1. The court of appeals understood this Court's decision in *Wolens* as drawing "a clear distinction * * * between state laws that regulate airlines and state enforcement of contract disputes." Pet. App. 10. That formulation is incorrect. The key "distinction," this Court explained, is "between what the State dictates and what the airline itself undertakes." *Wolens*, 513 U.S. at 233. That distinction is critical because the "core" of contract law "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233 & n.8.

As the United States stated in *Wolens*, "[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." 513 U.S. at 233 n.8 (quoting U.S. Amicus Br. at 28 (No. 93-1286)); see, *e.g.*, 2 Restatement (Second) of Contracts 2 (1981) (Restatement) ("Sometimes * * * a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise

or other term on grounds of public policy."); see also, *e.g.*, *id.* § 208 (Unconscionable Contract or Term); U.S. Amicus Br. at 28, *Wolens*, *supra* (No. 93-1286) (suggesting that unconscionability claims would be preempted). Respondent's claim here, based on an implied covenant of good faith and fair dealing, is preempted because, in the circumstances of this case, it seeks to enforce a standard external to the document specifying petitioner's self-imposed obligations under its frequent-flyer program, which formed its contract with respondent and others who enrolled in the program.

Respondent's complaint alleged that petitioner improperly determined that he had abused the frequent-flyer program. J.A. 39-46. He also alleged that petitioner's termination of his membership status "was nothing more than a pretext for cost-cutting in advance of" petitioner's merger with another airline. J.A. 45. In Minnesota, the State whose law the district court found applicable in this case (Pet. App. 70), parties may separately plead claims for "breach of contract" and "breach of the implied covenant of good faith and fair dealing." *Columbia Cas. Co.* v. *3M Co.*, 814 N.W.2d 33, 35, 37 (Minn. Ct. App. 2012).[4] Respondent's complaint asserted both types of claims. J.A. 49-52. Respondent's breach-of-contract claim alleged that petitioner revoked his membership status

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[4] That pleading rule appears to be premised on a distinction between claims based on "breach of the express terms" of a contract and breach of terms that must be implied, such as "implied provisions indispensable to effectuate the intention of the parties and carry out the contract." *Columbia Cas. Co.*, 814 N.W. 2d at 37 (quoting *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F.2d 340, 348 (8th Cir. 1944)).

"without valid cause." J.A. 49. His implied-covenant claim alleged that petitioner failed to exercise the discretion given to it under the contract "in a manner consistent with the reasonable expectations of the other party or parties." J.A. 51.

In dismissing respondent's breach-of-contract claim, the district court relied on the terms of the frequent-flyer contract giving petitioner the right to terminate respondent's membership for "improper conduct as determined by [petitioner] *in its sole judgment*.'" Pet. App. 71 (quoting J.A. 64). Interpreting that provision, the district court concluded that "the very issue of what qualifies as 'valid cause'" for termination of respondent's status "was left [by the contract] to the 'sole discretion' of [petitioner]." *Id.* at 71-72; see Pet. Br. 22 ("[T]he express contractual terms * * * put control over program membership in [petitioner's] 'sole judgment.'"); see also, *e.g.*, *id.* at 27, 32-33.

The district court's dismissal of respondent's breach-of-contract claim at the pleading stage may have been in error. The contract does not appear to have given petitioner unbridled discretion to terminate membership. Rather, it left to petitioner's "sole judgment" whether respondent had engaged in "improper conduct" amounting to "[a]buse of the [frequent-flyer] program." J.A. 64. To the extent, for example, that respondent alleged that petitioner had actually terminated his membership status for business reasons rather than for any conduct of "abuse" on his part—an allegation the district court noted (Pet. App. 60)—respondent might have asserted a valid breach-of-contract claim on the theory that petitioner's action was not authorized by the termination

provision. See Restatement § 202(3)(a) ("[W]here language has a generally prevailing meaning, it is interpreted in accordance with that meaning.").

