No. _____

In the Supreme Court of the United States

LYNN ROBINSON, *et al.*,
Petitioners,
v.

AMERICAN AIRLINES, INC.,
d/b/a American Airlines, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Since the enactment of the Airline Deregulation Act of 1978, there has been confusion and uncertainty among the courts as to what the answer is to the question presented. There is confusion and uncertainty because the Supreme Court has never answered this question directly and clearly.

> Provided a court seeks to ascertain and effectuate the intent of the parties, may the court use and apply a State's common-law contract laws, rules and principles (for example, the doctrine of unconscionability, the rule against forfeitures, and the rule of approximating terms) to interpret and construct an airlines' adhesion contract with consumers, just like they do every other day in contract dispute cases?

PARTIES TO THE PROCEEDINGS

Petitioners, Lynn Robinson and Judith Robinson, were the Plaintiffs/Appellants in a case below and, Respondent, American Airlines ("AA"), was the Defendant/Appellee in that case. Southwest Airlines ("SWA") was also a Defendant/Appellee in a separate case below, and that case was concluded, along with the AA case, in consolidated rulings of both Courts below. Although the facts of the SWA case are similar, the applicable law is the same, and this Court's answer to the question presented will apply to SWA, the Plaintiffs/Appellants in that case decided to not be included in these proceedings. Therefore, SWA is not mentioned again.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the District Court of the Western District of Oklahoma regarding the question presented and the 10th Circuit Court of Appeals' decision to ignore the question.

OPINIONS BELOW

The Order and Judgment of the 10th Circuit Court may be found at Pet. App. 1 – 11. The Transcript of the District Court's Ruling may be found at Pet. App. 12 – 21. Neither of the Courts' final judgment was published.

JURISDICTION

The Order and Judgment of the 10th Circuit Court was entered on August 2, 2018, and its Order denying Petitioners' Petition for Rehearing was entered on August 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The Airline Deregulation Act of 1978 ("ADA"). Specifically, 49 U.S.C. §41713, which concerns preemption of authority over airline prices, routes, and services, and was intended to ensure States would not undo federal deregulation with regulation of their own. The relevant part of the preemption clause reads as follows:

> "[N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . ."

INTRODUCTION

The Supreme Court has never answered the question presented because the Court has never been asked. Petitioners are here asking the question now due to the facts and occurrences of their case below. In short, they lack the complete sense that justice was done in the Courts below because neither Court used applicable State contract laws, rules and principles to resolve their contract dispute with AA. The Courts did not, because of the confusion and uncertainty as to whether they could. The question presented provides this Court an opportunity to clear up the confusion and uncertainty. And, no matter what the ultimate answer is, all the courts, attorneys, airline companies, and millions of consumers will be better off because of it.

Petitioners' story begins when they were 72 years old and paid American Airlines ("AA") $2,700.00 for transportation on an aircraft to Paris, France and back to Oklahoma. Ultimately, they decided to not take the trip for fear of terrorist activities in Paris, and they canceled their reservations. Because they canceled their reservations, the money they paid AA became money-credits which they could and did use to book other flights. AA charged them $300.00 each as "change fees" for the new flight reservations and deducted the $600.00 from their money-credits total. Due to ill-health issues Mr. Robinson suffered, they were not able to take the second set of flights and cancelled those reservations also.

According to AA, terms in its adhesion contract were triggered when Petitioners first canceled their reservations, to-wit: Petitioners had to (a) pay "change fees" to purchase different reservations using their

money-credits, and had to (b) use their money-credits within one year or they would forfeit all the money they paid to AA for nothing in return.

Sadly, Mr. Robinson's poor health kept them from traveling anywhere within AA's adhesion terms deadline. For that reason, AA declared that, pursuant to the terms of its adhesion contract, all the money Petitioners paid to AA, all $2,700.00, was forfeited to AA. AA kept their money but provided nothing in return.

Petitioners filed suit for breach of contract in State court in Oklahoma, claiming under Oklahoma and Texas' contract laws, rules and principles, specifically those governing adhesion contracts, AA's forfeiture and confiscation terms and practices constitute a breach of the parties' agreement.

