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1 P R O C E E D I N G S

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 12-462, Northwest,
5 Incorporated v. Rabbi Ginsberg.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 Under this Court's decision in *Wolens*, there
12 are only two relevant questions here, and the Ninth
13 Circuit got both of them wrong. The first question is
14 whether a claim for additional benefits under a frequent
15 flyer program, like flight upgrades, relate to prices,
16 routes, and services.

17 This Court answered that question in the
18 affirmative in *Wolens* and, indeed, underscored that the
19 question's not particularly close. The Ninth Circuit's
20 ability to reach the contrary conclusion in the precise
21 same context underscores how far they have strayed from
22 this Court's precedence.

23 The second question is whether the
24 Plaintiffs' claim here seek merely to enforce the
25 parties' voluntary undertakings or, rather, seek to

1 enforce State law to enlarge those undertakings and
2 enlarge the parties' bargain.

3 And it's to that question 2 we think
4 Respondent's own claims here make the case quite clear.
5 Respondent did bring a claim here to enforce the
6 parties' voluntary undertakings, a breach of contract
7 claim, and lost on the merits.

8 The implied preemption claim is different.
9 It seeks to impose a duty of fair dealing and
10 reasonableness and superimposed that on the bargain,
11 even where the parties to the contract have essentially
12 given one party absolute discretion.

13 JUSTICE GINSBURG: Mr. Clement, the argument
14 was made that if -- if the airline has an unreviewable
15 right to terminate this agreement for any reason or for
16 no reason, if that is so, then it's an illusory
17 contract.

18 What -- what is your answer to that, if one
19 party can get out willy-nilly, why -- what kind of
20 bargain is it?

21 MR. CLEMENT: Well, there are a couple of
22 answers to that, Justice Ginsburg. The first is I think
23 although the focus on whether a contract is illusory is
24 sometimes used as part of the analysis under the implied
25 covenant for a bilateral contract, I don't think that

1 same analysis would apply to something like a frequent
2 flyer program, which I think would be properly
3 understood as a unilateral contract, where you don't
4 worry about those sort of illusory promises.

5 The second thing is I think you have to
6 understand in the context --

7 JUSTICE SOTOMAYOR: Did a unitary contract?

8 MR. CLEMENT: I'm sorry.

9 JUSTICE SOTOMAYOR: I'm not sure I
10 understand that point.

11 MR. CLEMENT: There -- there is a
12 distinction, if you go back to the Horne books on
13 contract law between a unilateral contract and a
14 bilateral contract.

15 A unilateral contract is -- is a typical
16 sort of outstanding promise, that promise doesn't
17 require an exchange of consideration, and the party who
18 makes the promise has the ability to withdraw the
19 promise until there's -- there's performance,
20 essentially, relying on the promise.

21 And that's why I think it's actually a
22 little bit of a mistake to apply that doctrine to
23 something like a frequent flyer program.

24 JUSTICE KAGAN: I guess I don't understand
25 that, Mr. Clement, because I always thought that the way

1 these agreements worked were there were agreements that,
2 if I flew a certain number of miles on your plan, I was
3 going to get a free ticket.

4 And -- and it wasn't a gift that I was
5 getting a free ticket, it was because I did something, I
6 flew a certain number of miles, so that there was an
7 exchange with value on both sides.

8 MR. CLEMENT: Well, I -- I suppose you could
9 conceive of it that way. You could also conceive of it
10 as, basically, being a premium that's offered by the
11 company to reward your loyalty, but you've already
12 gotten full performance.

13 JUSTICE SCALIA: No. I think you have to
14 conceive of it that way, but that still makes it a
15 unilateral contract. It's not a promise in exchange for
16 another promise. It's a promise in exchange for the
17 performance of an act; that is, flying the
18 airline -- you know, a certain number of miles.

19 You're correct, it is a -- a unilateral
20 contract. Now, whether that -- that means that there's
21 no -- is there no such thing as an illusory unilateral
22 contract?

23 MR. CLEMENT: I don't think there really
24 is -- you know, I looked at the -- the treatises for
25 that, and I just don't think that concept really applies

1 in the unitary -- the unilateral contract context.

2 JUSTICE KAGAN: I don't -- I just don't see
3 why that would make sense because, if I knew that it was
4 really up to you to give me the free ticket, maybe I was
5 willing to get it and maybe I wasn't. I don't think
6 that I'd be spending all this time in the air on your
7 planes -- you know, I'd find another company that
8 actually gave me the free ticket.

9 MR. CLEMENT: And that, really, I think,
10 gets to the nub of this because, of course, what you're
11 suggesting is that there would be a market solution to
12 this problem. And that's what the Airline Deregulation
13 Act is all about, letting the market decide these
14 issues.

15 So, if some airline really were crazy enough
16 to systematically turn on its most lucrative and loyal
17 customers, surely, the market would solve that. And, of
18 course, if a bunch of airlines did it, the Department of
19 Transportation stands ready to police that.

20 But --

21 JUSTICE KAGAN: But, usually, what we say
22 when a contract has no consideration, we don't say, oh,
23 we're going to hold you to it anyway because the market
24 will solve it. We say the contract has no
25 consideration, it's illusory, in just the way that

1 Justice Ginsburg pointed out.

2 And the question is: If there's really no
3 obligation on the part of the airline here to give that
4 free ticket, if they can do it when they feel like it
5 and not do it when they don't feel like it, why is there
6 any consideration? Why isn't the contract illusory?

7 MR. CLEMENT: There -- there is
8 consideration -- I'm not sure anything turns on this --
9 but there is consideration because this is not something
10 where the airline says, look, we can do anything we
11 want.

12 They say, look, if you present us with miles
13 while you're still in good standing in the program,
14 we'll give you upgrades, we'll let you into a lounge.
15 But if, pursuant to the contract, you abuse the program,
16 in our sole discretion, then you lose your membership
17 status. And that's what's happened here.

18 JUSTICE SCALIA: Well, you -- you're not
19 trying to enforce the contract anyway. You -- you want
20 to get out of the contract. So you -- you ought to be
21 happy to have it pronounced an illusory contract, right?
22 What do you care?

23 MR. CLEMENT: Well, that is true, but I
24 suppose the argument might be that you could, as a
25 matter of breach of contract law, use this principle to

1 interpret the contract. And, if that were an argument,
2 it's an argument that's made under Count 1 of this
3 complaint.

4 JUSTICE SOTOMAYOR: Mr. Clement, you're
5 making -- you're making an assumption. The claim here
6 is not whether he abused or didn't abuse the program.
7 His allegation is that the only reason you terminated
8 with a contract was because you wanted to get rid of
9 these high flyers in your merger negotiations with the
10 other airline.

11 That's the same as saying, they didn't
12 terminate me because I abused the program, they
13 terminated me because I was of a certain race, or I was
14 a woman, or I was handicapped, or some other improper
15 consideration.

16 So are you suggesting that this contract
17 permits you to use that kind of self -- that kind of
18 ground, one not grounded in the contract, but grounded
19 in your whim and caprice?

20 MR. CLEMENT: Well, a couple of points,
21 Justice Sotomayor. First of all, I think it's -- it's
22 really important to emphasize that the claim about
23 pretext and this all being about the merger is actually
24 not something that's made in the breach of contract
25 count or the breach of implied covenant count. That's

1 pled, actually, in the misrepresentation counts,
2 Counts 3 and 4 of the complaint, that everybody
3 recognizes are preemptive.

4 Now, what's pled in contract Count 1, the
5 breach of contract count, is that, under the contract,
6 somehow, we don't have the ability to terminate somebody
7 without just cause. And that's the argument that the
8 district court rejected on the merits.