Respondent, however, did not appeal from the dismissal of his breach-of-contract claim; he appealed only from the district court's dismissal of his implied-covenant claim. Pet. App. 5. It is possible that, under Minnesota law, a party may maintain a claim—whether under the rubric of an implied covenant of good faith and fair dealing or otherwise—on the theory that the other party exercised a contractual grant of discretion in a manner not contemplated by the parties at the time of the contract's formation. See *White Stone Partners, LP* v. *Piper Jaffray Cos.*, 978 F. Supp. 878, 880-885 (D. Minn. 1997).[5] But any such theory is foreclosed by the district court's interpretation of the contract itself as leaving to petitioner's "sole judgment" what constitutes "valid cause" for termination. Pet. App. 71-72; see *id.* at 47 (rejecting respondent's motion for reconsideration because, in part, respondent had not challenged the district court's determination that he "failed to allege any actual violation" of the contract).

Because respondent did not appeal from the dismissal of his breach-of-contract claim, the district court's holding that petitioner did not breach any obligation undertaken by petitioner under the terms of the contract itself would appear to be controlling here. Respondent's reliance on an implied covenant to trump the terms of the contract, as construed by the district court in the unappealed ruling, thus attempts

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[5] Because respondent's claim was dismissed at the pleading stage, the contours of his implied-covenant claim were not fully developed in the district court.

to enforce a standard external to petitioner's "own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. Respondent's implied-covenant claim is, accordingly, preempted by the ADA, and the court of appeals' judgment should be reversed.

2. a. Beyond the circumstances of this case, petitioner urges the Court to adopt a bright-line rule that claims based on an implied covenant of good faith and fair dealing are always preempted by the ADA. See Pet. Br. 20-40. Under *Wolens*, such a rule would be sound insofar as an implied covenent was used to expand or limit contract terms based on a court's view of fairness, equity, or other policy considerations external to an air carrier's actual undertakings. And in other circumstances, even without reliance on such an implied covenant, ordinary tools of contract interpretation should often suffice for the adjudication of "routine breach-of-contract claims." *Wolens*, 513 U.S. at 232.

Congress's fundamental purpose in enacting the ADA was to promote "maximum reliance on competitive market forces," subject to limited regulation of air carriers by DOT. 49 U.S.C. 40101(a)(6); see *Wolens*, 513 U.S. at 230. Any contract claim against an air carrier must start from that basic premise. Contracts of carriage, for example, typically reserve to the air carrier the right to, "without notice * * * alter or omit stopping places shown on the ticket" and to change schedules. Delta Airlines, *Contract of Carriage* 3, http://www.delta.com/content/dam/delta-www/pdfs/legal/contract_of_carriage_dom.pdf. 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, which Congress intended to leave to the airlines and market forces.

Frequent-flyer contracts, like contracts of carriage, also embody discretionary terms related to air carrier prices, routes, and services. For example, frequent-flyer contracts typically contain provisions permitting the carrier, in its discretion and without notice, to modify the rules, benefits, and awards under the program, as well as travel embargo dates and seat availability, even if such changes might affect the value of a member's accumulated mileage. See, *e.g.*, J.A. 63. As we have noted, airlines use frequent-flyer programs as marketing devices and compete directly with each other for passenger participation, loyalty, and commitment to their programs. It would be inconsistent with the ADA's deregulatory purposes, and with the ADA's preemption provision, for implied-covenant claims to be used to subject the numerous decisions made by the airlines in administering these programs to constant legal challenge based on extra-contractual notions of fairness.

In enacting the ADA, Congress assigned to DOT, not the courts, the responsibility for determining whether an air carrier has engaged in unfair conduct towards its passengers. Congress gave DOT the authority to "investigate and decide whether an air carrier * * * has been or is engaged in an unfair or deceptive practice or an unfair method of competition," 49 U.S.C. 41712(a), and to impose civil penalties for such conduct, 49 U.S.C. 46301(a)(1). To date, DOT has not chosen to adopt regulations governing frequent-flyer programs. But it has promulgated regula-

tions "to bolster air carriers' accountability to consumers," 14 C.F.R. 259.1, such as rules requiring air carriers to adopt customer-service plans, which must include disclosure of frequent-flyer rules, 14 C.F.R. 259.5, and imposing requirements for airlines' responses to consumer complaints, 14 C.F.R. 259.7. Congress has also specifically authorized DOT to investigate complaints relating to frequent-flyer awards. See FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 408(6), 126 Stat. 87.