Importantly, Petitioners also alleged that AA resold the seats Petitioners gave up when they canceled their reservations. Thus, AA landed itself a hefty windfall by collecting payment for the same seats twice.

AA removed the action to the Federal District Court of the Western District of Oklahoma and filed a motion to dismiss. AA argued under the Airlines Deregulation Act of 1978, Petitioners' claims were preempted and, moreover, the Court was preempted from using and applying any State contract laws, rules or principles to interpret and construct AA's adhesion contract with Petitioners.

Despite Petitioners' arguments to the contrary, including many cites to three opinions of the Supreme

Court,[1] the District Court concluded it was preempted, saying:

> "But I want it to be understood by all concerned that my ruling today is a preemption ruling based on ADA preemption and I find ADA preemption is fatal to the claims asserted by plaintiff in both of these cases."[2]

> "I would love to apply some of those principles, but it is my conclusion that the ADA preemption, as applied by the Supreme Court in the cases I have mentioned, precludes me from doing so."[3]

The District Court's conclusion that it was preempted confirms a statement made by Justice O'Connor in her dissent in *Wolens* about how lower courts see and do things.

> "The lower courts seem to agree; as far as I know, no court to have considered ADA pre-emption since we decided *Morales* has suggested that enforcement of State contract law does not fall within §1305 if the necessary relation to airline rates, routes, or services exists."[4]

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[1] *Morales v. Trans World Airlines*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995); *Northwest, Inc. v. Ginsberg,* 572 U.S. __, 134 S. Ct. 1422, 188 L. Ed. 2d 538 (2014).

[2] Pet. App. 19.

[3] Pet. App. 16.

[4] *Wolens*, at 241 (from Justice O'Connor's dissent).

Petitioners appealed the District Court's preemption conclusion to the 10th Circuit. Petitioners' primary question on appeal was essentially the same as the question presented herein.

"The primary question/issue Plaintiffs raise in this appeal is:

> Whether the District Court is preempted from interpreting and constructing the AA-Plaintiffs' adhesion contract using and applying State common-law contract rules, laws and principles."[5]

Petitioners went to the 10th Circuit in good faith and with hope to get the question answered. The District Court also hoped the question would be answered, and answered with certainty.

> "That, I hope, tees up these two cases … for some sort of consolidated treatment by the Court of Appeals. I think that would be entirely appropriate. And we'll find out with certainty a more authoritative voice than mine where we stand."[6]

Disappointingly, the 10th Circuit refused to address the question saying, "…we decline to address preemption…"[7] Therefore, the confusion and uncertainty on the answer to the question continues

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[5] Petitioners/Appellants' 10th Circuit Reply Brief, at p. 1.

[6] Pet. App. 20.

[7] Pet. App. 3.

among the courts, at least among those within the district of the 10th Circuit.

As the Court decides whether to answer the question presented, please consider two statements Justice O'Connor made over 20 years ago in *American Airlines v. Wolens*.

> "In other words, a determination that a contract is unconscionable may in fact just be a determination that one party did not intend to agree to the terms of the contract."[8]

> "If Courts are not permitted to look to these aspects of contract law in airline-related actions, they will find the cases difficult to decide."[9]

Please also consider the majority's statement in *Wolens,* saying more cases are needed to settle the principles involved.

> "And while we adhere to our holding in *Morales*, we do not overlook that in our system of adjudication, principles seldom can be settled on the basis of one or two cases, but require a closer working out."[10]

Only one airlines' contract case has been handled by the Supreme Court since making that statement. One case in over 20 years, and the principles are still not settled. The question presented provides the Court a

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[8] *Wolens*, at 249.

[9] *Id.*, at 249.

[10] *Id.*, at 234-235.

perfect opportunity to construct a *closer working out* of the principles.

STATEMENT OF THE CASE

Respectfully, Petitioners submit that, pursuant to and under the current state of the law, courts are permitted to use and apply State contract laws, rules and principles to interpret and construct airline adhesion contracts with consumers, just like they do every day in other contract dispute cases. That is to say, courts are not preempted from doing so because resolving airline-consumer contract dispute cases requires a court to do nothing more than engage in routine contract construction and interpretation in accordance with State law.