9 Now, the implied covenant count, Count 2, is
10 different. It says that, under State law, there is a
11 duty of good faith and fair dealing, and that duty is
12 superimposed on the contract, even if the contract gives
13 one of the parties absolute discretion.

14 And those aren't my words. Those are the
15 words of Count 2 of the complaint at Joint Appendix page
16 51.

17 JUSTICE SOTOMAYOR: Even if you have
18 absolute discretion, isn't there a limit to that? Isn't
19 there a limit of reasonableness to that absolute
20 discretion? That's the whole question of -- otherwise,
21 you have a contract with no substance.

22 MR. CLEMENT: Well, the way I would think
23 about it, Justice Sotomayor, is "absolute" might not
24 quite mean absolute, and the place to make that argument
25 is under the breach of contract rubric; that, you can

1 cite Cardozo and Lady Duff-Gordon.

2 But when you get to saying, even if the
3 contract's absolute, State law still superimposes a
4 reasonableness requirement on the contract, that's the
5 point at which preemption kicks in.

6 JUSTICE SCALIA: Is that entirely -- I mean,
7 suppose the contract said, "in its absolute discretion
8 and subject to no obligation of good faith." Suppose it
9 said that. Would State law still impose an obligation
10 of good faith?

11 MR. CLEMENT: It might well, Justice Scalia,
12 because --

13 JUSTICE SCALIA: Well, it might well, or it
14 would? I mean --

15 MR. CLEMENT: It depends on the State. So
16 the majority --

17 JUSTICE SCALIA: Well, this State, I mean,
18 the State we're talking about.

19 MR. CLEMENT: Okay. Minnesota. I -- as I
20 read the cases, the rule in Minnesota is that the
21 covenant of good faith and fair dealing is not waivable.

22 So there's a case that we found called New
23 Amsterdam Casualty. It's in the indemnity context, so I
24 assume that -- and it says that in the indemnity context
25 a covenant of good faith and fair dealing is not

1 waivable.

2 So I don't think you could do that, which I
3 think underscores that this is not the parties agreeing
4 to this. This is having this condition superimposed on
5 them by State law.

6 JUSTICE KENNEDY: Is the choice we have here
7 only between State law and no relief? Or is there some
8 theory under which either Federal common law or an appeal
9 to the DOT could give the flyer, the customer, some
10 relief? And -- you know, we can all think of crazy
11 hypotheticals.

12 Suppose the phone rings, and he says, I'm
13 John Doe, I want to talk to you about my airline, you've
14 miscalculated. They said, Mr. Doe, we've heard from you
15 15 times, you're -- you're out of this program. It's a
16 mistaken identity. There are two John Does. Can the --
17 can the innocent, good-faith John Doe do any -- anything
18 at all?

19 MR. CLEMENT: Yes. The -- the good-faith
20 John Doe can do two things. One, as your question
21 suggested, he can go to the DOT. The DOT has the
22 authority to investigate complaints about frequent flyer
23 programs. It exercises that authority. It's discussed
24 at pages, I think, 20 and 21 of the SG's brief. They
25 heard something like 289 of these complaints last year.

Official

1 So that's -- so that's one place you can go.

2 The other place you can go in a case of mistaken identity -- I
3 mean, if you followed up and,
4 certainly, if you went so far as to bring a routine
5 breach of contract claim, I assume that would get
6 addressed in that forum because airlines are not in the
7 interest -- do not have an interest in getting rid of
8 their most lucrative and loyal customers.

9 JUSTICE KENNEDY: Well, but -- in part of
10 that suit, wouldn't you have to -- the judge says,
11 what's the underlying substance, and you say, well,
12 there's a duty of good-faith dealing under Minnesota
13 law. And then you're right back where you started,
14 unless there's some -- unless there's some Federal
15 common law with Lincoln Mills or something like that?

16 MR. CLEMENT: No, I don't think there's
17 Federal common law. This Court, I think, essentially
18 rejected that in Wolens. I'm making a more practical
19 point, which is in a real case of mistaken identity, I
20 think that would get sorted out in the process,
21 certainly at the point where a breach of contract action
22 was brought.

23 Because, again, if there's -- if there's a
24 John Doe who really is a frequent flyer --

25 JUSTICE KENNEDY: Well, I still don't

1 understand the substantive basis for the breach of
2 contract suit, if you say we can't refer to State law.

3 MR. CLEMENT: You can refer to State law for
4 the breach of contract. You can't, we would submit, add
5 the implied covenant of breach of good faith because
6 that enlarges the bargain.

7 JUSTICE KAGAN: Well, Mr. Clement, suppose
8 that this complaint only had one count. And suppose
9 that they had said, look, we have this contract, and it
10 gives very substantial discretion, it gives -- you know,
11 by the words alone, it gives absolute discretion to
12 Northwest. But that can't really be right because
13 contracts have this implied covenant of good faith.

14 There's an implied duty to perform in good
15 faith. And that means that this discretion is narrowed
16 in certain kinds of ways, that they can't terminate my
17 membership for certain kinds of reasons, and that's all
18 the complaint said. There was just this one count.

19 Do you think that would be preempted?

20 MR. CLEMENT: I think the reliance on the
21 implied covenant in that context should be preempted. I
22 think that's the better rule.

23 If this Court wanted to adopt a narrower
24 rule and say, look, it's really at the point that you
25 try to bring a separate implied covenant claim, that's

1 preempted, I suppose, as a matter of adminstrability,
2 you could do that. It might make some sense, because --
3 I mean, you do have to take a practical look at this.

4 In the wake of Wolens, if you plead a
5 routine breach of contract claim, you're going to avoid
6 preemption. The only reason, practically, you run the
7 risk of preemption by pleading a separate claim is when
8 you're trying to really get outside of the terms of the
9 contract.

10 JUSTICE KAGAN: I guess what I'm suggesting
11 is that the implied covenant here, it's just an
12 interpretive tool. It says that there are certain kinds
13 of provisions that are written very broadly or very
14 vaguely, and an implied covenant comes in to help us
15 interpret those kinds of provisions.

16 And, viewed in that way, it's just a
17 contractual device that, in light of Wolens, ought to be
18 permitted.

19 MR. CLEMENT: Well, here's my thought on
20 that, which is I think even the Respondents admit that,
21 in some States, the implied covenant is much more than
22 simply a rule of construction for the explicit terms of
23 the contract.

24 And I suppose, if this Court wants to say
25 that the only way the implied covenant is not preempted,

1 is when it's just a rule of construction for the
2 explicit terms of the contract, I suppose we could live
3 with that rule, and I think we'd certainly win in this
4 case.

5 The reason I would suggest that the better
6 rule for this Court to adopt is that the implied
7 covenant should just be preempted, even in that
8 circumstance, is because, in that circumstance, it
9 doesn't add anything.

10 If it really is just a rule of construction
11 for the express terms of the contract, you could get in
12 the same place with the citation to Cardozo and Lady
13 Duff-Gordon.

14 CHIEF JUSTICE ROBERTS: Counsel, could you
15 tell me where you think they concede that some States --
16 that their position would lead to a different result in
17 some States?

18 MR. CLEMENT: Well, I'm not -- it's -- it's
19 in the Red Brief, and I think it's quite clear. I think
20 they -- they say -- I'll try to find the -- the point
21 where -- where I find this rebuttal. But I don't think
22 the -- they do this. They basically say that some
23 States do apply this rule. They say that our claim is
24 different.