Pursuant to its authority under those provisions, DOT conducts an active enforcement and consumer-protection program and routinely investigates complaints alleging unfair or deceptive actions by airlines. See generally DOT, *File a consumer complaint*, http://www.dot.gov/airconsumer/file-consumer-complaint. In the last year alone, DOT reviewed and investigated 289 complaints concerning airline frequent-flyer programs. See DOT, *Air Travel Consumer Report* 43 (2013), http://www.dot.gov/sites/dot.dev/files/docs/2013FebruaryATCR_0.pdf. It 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," *Wolens*, 513 U.S. at 233, in adjudicating claims relating to air-carrier prices, routes, or services—especially where, as here, DOT has chosen not to directly regulate frequent-flyer programs. See *id.* at 228 & n.4 (holding state fraud statute preempted by the ADA, relying, in part, on DOT's authority to investigate unfair and deceptive practices); see also Pet. Br. 38-40.

b. For the foregoing reasons, invocation of an implied covenant to impose on an air carrier obligations

not affirmatively set forth in the contract itself would in many instances result in an "enlargement or enhancement" of the parties' bargain, *Wolens*, 513 U.S. at 233, and undermine the ADA's purposes. Because respondent's invocation of a covenant of good faith and fair dealing is preempted in the posture of this case (see pp. 17-20, *supra*), the Court need not decide more generally the circumstances in which a court may or may not invoke the rubric of such a covenant, or whether some more categorical rules would be appropriate—perhaps as a prophylactic matter in some respects to prevent imposition of obligations not actually undertaken by the airlines. But there are considerations about the evolution of such an implied covenant that suggest caution against absolute rules.

At the most general level, the implied-covenant doctrine states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2312 (2010) (brackets in original) (quoting Restatement § 205). As then-Judge Scalia explained, "the concept of good faith in the performance of contracts * * * 'is a phrase without general meaning (or meanings) of its own.'" *Tymshare, Inc.* v. *Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (quoting Robert S. Summers, "*Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 201 (1968)). And unsurprisingly, in invoking such an implied covenant in contract disputes, States have had differing approaches. In some instances, the rubric of the implied covenant is used to "rechristen[] fundamental principles of contract law." *Id.* at 1152. It is possible that some claims based upon an application of

that version of an implied covenant would actually constitute the "adjudication of routine breach-of-contract claims," *Wolens*, 513 U.S. at 232, and hold the airline to "its own, self-imposed undertakings," *id.* at 228, and so would not be preempted by the ADA. In other States or other cases, however, courts might employ the doctrine to impose extra-contractual obligations. The ADA preempts claims based on such policies external to the agreement. *Id.* at 233.

i. It is not unusual for state courts, when construing contract terms, "[to] employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 371 (1980); see Restatement § 205 cmt. a ("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.").[6]

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[6] See also, *e.g., QBE Ins. Corp.* v. *Chalfonte Condo. Apartment Ass'n*, 94 So. 3d 541, 548 (Fla. 2012) ("This covenant is intended to protect the reasonable expectations of the contracting parties in light of their express agreement.") (internal quotation marks and citation omitted); *Blondell* v. *Littlepage*, 991 A.2d 80, 91 (Md. 2010) (holding that a duty arising out of an implied covenant "is simply a recognition of conditions inherent in expressed promises"); *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.") (citation omitted); *Whitlock Constr., Inc.* v. *South Big Horn Cnty. Water Supply Joint Powers Bd.*, 41 P.3d 1261, 1267 (Wyo. 2002) ("The implied covenant of good faith and fair dealing requires that a party's action be consistent with the agreed common purpose and justified expectations of the other party.") (citation omitted); *Guz* v. *Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000) ("[The implied covenant] exists merely to prevent

Under that approach, for example, some courts refer to the doctrine in construing contractual grants of discretion to one party to impose an obligation "to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting," where the failure to observe such limits would deprive the other party "of a substantial proportion of the agreement's value." *Centronics Corp.* v. *Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989) (Souter, J.); see *Tymshare*, 727 F.2d at 1152 (applying the implied covenant rubric, as a form of an implied-limitation principle, to limit a contractual grant of discretion to one party to "honor[] the reasonable expectations created by the autonomous expressions of the contracting parties"); see also, *e.g.*, *Feld* v. *Henry S. Levy & Sons, Inc.*, 335 N.E.2d 320, 321, 323 (N.Y. 1975) (relying on an implied covenant in construing an output contract not to defeat the performance contemplated by the parties at the time of contract formation).