A. The Cause of the Problem

The cause of the confusion and uncertainty problem among the courts is the preemption clause of the ADA, together with the "middle of the road" position the Supreme Court took in *American Airlines v. Wolens*. The relevant part of the preemption clause reads as follows:

> "[N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . ."[11]

This clause has been cited and argued by airline companies to limit and prohibit courts from adjudicating disputes over the terms of airline

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[11] 49 U.S.C. §41713.

adhesion contracts. Due to the confusion and uncertainty, courts have sometimes agreed with the airlines, and sometimes not.

The most significant statements in *Wolens* contributing to the problem are probably the following two:

> "The middle course we adopt seems to us best calculated to carry out the congressional design; it also bears the approval of the statute's experienced administrator, the DOT."[12]

And

> "[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."[13]

Justice O'Connor criticized the majority's "middle of the road" position and its *"might well be preempted"* statement saying, it threatens to swallow all of contract law.

> "Thus, the Court's allowance that "[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," [citation omitted], threatens to swallow all of contract law."[14]

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[12] *Wolens*, at 234.

[13] *Id.,* at 233, n. 8.

[14] *Id.,* at 248 (from Justice O'Connor's dissent).

B. The Position Adopted in *Wolens*

Although the Supreme Court has never directly and clearly answered the question presented, the Court has already adopted a position on it.

> "In both respects, **we adopt the position** of the DOT as advanced in this Court by the United States."[15]

> "American argues that even under **the position on preemption** advanced by the United States **– the one we adopt** – …"[16]

The position the Court adopted is easily found in other statements in *Wolens* and in *Northwest v. Ginsberg*.

> "We hold that the ADA preemption prescription bars State-imposed regulation of air carriers, but allows room for **court enforcement of contract terms** set by the parties themselves."[17]

> "… the DOT's regulations contemplate that, … "ticket contracts" ordinarily would be **enforceable under "the contract law of the States."**"[18]

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[15] *Wolens*, at 226. [**All Emphasis** here & throughout is Petitioners'].

[16] *Id.*, at 234.

[17] *Id.*, at 222.

[18] *Id.*, at 230.

"The conclusion the ADA permits **State-law based court adjudication** of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's saving clause, §1106, 49 U.S.C. App. §1506 (preserving "the remedies now existing **at common law or by statute**")."[19]

"[A] **common-law remedy** for a contractual commitment voluntarily undertaken should not be regarded as a ***'requirement imposed under State law'*** within the meaning of [the ADA]."[20]

"American's argument is unpersuasive, for it assumes the answer to the very **contract construction issue** on which Plaintiffs' claims turn: Did American, by contract, reserve the right to change the value of already accumulated mileage credits, or only to change the rules governing credits earned from and after the date of the change?" … "That question of **contract interpretation** has not yet had a full hearing, and we intimate no view on its resolution."[21]

"The Court says, however, that **judicial enforcement** of a contract's terms, **in accordance with State contract law** does not amount to a "State … enforcing any law, §1305,

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[19] *Wolens*, at 232.

[20] *Id.*, at 229.

[21] *Id.*, at 234.

but instead is simply a State holding parties to their agreement."[22]

"The Court concludes, however, that §1305 does not preempt enforcement, **by means of generally applicable State law**, of a private agreement relating to airline rates and services."[23]

"In *Wolens*, we considered the application of the ADA pre-emption provision to … breach-of-contract claims. We reaffirmed Morales' broad interpretation of the ADA pre-emption provision and held that this provision barred claims based on the Illinois statute **but not the breach-of-contract claims**."[24]

"We note, finally, that respondent's claim of ill treatment by Northwest might have been vindicated **if he had pursued his breach-of-contract claim** after dismissal by the District Court. … **If respondent had appealed the dismissal of his breach-of-contract claim**, he could have presented these arguments to the Court of Appeals, but he chose not to press that claim."[25]

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[22] *Wolens*, at 238-239 (from Justice O'Connor's dissent citing the majority opinion at 229, n. 5.).

[23] *Id.,* at 241 (from Justice O'Connor's dissent referring to a conclusion of the majority. No cite was provided).

[24] *Northwest v. Ginsberg*, 134 S. Ct. at 1428-1429.

[25] *Id.,* 134 S. Ct. at 1433.