25 And I'll get you the exact page.

1 CHIEF JUSTICE ROBERTS: I thought they were
2 saying that, in some States, it's not an implied term of
3 the contract, but a different sort of provision.

4 MR. CLEMENT: Well, I may have misspoke.
5 What I meant is I think both parties agree, as they
6 would have to, that, in some States, the Implied
7 Covenant Doctrine is used to directly impose public
8 policy. And so, in Alaska, that seems to be the case.
9 In Montana, that seems to be the case.

10 JUSTICE GINSBURG: How about Minnesota? In
11 Minnesota, isn't it just a rule of construction of the
12 contract?

13 MR. CLEMENT: We don't believe so, Your
14 Honor. I think -- I'm not going to try to tell you that
15 Minnesota law is pellucidly clear on this. But
16 Minnesota -- the Minnesota Supreme Court case -- the
17 Hennepin case that adopts -- recognizes the implied
18 covenant, cites the Restatement.

19 The Restatement quite clearly embraces a
20 view of the implied covenant that goes beyond merely
21 constructing the express terms of the contract.

22 JUSTICE ALITO: Is it the case that --

23 JUSTICE KENNEDY: I still -- I still have
24 this problem. You say don't -- now, don't worry, you
25 can always bring an express contract action. And I say,

1 well, what law do you apply? Well, you -- you have no
2 State law, and there's no Federal common law. I don't
3 understand how you can bring an action with no
4 substantive law to inform it.

5 MR. CLEMENT: I may have misspoke, Justice
6 Kennedy. The breach of contract claim that you bring --
7 the routine breach of contract claim you bring is a
8 State law claim, so we don't have any quarrel with Count
9 1 of this claim, which views Minnesota State contract
10 law to interpret the express terms of the contract.

11 Where we have a beef is with Count 2 of the
12 complaint that says, even if the contract gives the
13 parties absolute discretion, we are going to superimpose
14 a duty of good faith and fair dealing.

15 And, to complete the answer, since Minnesota
16 has adopted the Restatement, the Restatement suggests
17 that the way you find good faith is you exclude the
18 possibility of bad faith, based on community standards
19 of fairness and decency.

20 And, at the point that you're applying
21 community standards of fairness and decency, it seems to
22 me, quite clear, that you are not applying the parties'
23 self-imposed undertakings, but something else.

24 JUSTICE SCALIA: Well, I suppose you could
25 say that it is assumed that parties to a contract

1 comport with community standards of fairness and
2 decency -- you know, you can wiggle to there, if you
3 want.

4 MR. CLEMENT: You could try to wiggle there.
5 And my point would be the way to try to wiggle there is
6 interpreting the express terms of the contract. An
7 implied covenant is different.

8 And I think if you take a step back and
9 think about this context: When an airline reserves to
10 itself the sole discretion to make a judgment about
11 frequent flyers or about taking an unruly passenger off
12 a plane, do you really want State courts applying
13 community standards of decency to judge that, or is that
14 something that should be judged by a complaint to the
15 Department of Transportation?

16 If I could reserve the remainder of my time?

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Yelin.

19 ORAL ARGUMENT OF LEWIS S. YELIN,
20 FOR UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONERS

22 MR. YELIN: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 In Wolens, this Court recognized that
25 Congress enacted the ADA to leave decisions concerning

1 airline prices, routes, and services to the business
2 judgment of air carriers, subject to market forces and
3 limited oversight by the Department of Transportation.

4 In light of that statutory purpose, Wolens
5 held that claims based on the State common law of
6 contract are not preempted by the ADA to the extent they
7 seek to enforce the voluntary undertakings of the
8 parties.

9 CHIEF JUSTICE ROBERTS: What if you had a
10 decision by the Minnesota supreme court on common law
11 contract principles and it said -- you know, when the
12 parties use the word "sole" in a contract, we interpret
13 that to mean subject to reasonableness constraint. The
14 parties here use the word "sole."

15 Would the application of that principle
16 violate -- would that be preempted or not?

17 MR. YELIN: In that context, I think not.
18 It depends on what the Court meant by the term
19 "reasonable." If the term "reasonable" incorporates
20 external standards, such as community --

21 CHIEF JUSTICE ROBERTS: Well, "reasonable"
22 means -- I mean -- you know, the -- the airline says
23 "sole" means sole. We don't have to explain why we did
24 it. And the Minnesota court said, no, when you say
25 "sole," it has to be reasonable. It can't be, for

1 example, for no reason. It has to be for some
2 articulated reason.

3 MR. YELIN: Yes, I understand,
4 Chief Justice, thank you. But I think "reasonable" can
5 have different focuses. It could be reasonable in light
6 of the expectations of the parties at the time that they
7 formed the contract, or it could be reasonable in light
8 of community standards of decency, which are --

9 CHIEF JUSTICE ROBERTS: Well, let's say
10 going forward. Going forward, the parties know that
11 this decision is out there, and they say, "sole." So it
12 means they're using the term, subject to the gloss
13 that's been put on it by the Minnesota supreme court.
14 So what about in that case?

15 MR. YELIN: I think subsequent -- if there
16 is a gloss where -- and the -- I think that would be a
17 question of what the parties intended with the contract,
18 and I think there may well be an argument under that
19 scenario, that the airline understood that the gloss was
20 going to be given, although I --

21 CHIEF JUSTICE ROBERTS: We would assume,
22 then, that the parties knew, whenever they used the word
23 "sole," they actually meant subject to reasonableness as
24 interpreted -- interpreted by the Minnesota supreme
25 court.

1 MR. YELIN: I think that may well be right,
2 Your Honor, but I -- I want to caution that an argument
3 like that can prove too much. An argument like that
4 could suggest, as Respondent argued in the lower court,
5 that, any time a party enters into a contract, the party
6 endorses or at least accepts all normative principles of
7 contract law.

8 That would include things like doctrines of
9 unconscionability and other doctrines that impose
10 extracontractual limitations on the parties' choices.

11 CHIEF JUSTICE ROBERTS: So you're not going
12 to give me "reasonable" for anything?

13 MR. YELIN: No, no. I absolutely am going
14 to give you "reasonable."

15 CHIEF JUSTICE ROBERTS: Okay.

16 MR. YELIN: I think it just --

17 CHIEF JUSTICE ROBERTS: Well, if you're
18 going to give me "reasonable" -- in other words, the
19 parties' express terms do not say "reasonable"; in fact,
20 the most natural reading is that it's not reasonable,
21 but they take the contractual -- the interpretation that
22 the Minnesota supreme court has adopted, I don't know
23 why the same rule wouldn't apply when the Minnesota
24 supreme court says there is an implied condition of
25 reasonableness across -- across the board and that the

1 parties contract against that background, just like they
2 do when there's a specific interpretation of the word
3 "sole."

4 MR. YELIN: I think the problem, Chief
5 Justice, is that the notion of the doctrine of the
6 implied covenant is extraordinarily broad and
7 encompasses a number of different concepts. It
8 encompasses notions of reasonableness and implying
9 limitations to discretionary grants of authority
10 reserved in contracts.

11 It also encompasses, in some States,
12 concepts, such as notions of fairness, or which extend
13 beyond the intent of the parties.

14 JUSTICE ALITO: Let me change the
15 hypothetical slightly. Suppose the contract says that
16 one of the parties reserves sole discretion to do
17 something, and then the contract goes on to say, and
18 then, in exercising this discretion, we don't promise to
19 act in a reasonable manner.

20 But the State court says that, nevertheless,
21 that has to be interpreted to mean that the -- the party
22 can only perform in a reasonable manner. Then what
23 would the situation be?