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one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made.") (emphasis omitted); *Bayou Land Co.* v. *Talley*, 924 P.2d 136, 154 (Colo. 1996) ("Generally, the implied covenant of good faith and fair dealing is used to effectuate the intention of the parties or to honor their reasonable expectations in entering into the contract."); *Garrett* v. *Bankwest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) ("The implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties.") (internal quotation marks and citation omitted); *Eis* v. *Meyer*, 566 A.2d 422, 426 (Conn. 1989) ("An implied covenant of good faith and fair dealing is essentially a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended.") (internal quotation marks, alterations, and citation omitted).

Because reliance on an implied covenant of good faith and fair dealing, under that approach, appears at bottom to be a method for interpreting the contract itself and determining the intent of the contracting parties, the covenant in that situation "cannot be used to overcome or negate an express term contained within a contract." *Sanders* v. *FedEx Ground Package Sys., Inc.*, 188 P.3d 1200, 1203 (N.M. 2008); see *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2130 (2013) ("[T]he express terms" of a contract are "the best indication of the intent of the parties.").[7] And because, under "[o]rdinary principles of contract interpretation," *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 (2013), courts construe contracts "according to the intent of the parties," *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1771 n.4 (2011), claims based on such a circumscribed reliance on an implied covenant in interpreting a contract could constitute one form of adjudicating "routine breach-of-contract claims," *Wolens*, 513 U.S. at 323, and would not be preempted by the ADA.

ii. On the other hand, at least some States have adopted a different understanding of the implied covenant that imposes obligations regardless of the intent

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[7] See also *Dick Broad. Co.* v. *Oak Ridge FM, Inc.*, 395 S.W.3d 653, 666 (Tenn. 2013) (stating that the implied covenant does not "create new contractual rights or obligations, nor can it be used to circumvent or alter the specific terms of the parties' agreement") (citation omitted); *WFND, LLC* v. *Fargo Marc, LLC*, 730 N.W.2d 841, 851 (N.D. 2007) (same); *511 W. 232nd Owners Corp.* v. *Jennifer Realty Co.*, 773 N.E.2d 496, 500-501 (N.Y. 2002) (same); *Barn-Chestnut, Inc.* v. *CFM Dev. Corp.*, 457 S.E.2d 502, 509 (W. Va. 1995) (same); *Farris* v. *Hutchinson*, 838 P.2d 374, 376 (Mont. 1992) (same); *Automatic Sprinkler Corp. of Am.* v. *Anderson*, 257 S.E.2d 283, 284 (Ga. 1979) (same).

of the contracting parties. In *Fortune* v. *National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977), for example, the Supreme Judicial Court of Massachusetts relied on the implied covenant in holding that the termination of an at-will employee was "not made in good faith [and] constitutes a breach of the contract." *Id.* at 1256. In that case, an employer allegedly terminated an employee on a particular date to avoid paying the employee a large bonus to which the employee would have been entitled had he remained in his position. *Id.* at 1253-1254. The court found it "clear that the [employment] contract itself reserved to the parties an explicit power to terminate the contract without cause on written notice." *Id.* at 1255. The court also found it "clear that under the express terms of the contract [the employee] has received all the bonus commissions to which he is entitled." *Ibid.* Thus, "[a]ccording to a literal reading of the contract," the employer "did not breach the contract." *Ibid.*

Despite the employer's "literal compliance with payment provisions of the contract," the Massachusetts court concluded that the employer had acted in bad faith, and so violated the implied covenant, by terminating the contract in order to limit its payments to the employee. *Fortune*, 364 N.E.2d at 1257-1258.[8]

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[8] See also, *e.g.*, *Ranier* v. *Mount Sterling Nat'l Bank*, 812 S.W.2d 154, 156-157 (Ky. 1991) (finding breach of implied covenant based on "[b]asic fundamental fairness and equity"); *Smith* v. *American Greetings Corp.*, 804 S.W.2d 683, 684 (Ark. 1991) (holding that the implied covenant "prohibits discharge for a reason which contravenes public policy" notwithstanding at-will employment contract); *Wagenseller* v. *Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1036 (Ariz. 1985) (describing implied covenant as imposing a contract term as a matter of law, "even though the parties may not have intended it").