C. The General Rule of Law

Accordingly, it is clear the general rule of law already established by the Supreme Court is, lower courts are not preempted from interpreting and constructing airline-consumer adhesion contracts using State contract laws, rules and principles.

D. The 5th and 7th Circuit Courts Agree

Opinions of the 5th and 7th Circuit Courts of Appeal in airline contract dispute cases affirm Petitioners' reading of *Wolens*. In *Travel All v. Saudi Arabia*, the 7th Circuit Court of Appeals interpreted *Wolens* to allow courts to decide airline contract dispute cases.

> "The *Wolens* Court did not hesitate to find that the plaintiffs' claims "relate to rates, …"[26]
>
> "[However], "the Court held that a State does not "enact or enforce any law" by enforcing private agreements."[27]
>
> "Indeed, *Wolens* compels us to conclude that the plaintiffs' breach of contract claim is not preempted …"[28]

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[26] *Travel All Over the World v. The Kingdom of Saudi Arabia,* 73 F.3d 1423, at 1431 (7th Cir. 1996) citing *Wolens*, 115 S. Ct. at 823.

[27] *Id.,* at 1431 citing *Wolens*, 115 S. Ct. at 824.

[28] *Id.,* at 1432 citing *Wolens*, 115 S. Ct. at 824.

> "The plaintiffs' claim for compensatory relief for breach of contract is therefore not expressly preempted by the ADA." [29]

And, in *Lyn-Lea Travel Corp v. American Airlines*, the 5th Circuit Court of Appeals' opinion agrees with Petitioners' and the 7th Circuit's reading of *Wolens*.

> "The [*Wolens*] majority opinion repeatedly singles out **common law contract actions as not being preempted**."[30]

> "Indeed, *Wolens* cautioned, **when it decided that enforcement of air carriers' contracts is not preempted**, **some 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."[31]

A question arises here. Did the 5th and 7th Circuit Courts get it wrong in the cases quoted above, and the District and 10th Circuit Courts got it right in Petitioners' case, or vice versa?

E. Boundaries Have Been Set

Although the general rule of law is the ADA permits State-law based court adjudication of airline-consumer

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[29] *Id.,* at 1432.

[30] *Lyn-Lea Travel Corp. v. American Airlines,* 283 F.3d 282, at 288 (5th Cir. 2002) citing *Wolens*, 513 U.S. at 236, 247 - 249.

[31] *Id.,* at 289 citing *Wolens*, 513 U.S. at 233 n. 8, 115 S. Ct. at 826.

breach-of-contract claims, the Supreme Court has set boundaries lower courts must stay within.

The first and foremost boundary set by the *Wolens* Court does not preempt State-law-based court adjudication of airlines' contract dispute cases, **so long as** State-law contract principles and rules are used *to ascertain and effectuate the intent of the parties,* not the State's public policies. This boundary was acknowledged by the 5th Circuit in *Lyn-Lea Travel v. American Airlines*.

> "*Wolens* cautioned, when it decided that enforcement of air carriers' contracts is not preempted, "some **State-law principles of contract law** … might well be preempted to the extent they seek to effectuate a State's public policies, rather than **the intent of the parties**."[32]

The second boundary set in *Wolens* does not preempt State-law-based court adjudication of airlines' contract dispute cases, **so long as** State-law contract principles and rules are not used to enlarge or enhance the contract in favor of one of the parties. This boundary was also acknowledged by the 5th Circuit in *Lyn-Lea Travel*.

> "The ADA does not preempt "State-law-based court adjudication of routine breach of contract claims," **so long as** there is "no enlargement of

[32] *Id.,* at 289, citing *Wolens*, 513 U.S. at 233 n. 8, 115 S. Ct. at 826.

> or enhancement [of the contract] based on State laws or policies external to the agreement."[33]

Finally, the third boundary set down in *Wolens* does not preempt State-law-based court adjudication of airlines' contract dispute cases, **so long as** State-law contract principles and rules are not used to enact or enforce State-imposed obligations.