24 MR. YELIN: I think the ADA would preempt
25 exactly that sort of claim or a claim based on that sort

1 of an argument. The -- the crux of the ADA is to leave
2 to the judgment of air carriers, subject to market
3 forces, decisions concerning rates, routes, or services.

4 And I'd like to underscore this point by
5 pointing out that the interpretation that this Court
6 gives to the ADA is not only going to control frequent
7 flyer programs; it's also going to control things like
8 contracts of carriage, which are --

9 JUSTICE BREYER: That's right. All right.
10 But, now, the question I have, which is, I think, for
11 anyone who wants to answer it, particularly the
12 government, I absolutely agree with you that -- that a
13 free market in price is at the heart of the Deregulation
14 Act. Given.

15 I also think frequent flyer programs are
16 simply price discounts. Given.

17 I also think that, if you don't have
18 contracts, you can't have free markets. Given.

19 But I also think that the State cannot, under the
20 guise of contract law, regulate the prices of airlines.
21 If you allow that, you're going to have worse than we
22 ever had. It'll be 50 different systems, all right?

23 So, if I think those four things, what
24 standard do I use to separate when a State is and when
25 it is not using its contract law to regulate prices?

1 MR. YELIN: Justice Breyer, I heartily
2 endorse each of the four criteria you identified.

3 JUSTICE BREYER: Well, good. Then you'll
4 give me the answer because what I'm missing is what the
5 standard is.

6 (Laughter.)

7 MR. YELIN: And I think the standard that
8 this Court could adopt and make very clear is that any
9 contract doctrine which seeks to interpret the intent of
10 the parties at the time of the contract's formation is a
11 valid standard to be applied in any suit and is not
12 preempted by the ADA.

13 But any contract doctrine like
14 unconscionability and like, in some States, some
15 instances of the doctrine of the implied covenant, which
16 seeks to impose extracontractual terms, like community
17 standards --

18 JUSTICE GINSBURG: You said, "in some
19 States." So what about the States where that doesn't?
20 Are you saying that, in some States, the implied
21 covenant is assumed to be what the parties agreed upon,
22 and, in some States, it's not?

23 MR. YELIN: Justice Ginsburg, I think
24 there's a continuum. The -- the notion of the implied
25 covenant, as Justice Scalia explained for the D.C.

1 Circuit in the Tymshare decision, is a label with
2 many -- that encompasses many meanings.

3 Some States, like Illinois and Connecticut,
4 use the doctrine purely, it appears to us, as an
5 interpretive device to discern the intent of the
6 parties. Other States at the other end of the
7 spectrum -- Arizona is one -- we've cited a number of
8 other cases in our brief -- used the same concept to
9 encompass extracontractual principles.

10 JUSTICE GINSBURG: Suppose the State --

11 JUSTICE SCALIA: I don't want to have to
12 sort those out State by State. I mean, it seems to me
13 the -- the regime proposed by the Petitioner is -- is
14 much more manageable. If it goes beyond the words of
15 the contract, it -- and you're reading into it something
16 that it doesn't say, it's a matter of State policy, so I
17 can -- I can work with that.

18 But you're -- you're asking me to go through
19 each of the 50 States one-by-one to decide, oh, which --
20 which of these are really trying to discern the intent
21 of the parties and which ones aren't, I -- especially
22 since you discern the intent of the parties by simply
23 saying, well, parties intend to apply community
24 standards, right?

25 And there'll be different community

1 standards in every State, presumably. Some States are
2 more honest than others, right?

3 MR. YELIN: Justice Scalia, I have two
4 responses to that observation. The first is I don't
5 think the State-by-State analysis is either unusual or
6 difficult. There has to be a State-by-State analysis
7 any time you -- you have a contract claim applying State
8 law. There are variances among States in their contract
9 law.

10 The -- the second part of the same response
11 is, I don't think the standard that we're articulating
12 is a particularly different one.

13 JUSTICE SCALIA: There are variances, but
14 not variances in such an ineffable question as to
15 whether this is really an effort to discern the real
16 intent of the parties or, rather, whether it's an intent
17 to impose community standards, especially since, as I
18 say, parties intend to adopt community standards,
19 usually.

20 MR. YELIN: With respect, Justice Scalia, I
21 think that's not at all a difficult question. I think a
22 contract -- I think it's unlikely that a frequent flyer
23 contract or any airline contract that reserves
24 discretion is likely to have incorporated, implicitly,
25 community standards.

1 I think the point would be that, if a
2 carrier were to decide to -- to incorporate ineffable
3 standards, such as that, it would have been pretty clear
4 in any reservation --

5 JUSTICE SOTOMAYOR: Could I give you -- I'm
6 quoting the Minnesota --

7 JUSTICE KENNEDY: Well, it's easy for you --
8 for you, representing the government, but suppose you
9 were representing the airline. Would you come up here
10 and say, the airlines want it to be well known that we
11 don't have to be reasonable? I -- I find that very
12 difficult to understand.

13 MR. YELIN: I -- I have one principal
14 response, Justice Kennedy, which is this: If the Court
15 were to adopt a prophylactic rule along the lines that
16 Petitioner was suggesting, we think that would be better
17 than an alternative prophylactic rule in the other
18 direction because it would cut off the use of the
19 Implied Covenant Doctrine that would impose
20 extracontractual limitations.

21 JUSTICE GINSBURG: If we had --

22 CHIEF JUSTICE ROBERTS: I do agree, it seems
23 pretty inconsistent with the normal presumption against
24 preemption that we apply out of respect for the State
25 legal regimes, to say we're going to adopt a broad

1 prophylactic rule.

2 MR. YELIN: This -- this is, in part,
3 precisely why we propose that the Court look -- adopt a
4 standard, which we don't think would be particularly --

5 JUSTICE SOTOMAYOR: So let's go back to a
6 simpler standard.

7 CHIEF JUSTICE ROBERTS: You -- go ahead.

8 JUSTICE SOTOMAYOR: My simpler standard
9 comes from quoting Hennepin. "Does the implied covenant
10 claim extend to actions beyond the scope of the
11 underlying contract, or can it override the express
12 terms of an agreement? If the answer is no, it's not
13 preempted."

14 Is that an okay statement.

15 MR. YELIN: That is an okay statement.

16 We --

17 JUSTICE SOTOMAYOR: So, if that's what
18 Minnesota law says, it's okay, and it's not preempted.

19 MR. YELIN: With the following caveat,
20 Justice Sotomayor: In some States that have adopted the
21 implied covenant, they have hybrid approaches where they
22 not only look to the intent of the parties, but also
23 impose external standards.

24 The standard --

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MR. YELIN: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Rosenbaum.

4 ORAL ARGUMENT OF ADINA H. ROSENBAUM

5 ON BEHALF OF THE RESPONDENT

6 MS. ROSENBAUM: Mr. Chief Justice, and may
7 it please the Court:

8 Northwest claims that the World Perks
9 contract allowed it to terminate Rabbi Ginsberg's
10 membership and take away the miles he had already
11 accrued in reliance on the frequent flyer program
12 contract; that is, that it allowed it, for any reason or
13 on any whim, to deprive him of all of the benefits of
14 the frequent flyer program contract bargain.

15 Our position, in contrast, is that
16 Northwest's actions breached its obligations under the
17 contract, specifically the contractual obligation to
18 perform in good faith. Because this is a question of
19 contract interpretation, Rabbi Ginsberg's claim is
20 not --

21 JUSTICE SOTOMAYOR: What was the lack of
22 good faith that you are claiming? If they thought he
23 was abusive, or are you saying -- what are you saying
24 was the bad faith, what action?