Claims based on such an understanding of an implied covenant are preempted by the ADA because that variant permits courts to override express contract terms and does not attempt to discern the contracting parties' intent.

3. a. Petitioner contends that an invocation of an implied covenant of good faith and fair dealing would permit courts to disregard the terms of contracts related to air carrier prices, routes, and services and so threaten Congress's intent to leave decisions concerning those matters to the airlines, subject only to market forces and limited oversight by DOT. Pet. Br. 28-40. Accordingly, petitioner urges the Court to limit judicial construction of an air carrier contract to only the "express terms" of the agreement. Pet. Br. 17; see *id.* at 27, 28-29. While the United States agrees that this Court should avoid any construction of the ADA that would undermine Congress's deregulatory purposes, petitioner's argument does not account for cases in which a contract is ambiguous or silent on a point and the court needs to determine the intent of the parties at the time of the contract's formation. See *McCutchen*, 133 S. Ct. at 1548-1549.

Where the express terms of a contract are unambiguous, they control, as they are "the best indication of the intent of the parties." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2130. But contracts "may also leave gaps" and ambiguities. *McCutchen*, 133 S. Ct. at 1549. When faced with such uncertainties, courts employ principles of contract interpretation, such as the principle that courts will supply an omitted essential term (see Restatement § 204), as a means of discerning the parties' intent. See, *e.g.*, *Wood* v. *Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.)

(finding a contract "instinct with an obligation, imperfectly expressed") (internal quotation marks and citation omitted).

Wolens does not require courts to forgo use of such principles, which are part of the "adjudication of routine breach-of-contract claims." 513 U.S. at 232; see *McCutchen*, 133 S. Ct. at 1549 (stating that, in construing gaps or ambiguities in a contract, "a court properly takes account of background legal rules," and "'common-sense understandings * * * that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' [contrary] intent.'") (brackets in original) (quoting *Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan* v. *Wells*, 213 F.3d 398, 402 (7th Cir.) (Posner, J.), cert. denied, 531 U.S. 985 (2000)). To the extent that a court does no more than employ such principles in resolving routine breach-of-contract claims, even if under the rubric of an implied covenant of good faith and fair dealing, the adjudication would be consistent with *Wolens*.

Petitioner argues that "[b]ecause '[g]ood faith is a concept that defies precise definition,'" allowance of any claims based on the implied-covenant doctrine "all but guarantees a patchwork of inconsistent results." Pet. Br. 31, 32 (quoting *Brunswick Hills Racquet Club, Inc.* v. *Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 395 (N.J. 2005)). But the assertedly "amorphous" (*id.* at 29) nature of the doctrine, when viewed from a national perspective, stems in part from the fact that some States have collected various disparate components of traditional contract law principles under that label, while other States use the doctrine in some

contexts to implement extra-contractual policy objectives. Preemption analysis is not conducted wholesale, however.

Whether a State's law is preempted by a federal statute requires consideration of specific state law in the context of a case implicating the federal law, as petitioner elsewhere recognizes. See Pet. 17 ("*Wolens* at the very least requires an individualized inquiry into the nature of the implied covenant of good faith claim asserted by the plaintiff."). If a State's implied-covenant doctrine "is used only as a construction aid in determining the intent of contracting parties," *Cramer* v. *Insurance Exch. Agency*, 675 N.E.2d 897, 903 (Ill. 1996), then the ADA does not preempt it. But it is preempted if a State uses the doctrine as a device to enforce obligations other than the air carrier's "own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. Accordingly, petitioner is correct in saying 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. Pet. Br. 24 (quoting *Farnsworth on Contracts* § 7.17 (3d ed. 2004) and Restatement § 205 cmt. a); see *id.* at 26, 29, 40.