This boundary was acknowledged by Justice O'Connor in *Wolens* and was affirmed by the Supreme Court in *Northwest v. Ginsberg,* and may be stated this way: The ADA does not preempt State-law-based court adjudication of airline breach of contract claims, **so long as** the Court's actions do not amount to the enactment or enforcement of a State-imposed obligation, such as a law, rule, regulation, standard or other provision having the force and effect of law within the meaning of the ADA preemption provision.[34]

In summary, the three boundaries are:

> (1) Only ascertain and effectuate the intent of the parties;
> (2) Do not enhance or enlarge the contract terms for either party; and
> (3) Do not enact or enforce a State-imposed obligation.

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[33] *Lyn-Lea Travel Corp.,* at 287, citing *Wolens*, 513 U.S. at 232-233, 115 S. Ct. at 826.

[34] *See, Wolens*, 513 U.S. at 229 & 239, *and see, Northwest, Inc. v. Ginsberg,* 572 U.S. __, 134 S. Ct. 1422, at 1429.

F. These Boundaries Apply to All Contract Disputes

Interestingly, these boundaries are not new to contract law and they apply to all courts and all contract dispute cases, not just to airline contract dispute cases.

The first two boundaries are interconnected. Courts will never breach boundary No. 2 (no enlargement or enhancement of the parties' agreement), unless a court first breaches boundary No. 1 (only seek to ascertain and effectuate the intent of the parties).

In other words, if a court *ascertains the intent of the parties* and then *effectuates the intent of the parties*, the court will never enlarge or enhance *the parties' agreement* based on State laws or policies external to the agreement. In fact, it is impossible for a Court to enlarge or enhance a contract for one of the parties, so long as the Court *effectuates the intent of the parties*.

G. Nothing New Under the Sun

Moreover, these two boundaries are not new to contract law. They apply to all contract dispute cases, not just to airline–consumer contract disputes. Judges are never permitted to enlarge or enhance *the agreement of the parties* and are always obligated to only seek to *ascertain and effectuate the intent of the parties*. Staying within these two boundaries is simple, routine breach-of-contract construction and interpretation.

All courts must follow the same routine when adjudicating contract disputes, and the routine always includes three basic steps:

> (1) Ascertain the intent of the parties, back at the time the parties made their agreement.
> (2) Determine what the parties actually agreed upon, what they truly had a meeting of their minds on, back at the time the parties made their agreement.
> (3) Effectuate the agreement the parties made.

Following these routine steps is not "enhancing" nor "enlarging" the agreement for either party. And, unless this Supreme Court states otherwise now, following this routine in airline-consumer contract disputes is not preempted under the ADA, *Morales*, *Wolens*, or *Ginsberg*.

H. No State-Imposed Obligations

Staying within the third boundary is also an easy routine for courts. Stating its understanding of the *Wolens* opinion, the *Northwest v. Ginsberg* Court said – enforcing terms airlines and passengers agreed to does not amount to a State's enactment or enforcement of any State law, rule, regulation or other provision.[35] This makes perfect sense. When a court enforces only terms the parties agreed to - *the agreement of the parties* – it is not enforcing a State's laws, it is enforcing *the parties' agreement*.

The Big Question in all contract dispute cases is, *What Did The Parties Actually Agree To*? What was there truly a *Meeting of Their Minds* on? Just because certain words and wording appear in an adhesion

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[35] *See*, *Northwest v. Ginsberg*, 134 S. Ct. at 1429 citing *Wolens*, 513 U.S. at 228-229 and 115 S. Ct. 817.

contract, placed there by the drafting party, does not mean there was *a meeting of the minds* on those words.

I. Routine Breach of Contract Interpretation

There is nothing unusual or special about disputes over airline adhesion contract terms. Resolving these disputes demands only routine contract construction and interpretation in accordance with State law. All courts have to do is follow the most basic principle of State contract law in Oklahoma and Texas (and no doubt the most basic principle in all 50 States). That is, *ascertain and effectuate the intent of the parties*.