25 MS. ROSENBAUM: The action was terminating

1 him from the program and taking away his miles --

2 JUSTICE SOTOMAYOR: It can't be that --

3 MS. ROSENBAUM: -- without possible cause.

4 JUSTICE SOTOMAYOR: -- because there has to
5 be -- what are you saying was the bad cause here?

6 Assume their answer, that he was abusing the program.

7 MS. ROSENBAUM: Well, we do not think that
8 he was abusing the program.

9 JUSTICE SOTOMAYOR: That's --

10 MS. ROSENBAUM: And the allegations in the
11 complaint are that --

12 JUSTICE SOTOMAYOR: So you are doing exactly
13 what he is saying. You are saying that their judgment
14 of abuse is not enough.

15 MS. ROSENBAUM: We think that there is
16 some -- there are some reasons that he could not be
17 terminated from the program for, and there are
18 allegations in the complaint that are incorporated into
19 the covenant of good faith claim in the complaint, that
20 he was terminated because of the merger between Delta
21 and Northwest.

22 JUSTICE SCALIA: As I understand your
23 argument -- correct me if I am wrong -- he could be
24 terminated without reasonable cause if he happened to be
25 from a State or if the suit was brought under the

1 governing law of a State, which imposed this obligation
2 of good faith as a matter of law.

3 The State says, regardless of what the
4 contract says, even if it says, in its sole discretion,
5 without any obligation of good faith, even if it says
6 that, as a matter of law, there is an obligation of good
7 faith.

8 As I understand your case, you acknowledge
9 that, in that State, he would simply be out of luck.

10 MS. ROSENBAUM: I don't think so. Well,
11 that he would be out of luck --

12 JUSTICE SCALIA: He would have no cause of
13 action because this is, obviously, not an interpretation
14 of the contract; it is -- it is an imposition of a State
15 requirement.

16 MS. ROSENBAUM: We agree that, if it's not
17 construing the contract, that if a State --

18 JUSTICE SCALIA: Okay. I just --

19 MS. ROSENBAUM: -- were, instead, claiming
20 that the contract violated the law, instead of
21 that Northwest had violated the contract --

22 JUSTICE SCALIA: Wow, somebody's really been
23 given a raw deal -- you know, that's still going to be
24 possible, even if we rule for you here. It depends on
25 what State he's from, right?

1 MS. ROSENBAUM: Well, States tend, in
2 applying the covenant of good faith, to apply it in --
3 as a contract interpretation tool, as a way of giving
4 effect to the benefits of the bargain.

5 JUSTICE SCALIA: Some do; some don't. Some
6 do; some don't.

7 MS. ROSENBAUM: The vast majority of
8 States -- and there is an appendix to the States' brief
9 on this issue -- talk about the covenant of good faith
10 as a way of interpreting the contract. And Minnesota --

11 JUSTICE ALITO: Well, let me ask you this:
12 Suppose you have, in Minnesota or one of the States
13 where you say the covenant is simply a way of
14 effectuating the intent of the parties, you have a
15 contract between two very tough and nasty businessmen.

16 And they write right in their
17 contract -- you know, we're going to comply with the
18 literal terms of this contract, but we do not promise
19 each other that we're going to proceed in good faith or
20 that we are going to deal with each other fairly. We
21 are going to take every advantage we can under the
22 literal terms of the contract.

23 Now, would that get rid of the covenant
24 under Minnesota law?

25 MS. ROSENBAUM: Generally, the covenant of

1 good faith cannot be waived -- you know, I think the
2 question of whether the principle that the covenant
3 can't be waived is, itself, an external principle of
4 law, is a much harder question than the question here,
5 of whether the covenant itself --

6 JUSTICE KAGAN: But, counsel, if it can't be
7 waived, it sure seems as though it is operating
8 independently of the parties' reasonable expectations.

9 MS. ROSENBAUM: Again, I think you need to
10 separate out the principle that it can't be waived from
11 the underlying principle of what the covenant is doing,
12 which is giving effect to the bargain that the parties
13 entered into, based on looking at the reasonable
14 expression -- the reasonable expectations of the
15 parties.

16 JUSTICE GINSBURG: In Wolens -- and this is
17 a case that you rely on and that allowed room for
18 contract claims -- the expression was "self-imposed
19 undertaking." And the airline says, we didn't impose,
20 we didn't take on this obligation, but the law reads it
21 into every contract, whether we want it or not.

22 How is it self-imposed if the party has no
23 say, that it's going to apply anyway?

24 MS. ROSENBAUM: Well, the terms of the
25 contract are the self-imposed undertaking, and then this

1 is a tool that's being used to understand and
2 interpret the tools of the -- terms of the contract and
3 then to enforce them.

4 And this is a widely used tool to interpret
5 terms of contracts, particularly when there are
6 discretionary terms within a contract. That's something
7 that's done in the vast majority of the States, and, in
8 fact, the discretionary -- the cases where there are
9 discretionary terms within a context is the
10 quintessential application of the covenant of good
11 faith.

12 A lot of the early covenant of good faith
13 claims involved outputs or requirements contracts, where
14 the specific amount in the contract was not set, and the
15 covenant was applied to that sort of situation. And
16 scholars, in talking about the covenant, often
17 specifically note that it applies to discretionary
18 terms.

19 JUSTICE ALITO: Well, how do you account for
20 the fact that, in many States, the covenant of good
21 faith and fair dealing is read into most contracts, but
22 is not read into employment contracts?

23 MS. ROSENBAUM: I think that that's a
24 situation that States struggle with, given the at-will
25 employment doctrine, and they've viewed the covenant and

1 the at-will employment doctrine as being in conflict
2 with each other.

3 Here, though, the covenant and the contract
4 or any other principle are not in conflict with each
5 other. The covenant is not being used to override any
6 terms in the contract. It is being used to help give
7 meaning to the terms in the contract and to identify
8 what the implicit restrictions are.

9 JUSTICE ALITO: Well, doesn't that
10 discrepancy show simply that the State has different
11 policies with respect to those two types of contracts?

12 MS. ROSENBAUM: I -- I don't think that it's
13 applying different types of policy. I think it's
14 interpreting the contract and what the contract means
15 differently in different situations.

16 JUSTICE KAGAN: I mean, it might be, right,
17 because people have different expectations in those two
18 different situations and that the at-will employment is
19 so pervasive and so customary and so sweeping that the
20 policy -- the rule of an implied covenant of good faith
21 doesn't apply there because we think everybody expects
22 it not to apply there.

23 MS. ROSENBAUM: Exactly. And I do think
24 that courts will, sometimes, say the covenant doesn't
25 apply when what they mean is that, if the covenant did

1 apply and the court were looking at the reasonable
2 expectations of the parties, based on the contract,
3 there would be no reasonable expectations --

4 JUSTICE ALITO: Well, an at-will employment
5 contract is a contract that gives the employer sole
6 discretion as to whether to retain an employee. And,
7 here, we have a contract that says that the airline
8 has -- has sole discretion to determine whether to
9 terminate somebody from the frequent flyer program. So
10 what is the difference?

11 MS. ROSENBAUM: Well, it's a difference in
12 the context, and what the term "sole discretion" means
13 in different contexts is going to vary based on the
14 context and based on what someone entering into that
15 contract reasonably would have expected that contract to
16 mean, based on the terms of the contract.

17 So in the employment context, an employee,
18 given the wide acknowledgment of the at-will employment
19 doctrine, might not expect that they could only be
20 terminated for cause.