b. Respondent, for his part, contends that his claim "is not preempted because it arises under the common law and does not involve a 'law, regulation, or other provision having the force and effect of law.'" Br. in Opp. 18 (quoting 49 U.S.C. 41713(b)(1)). In support of that argument, respondent relies on *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002). See Br. in Opp. 18. In that case, this Court held that a provision of a federal law preempting "'a [state or local] law or regulation'" was "most naturally read as

not encompassing common-law claims." *Sprietsma*, 537 U.S. at 63 (brackets in original) (quoting 46 U.S.C. App. 4306 (1988)). That was because the provision used "the article 'a' before 'law or regulation' impl[ying] a discreteness—which is embodied in statutes and regulations—that is not present in the common law." *Ibid.* The court also concluded that "the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted only positive enactments." *Ibid.*; see *ibid.* ("[A] word is known by the company it keeps.") (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)).

The Court's conclusion in *Sprietsma* that the federal statute did not preempt a state common-law cause of action for damages was "buttresse[d]" by the inclusion of a "saving clause" in the statute providing that compliance with federal law "does not relieve a person from liability at common law or under State law." 537 U.S. at 63 (quoting 46 U.S.C. App. 4311(g) (1988)). The Court observed that the "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions." *Ibid.* (brackets in original) (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 868 (2000)).

The ADA's preemption provision, like the one at issue in *Sprietsma*, uses the terms "law," "regulation," and "provision," which, standing alone, would generally connote positive enactments. 49 U.S.C. 41713(b)(1). However, as originally enacted, that provision preempted any state "law, rule, regulation, *standard*, or other provision having the force and effect of law relating to rates, routes, or services of any air carri-

er." ADA § 4(a), 92 Stat. 1708 (emphasis added). This Court has construed references to "standards" in preemption provisions as encompassing state common-law claims. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). When Congress codified the existing ADA preemption provision, it indicated that the codification was intended to be "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994); see § 1(d), 108 Stat. 1143. There accordingly is no reason to conclude that Congress intended to exclude from preemption under the ADA all common-law claims, even those based on judicially fashioned substantive standards external to the contract. And, indeed, this Court has construed the ADA's preemption provision in a more limited manner. Reading it together with the ADA's saving clause, which preserves "the remedies now existing at common law or by statute," the Court held that the preemption provision permits "routine breach-of-contract claims" but "stops States from imposing their own substantive standards with respect to rates, routes, or services." *Wolens*, 513 U.S. at 232 (quoting 49 U.S.C. App. 1506 (1988)) (codified as amended at 49 U.S.C. 40120(c)); see also *id.* at 233 n.8.[9]

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[9] Although not at issue in this case, the FAAAA preemption provision, 49 U.S.C. 14501(c)(1), also likely preempts at least some common-law claims. Although that provision refers only to a state "law, regulation, or other provision having the force and effect of law," *ibid.*, Congress modeled it on the ADA's preemption provision, as that provision was originally enacted, and intended it to have the same scope. See H.R. Rep. No. 677, 103d Cong., 2d Sess. 82-83 (1994). Last Term, the United States argued that the words in the FAAAA preemption provision suggest that "Congress was focusing on duties imposed by positive enactments and regulatory powers, not on common-law remedies." U.S. Amicus Br. at 24,

In any event, the issue likely is academic. Even if a saving clause removes a common-law claim from the scope of an express preemption provision, the Court will nevertheless consider whether such a claim "actually conflict[s]" with the statutory scheme. *Geier*, 529 U.S. at 869; see *id.* at 869-874. There is little question that a common-law claim based on a State's substantive policies relating to prices, routes, or services of an air carrier would conflict with the ADA's deregulatory purpose and so would be preempted on implied preemption grounds, even if it is not precluded by the ADA's express preemption provision. See *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("[A] federal statute's saving clause 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.'") (second pair of brackets in original) (quoting *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998)).

Dan's City Used Cars, Inc. v. *Pelkey*, 133 S. Ct. 1769 (2013) (No. 12-52). That argument is not entirely correct, in light of the FAAAA preemption provision's origin and for the reasons stated in the text. The Court did not rely on that argument in resolving that case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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