21 JUSTICE BREYER: Well, you would -- you
22 would agree -- it's the same question I asked the
23 government. I would like your answer. I imagine that
24 you would agree that a State says the following: We
25 read into -- like common law courts used to do all the

1 time, for a transportation company, we believe the price
2 must be fair and reasonable, and a contract in our
3 State, for transportation prices, has to set a fair and
4 reasonable price, and I personally think many fares are
5 not reasonable. They are too high. All right. And,
6 therefore, we have substituted the judges and the States
7 for setting prices instead of the parties.

8 All right. You agree that would be
9 preempted?

10 MS. ROSENBAUM: We agree that that does
11 not --

12 JUSTICE BREYER: All right. Now, so what is
13 your standard for distinguishing what is and is not
14 preempted where the State uses its contract law to imply
15 a fair and reasonable term?

16 MS. ROSENBAUM: I think our standard is very
17 similar to the one that the United States said. It's
18 about whether the covenant is going to -- whether the
19 claim is looking at whether the parties breached the
20 contract or whether it's looking at whether the contract
21 itself violated the law.

22 So it's a question of whether the claim is
23 actually interpreting the contract and trying to get at
24 what the parties -- what their agreement was or whether
25 the claim is really that the contract, as the parties

1 agreed to it, violated the law.

2 JUSTICE GINSBURG: Suppose the supreme court
3 of the State had an opinion that says, we're going to be
4 candid about this, the covenant of fair dealing and good
5 faith, it's not in this contract, but we will read it
6 into every contract; that is, if the State supreme court
7 said, it's externally imposed, this is a rule that we
8 will read into every contract because of the policy in
9 our State that people should deal with each other
10 fairly.

11 Suppose that was the controlling decision of
12 the Minnesota supreme court. Then you're out; is that
13 right?

14 MS. ROSENBAUM: Yes. If a State says that
15 it's imposing external notions of policy, that would
16 fall on the other side of the line drawn in Wolens,
17 which looked at enforcing terms of the agreement versus
18 imposing external State policies, but that --

19 JUSTICE KAGAN: That would be weird, isn't
20 it, because in such a State, there might be a contract
21 where the parties reasonably did expect this implicit
22 term that limits something -- a very broad conferral of
23 discretion to operate.

24 And, yet, just because this State supreme
25 court has framed its argument in a particular kind of

1 way, they don't get the benefit of that.

2 MS. ROSENBAUM: I think it would depend on
3 how the claim was framed and how the court interpreted
4 that claim and whether, in interpreting that claim, the
5 court was looking at the reasonable expectations of the
6 parties based on the terms of the contract and based on
7 their desire to be bound by an enforceable contract or
8 whether it thought it was imposing -- overriding the
9 parties' contract and imposing external notions of
10 fairness.

11 CHIEF JUSTICE ROBERTS: And that's no
12 clearer than the -- the government's view, and it seems
13 to me to be a particular problem when you're talking
14 about the objectives of the ADA, to say that the rule
15 varies from State to State, particularly since, of
16 course, we're dealing with airlines that go to a lot of
17 different States.

18 I mean, it seems to me that the loosest
19 State, from the point of view of the preemption, is
20 going to set the standard.

21 MS. ROSENBAUM: I don't think that -- that
22 the rule itself is varying from State to State. I think
23 that the rule would be the same across States, that when
24 a claim is --

25 CHIEF JUSTICE ROBERTS: Yes. It's a general

1 rule that it depends upon the particular circumstances.
2 That's the same rule, but in its application, it
3 certainly varies from State to State.

4 MS. ROSENBAUM: I don't think that it
5 necessarily would because, in all the States, a claim
6 that's seeking to get at the expectations and intents of
7 the parties would not be preempted, whereas one imposing
8 external notions of fairness would.

9 JUSTICE BREYER: That isn't what your --
10 your complaint that I think -- paragraph 56, which I
11 think is the key paragraph says, that the -- under
12 the -- the law is -- the contract law that you want to
13 enforce is, even where a party to a contract is given
14 absolute discretion, it must exercise that discretion in
15 good faith in a manner consistent with the reasonable
16 expectations of the other party or parties.

17 Now, that's, I think, what they're objecting
18 to because, there, it sounds to me like I go in
19 to -- you know, get a ticket, my reasonable expectation
20 is they're not going to charge me what they're going to
21 charge -- you know, I mean, it's unbelievable. But
22 there -- but, you see, that's my reasonable expectation,
23 and I'm the other party.

24 And so that clause sounds as if you could,
25 under State contract law, govern the price according to

1 my reasonable expectation, namely, the consumer, that
2 might be a great idea, but I don't think that's the idea
3 behind this act.

4 That's what -- what -- that's what I just
5 read you. So what do you say about that?

6 MS. ROSENBAUM: Well, I think there's a
7 difference between expectations, subjective expectations
8 and reasonable expectations. And the concept of
9 reasonable expectations in the complaint is -- is an
10 objective standard of what -- based on this contract and
11 based on the context, what -- how the contract should be
12 interpreted and what implicit terms there are in the
13 contract that need to be interpreted and then enforced
14 and that can, in fact, be breached by the other party.

15 JUSTICE SCALIA: Ms. Rosenbaum, in -- in our
16 decision in this case, do you think we should apply the
17 presumption against preemption of State law?

18 MS. ROSENBAUM: I think you should apply the
19 presumption against preemption of State law because it
20 does apply.

21 JUSTICE SCALIA: But the whole purpose of
22 the ADA was to preempt State laws. I mean, I can
23 understand applying that presumption to other statutes,
24 which say nothing about preemption. The whole purpose
25 of the ADA was to deregulate airlines, was to say there

1 was going to be no Federal regulation, let the free
2 market handle it, and there be will be no State
3 regulation.

4 And you want us to apply a presumption
5 against preemption to that statute?

6 MS. ROSENBAUM: I do think the presumption
7 applies. I don't think it's necessary to any outcome in
8 this case because, whether or not it applies in Wolens,
9 this Court held that claims are about holding airlines
10 to the terms of their agreement are not preempted, and
11 that's what the covenant of good faith claim is about.

12 JUSTICE GINSBURG: Well, it's one thing to
13 read the terms in the agreement. It's another thing to
14 say it's an underlying premise that good faith and fair
15 dealing will control.

16 Are you taking issue with the good faith and
17 fair dealings standard being amorphous, being
18 susceptible to different interpretations by different
19 judges, by different juries?

20 MS. ROSENBAUM: I think there is a fair
21 amount of uniformity across the States in how they
22 actually apply the covenant of good faith and in terms
23 of applying it as an interpretation of the contract, and
24 then, especially, in cases where one party is claiming
25 that all of their performance under the contract is in

1 their sole discretion and that they're free not to
2 perform under the contract at all -- you know,
3 essentially where the contract would be illusory in
4 applying the covenant specifically under those
5 circumstances to ensure that there is meaningful
6 performance that's required under the contract.

7 JUSTICE GINSBURG: Is an employment at-will
8 contract illusory?

9 MS. ROSENBAUM: I don't believe that's an
10 illusory contract.

11 But I think rather than it being important
12 whether there are specific -- whether specifically this
13 contract is illusory, I think the fact that one party is
14 claiming that it had no duty to perform under the
15 contract shows that the contract had reasonable implicit
16 limitations in it, that the parties would have
17 reasonably expected that they were contracting to there
18 being some sort of performance under the contract.

19 And, in fact, the principles at issue here
20 are remarkably similar to the principles that were at
21 issue in Wolens itself. And this Court there recognized
22 that those were contract construction issues.

23 JUSTICE GINSBURG: That's because the
24 contract was silent. Here, it isn't. Here, the
25 contract, says "sole discretion." In Wolens, the

1 question was retroactivity, and the contract said
2 nothing one way or the other about it.

3 MS. ROSENBAUM: Well, in Wolens, the
4 question was an express reservation of rights, and the
5 contract didn't say whether or not it applied
6 retroactively, so the question was whether there were
7 implied limitations on the express reservation of
8 rights.

9 JUSTICE SCALIA: Would this contract produce
10 a different result if it did not contain the words "in
11 its sole discretion"?

12 MS. ROSENBAUM: The interpretation of the
13 contract might be different, but the reasonable
14 expectations --

15 JUSTICE SCALIA: Well, you'd -- you'd --
16 you'd still apply the very same doctrine of
17 reasonableness, right? So the words "in its sole
18 discretion" become superfluous.

19 MS. ROSENBAUM: I think there may be a
20 larger amount of deference that's given to the airline,
21 in that a party would reasonably expect would be given
22 to the airline, because of the sole discretion language.
23 And that's, obviously, a question for the merits, what
24 exactly is the meaning of the sole discretion language.

25 JUSTICE SCALIA: Yes. I guess different

1 States will treat that differently as well, right?

2 MS. ROSENBAUM: I think the question is less
3 State-by-State and really more case-by-case and
4 context-by-context of what does sole discretion language
5 mean when used -- and where do you apply limitations on
6 it.

7 JUSTICE SCALIA: I find -- I find it hard to
8 believe that you're doing nothing but interpreting a
9 contract when you -- you give it the same outcome,
10 whether it says "in its sole discretion" or does not say
11 "in its sole discretion." I -- I find it hard to grasp
12 how what you're doing in that -- in that case is simply
13 interpreting the contract.

14 MS. ROSENBAUM: I don't think that there
15 would necessarily be the same outcome in every single
16 situation, whether or not the claim -- whether or not
17 the contract said, "sole discretion" or not. There may
18 be more deference given to the airline because of the
19 discretionary term; but, in both situations, the
20 question would be, what does this contract mean?

21 And contracts include both their express
22 terms and their implied terms, and the covenant of good
23 faith is going to interpreting those implied terms, to
24 identifying them within the contract, and then enforcing
25 them within the contract.

1 If an airline were able to just insert "sole
2 discretion" or "sole judgement" within its contract, it
3 would be able to entirely circumvent the rule that this
4 Court set forth in Wolens. Just by adding "sole
5 discretion" to its contract, it would never be held to
6 any contractual duties or requirements.

7 JUSTICE ALITO: May I ask you a question
8 about something slightly different? An amicus brief
9 submitted in support of your position by California and
10 some other States points out, at some length, that there
11 are now a lot of frequent flyer programs in which a lot
12 of miles are earned by making purchases other than
13 for -- for flights and in which miles can also be spent
14 for things other than flights.

15 Do we have to worry about that in this case?

16 MS. ROSENBAUM: We think that that's another
17 reason why this claim is not preempted, is because it
18 has to do with membership in a frequent flyer program,
19 rather than being -- rather than, like in Wolens, having
20 to do specifically with access to flights or --

21 JUSTICE ALITO: Well, what are the facts
22 relating to this particular plan? Can you earn miles by
23 doing things other than flying? Can you spend miles on
24 things other than flying?

25 MS. ROSENBAUM: There are not very many

1 facts in the record about the plan, but the -- the
2 contract does refer to airline miles -- to -- sorry, to
3 airline partners from whom one could earn miles and then
4 use miles, also.

5 JUSTICE GINSBURG: The plaintiff --

6 MS. ROSENBAUM: And Delta, which is merged
7 into --

8 JUSTICE GINSBURG: And the plaintiff used
9 the frequent flyer program, whatever else it might be
10 used for, he used it to get lower prices on flights,
11 right?

12 MS. ROSENBAUM: He did, yes, and that is
13 something in the record. But --

14 JUSTICE SCALIA: Why does -- it relates to
15 prices. Even if you get credit for miles from staying
16 at certain hotels, it still has the effect of lowering
17 the price for your airline ticket. And, likewise, if
18 you can use your frequent flyer miles to get cheaper
19 hotel rooms, that effectively lowers the price of your
20 airline ticket, doesn't it?

21 I mean, it doesn't seem to me to make any
22 difference whether -- whether the only thing you get
23 from the -- from the frequent flyer mileage is -- you
24 know, is airfares or other goodies. They -- they are
25 all price.

1 MS. ROSENBAUM: This is a claim just about
2 his membership in the program overall, and that is a
3 membership where there -- people who have the same claim
4 as him could be earning miles on their credit card,
5 spending miles on hotel rooms.

6 And, once there is a claim where someone can
7 bring it who has no relationship with air travel
8 whatsoever, where they can bring the exact same claim,
9 it's hard to see how that claim is related to prices,
10 routes, or services of air travel.

11 And there's certainly been no showing here
12 that --

13 JUSTICE SCALIA: I'm sorry. You are talking
14 about a situation where you can assign your -- your
15 mileage to somebody else who can get the hotel room?

16 MS. ROSENBAUM: No, I'm saying
17 that someone --

18 JUSTICE SCALIA: The person who gets the
19 discount for the hotel room is the person who bought the
20 airline ticket, right?

21 MS. ROSENBAUM: Or the person who used their
22 credit card to receive frequent flyer miles.

23 JUSTICE GINSBURG: Your point is that you
24 can get frequent flyer miles by purchases other than
25 airplane transportation.

1 MS. ROSENBAUM: Yes. And then also use them
2 for purposes other than airline transportation.
3 Reportedly, more miles are earned, now, on the ground
4 than on flight, through -- through means other than
5 travel than actually through --

6 JUSTICE BREYER: I didn't see anything in
7 the complaint about anything other than airlines.

8 MS. ROSENBAUM: No, he himself --

9 JUSTICE BREYER: Is there anything in your
10 complaint that talks about anything other than airlines?

11 MS. ROSENBAUM: No, there isn't. He --
12 Rabbi Ginsberg himself earned and used his miles --

13 JUSTICE BREYER: No, I know. But, I mean,
14 what we are taking about is what Count 2 of the
15 complaint says. I think that's their objection. But,
16 as far as Count 2 of the complaint says, it's about
17 airline miles, I take it, and airline miles are used on
18 airlines and -- et cetera.

19 MS. ROSENBAUM: Well, his claim --

20 JUSTICE BREYER: Well, if there is something
21 else in this complaint, tell me, and I will have to
22 figure out whether we go beyond the complaint.

23 MS. ROSENBAUM: His claim is about his
24 membership in the program itself, and the program itself
25 can be used, including the accrued miles that are earned

1 under the program, can be used for purposes besides
2 airline flights.

3 JUSTICE BREYER: Does it say that in the
4 complaint?

5

6 MS. ROSENBAUM: It does not specifically
7 say, but the contract does refer to the airline partners
8 and this was decided --

9 JUSTICE BREYER: And an airline partner, I
10 take it, is another airline?

11 MS. ROSENBAUM: No, I think airline partners
12 can be the people with whom they partner with, to whom
13 they sell their miles.

14 JUSTICE BREYER: So if I want to find out
15 about that in the record, where do I look?

16 MS. ROSENBAUM: This was decided on a motion
17 to dismiss, so all there is, is the complaint, but there
18 is --

19 JUSTICE BREYER: All there is, is the
20 complaint, and it doesn't talk about it in the
21 complaint. What I'm thinking about, obviously, is we
22 might reserve that question for another day.

23 MS. ROSENBAUM: The complaint does include
24 the contract, that does refer to the partners, but does

1 not, I don't think, define exactly who the partners are.

2 But this Court doesn't have to reach the
3 question of whether or not the claim relates to prices,
4 routes, and services because it can decide this case
5 based on the line drawn in Wolens of whether or not this
6 claim enforces the terms of the -- enforces the terms of
7 the contract, which, under Minnesota law, the covenant
8 of good faith does.

9 Cases in Minnesota have referred to this as
10 a breach of contract claim. And I want to respond to
11 Justice --

12 JUSTICE SCALIA: What you say would apply to
13 other contractual obligations of the airlines, right?
14 So, if the airline says you have to get off the plane if
15 the flight attendant tells you to do so, there is going
16 to be a good-faith obligation attached to that, so you
17 can challenge -- challenge those decisions in court?

18 MS. ROSENBAUM: Well, there are separate
19 regulations that apply to safety under the ADA, so --
20 and separate preemption doctrines that apply to safety
21 under the ADA. But, besides that, this would apply to
22 matters besides -- to matters besides frequent flyer
23 miles and other sole discretion, issues in which the
24 contract leaves an issue to the sole discretion of the
25 airline.

1 I do want to respond to Justice Kennedy's
2 question about whether someone can go to the Department
3 of Transportation. The Department of Transportation
4 does have authority over unfair and deceptive practices
5 that -- by airlines, but this is -- that's very
6 different than the claim that we're pursuing here.
7 That's a claim by -- by an airline -- sorry, by the
8 government, that doesn't give remedies to the specific
9 consumer who was hurt.

10 And that also looks at whether the practice
11 is unfair or deceptive. And our claim here isn't that
12 this was an unfair practice. The claim here is that
13 this is a practice -- or these were actions that
14 violated the contract, and what's being applied here are
15 contract law principles about interpreting the covenant
16 of good faith.

17 And the same thing was true also in Wolens.
18 At the time of Wolens, the Department of Transportation
19 had the same ability to pursue claims for unfair or
20 deceptive practices, but the Court recognized that that
21 did not override the need for there to be a contract
22 dispute resolution regime by -- by the State courts.
23 And that's the same -- the same is true here whether or
24 not the contract term at issue is expressed or implied.

25 And, overall, like in Wolens, this is a claim

1 where, if these sort of claims were preempted, it would
2 undercut the efficiency of contracts and the competitive
3 marketplace that overall the ADA meant to pursue.
4 People need to be able to rely on their contracts. They
5 need to be able to rely on the fact that the other party
6 to their contract will interpret that contract in good
7 faith according to the reasonable expectations of the
8 parties where they will give them the performance they
9 reasonably thought that they were securing when they
10 entered into the contract.

11 Under Northwest's position here, though,
12 that it has the discretion not to perform at all, people
13 won't be able to rely on the security of their
14 contracts. And it's hard to imagine that, when Congress
15 enacted the Airline Deregulation Act, it meant to
16 undercut the efficiency of contracts in that way.

17 CHIEF JUSTICE ROBERTS: I don't think it
18 helps your argument to say that your position promotes
19 the purposes of the ADA because the whole point of
20 that -- of the preemption provision, is that that's for the
21 Federal government to determine, not for different state
22 laws, what promotes the purposes of the ADA.

23 MS. ROSENBAUM: Well, one thing this Court
24 said in Wolens was that having -- being able -- for
25 people to be able to trust their contracts was something

1 that promoted the purposes of the ADA. And we think
2 that is true whether the terms that are being relied on
3 are expressed terms of contracts or, like here, the
4 implicit understood terms of the contract that the
5 contract is going to be performed in good faith.

6 Unless the Court has any other questions,
7 thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Three minutes, Mr. Clement.

10 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

11 ON BEHALF OF THE PETITIONERS

12 MR. CLEMENT: Thank you, Mr. Chief Justice.

13 First, just a couple of loose ends. The
14 concession that I was referring to before is on 15
15 and 16 of the Red Brief. I think it was reiterated at
16 the podium.

17 Also, this argument that, somehow, frequent
18 flyer miles programs have changed or something and are
19 different because there are partners, the same arguments
20 were made by the plaintiffs in Wolens, in their brief to
21 this Court, that, somehow, these don't relate to prices
22 and routes and services because you have rental cars and
23 hotels as partners, so I think this Court has already
24 crossed that bridge.

25 Three --

1 JUSTICE ALITO: I don't want to take up -- I
2 don't want to take up your rebuttal time, but, if the
3 facts were that, under a particular program, 90 percent
4 of the miles were earned by purchasing things other than
5 flying and 90 percent of the miles were spent on things
6 other than flying, wouldn't that be very different?

7 MR. CLEMENT: I'm not sure it would be
8 different in a -- in a claim brought against the
9 airlines. I mean, maybe if you want to sue the credit
10 card partner, the ADA has nothing to do with that.

11 But I would say that, if you're suing an
12 airline, the Airline Deregulation Act speaks to it.
13 But, if the Court want to reserve that, I suppose it
14 could.

15 I do want to make -- underscore that the
16 Implied Covenant Doctrine is very different from other
17 interpretative tools. It is non-waivable, and, I think,
18 in a world where you are trying to determine the
19 difference between self-imposed undertakings and things
20 imposed by State law, non-waivability is a huge strike
21 against it being voluntary.

22 It also just is -- you can bring in separate
23 implied covenant claims -- you know, no one -- I've
24 never heard of a contra proferentem claim, but an
25 implied covenant claim is routinely brought as a

1 separate claim.

2 It just shows you really can enlarge the
3 bargain in very real ways, and the States make policy
4 decisions about whether to have it. Texas doesn't have
5 implied covenants, as a general matter, at all.

6 Some States have a valid public policy.
7 They have different views about at-will employment
8 contracts. And, when Congress wanted to impose a duty
9 of good faith and fair dealing on the franchise
10 agreements between car manufacturers and automobile
11 dealers, they passed a statute. It's just statutory and
12 policy oriented in a way that normal rules of
13 construction are not.

14 Now, Justice Breyer, I certainly agree with
15 your four premises. If I had to state a standard, I
16 would say the standard is that the implied covenant is
17 only not preempted when it does no more than provide a
18 rule of construction for the express terms of the
19 contract.

20 But, of course, if that's all it does, then
21 there's nothing to be gained by saying those claims are
22 not preempted because you can still just get to the same
23 place by citing Cardozo and Lady Duff-Gordon.

24 And there's a lot to be gained by adopting a
25 more prophylactic rule because the claims that are

1 brought in the real world are claims that I get a refund
2 even though the ticket's nonrefundable. I get \$1,000,
3 even though the loss limit was 500. I get to sue you
4 for redirecting my packages, even though it was in your
5 sole discretion.

6 So in the real world, the implied covenant
7 claims are elastic and provide a basis for bringing the
8 kind of claims that courts have almost uniformly
9 correctly recognized are preempted.

10 The last question I ask you to think about
11 is: Why is it the airlines don't put these covenants in
12 as express covenants? Why do they say sole discretion
13 and not say sole discretion unless it violates
14 reasonable norms of community standards and decency?

15 Well, the reason is you can't run a
16 national, let alone international airline, if every one
17 of your judgments about taking an unruly passenger off
18 or taking out an abusive customer is going to be
19 second-guessed by a jury applying reasonable standards
20 of ordinary decency and morality.

21 So, for that reason, we think the judgment
22 below should be reversed, and we would urge you to apply
23 a more prophylactic rule.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

Official

1 The case is submitted.

2 (Whereupon, at 11:12 a.m., the case in the
3 above-entitled matter was submitted.)

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