> "The paramount rule for the construction of a contract is to **ascertain the intent** of the parties at the time the contract was entered in to and to **give effect to the same** if it can be done consistent with legal principles."[36]
>
> "… the primary object of all rules of interpretation and construction is **to arrive at and to give effect to the mutual intent of the parties** …"[37]
>
> "A court's primary concern in interpreting a contract under Texas law is to ***ascertain the parties' intent."*** [38]

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[36] *Porter v. Mid-America Paving Co*., 301 P.2d 1005, 1005 (Okla. 1956)

[37] *Withington v. Gypsy Oil Co.,* 1918 OK 236, 172 P. 634, par. 8 (Okla. 1918)

[38] *Balfour Beatty Rail, Inc. v. Kansas City Southern Railway Co.*, 173 F.Supp.3d 363, 382 (N.D. Tex. 2016), and *see also*, *National*

Accordingly, the District and 10th Circuit Courts could have and should have used and applied State-law contract rules and principles to interpret and construct AA's adhesion contract with Petitioners. Interpreting and constructing that contract is nothing more (and, hopefully, nothing less) than *ascertaining the intent of the parties* back at the time *the agreement of the parties* was made. And then, *effectuating the intent of the parties*.

J. A Full Hearing is Merited

In *Wolens*, the majority Court decided the airlines' adhesion contract and Wolens' claims should be sent back down for a full hearing of contract interpretation and construction in accordance with State contract law.

> "American argues that even under the position on preemption advanced by the United States – the one we adopt – plaintiffs' claims must fail because they "inescapably depend on State policies that are independent of the intent of the parties." Reply Brief 3. "The State court cannot reach the merits," American contends, "unless it first invalidates or limits American's express reservation of right to change the [rules contained in AAdvantage contracts]."[39]
>
> "American's argument is unpersuasive, for it assumes the answer to the very **contract construction issue** on which Plaintiffs' claims

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Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex.1995).

[39] *Wolens*, at 234.

> turn: Did American, by contract, reserve the right to change the value of already accumulated mileage credits, or only to change the rules governing credits earned from and after the date of the change?" … "That question of **contract interpretation** has not yet had a **full hearing**, and we intimate no view on its resolution."[40]

To date, AA's adhesion contract and Petitioners' claims have not yet had a full hearing of contract interpretation and construction in accordance with State contract law. Said another way, neither the District nor the 10th Circuit Courts attempted to *ascertain the intent of the parties* back at the time *the agreement of the parties* was made using applicable State contract laws, rules and principles.

The question presented asks, are lower courts preempted from doing so? Under *Wolens*, it seems obvious the answer is, no, courts are not preempted. Yet, the District Court concluded it was preempted? To clear up the apparent confusion, this Court's direct and clear answer to the question presented is necessary.

And, according to what Justice O'Connor foresaw and foretold over 20 years ago, the answer to the question is of utmost importance to courts being able to do their jobs.

> "If Courts are not permitted to look to these aspects of contract law in airline-related actions, they will find the cases difficult to decide."[41]

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[40] *Wolens*, at 234.

[41] *Id.*, at 249 (from Justice O'Connor's dissent).

10th CIRCUIT'S MISTAKES

The need for the question presented to be answered directly and clearly by this Court is much greater than any mistake Petitioners perceive the 10th Circuit Court made. And no matter what Petitioners might say here, the bottom-line is this Court has authority and power to answer the question presented or to decline it, simply based on what it wants to do. Nevertheless, believing they are required to perform this difficult (and possibly fruitless) task, Petitioners will do so, albeit reluctantly.

1. Reviewed the Wrong Issue

Just as surgeons and entire surgical teams somehow, someway get it "all wrong" sometimes, and amputate the wrong leg or operate on the wrong body part,[42] the 10th Circuit's "surgical" review of the District Court's decision and Petitioners' action was *all wrong*. Somehow, someway the 10th Circuit mistakenly focused its adjudication on the *all wrong* conclusion that Petitioners' complaint against AA was, *"for not fully refunding the price of nonrefundable airline tickets."*[43]

Petitioners never complained against AA "for not fully refunding the price of nonrefundable airline

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[42] *See*, *http://listverse.com/2018/03/08/top-10-disastrous-mistakes-performed-during-surgery/*

[43] Pet. App. 2.

tickets." Not once and not anywhere will that complaint be found in Petitioners' pleadings below.[44]

Petitioners complained that the term "nonrefundable" does not mean the same thing as "forfeitable" and "confiscatable." They complained that they never did and never would agree the airlines could take their money in exchange for nothing in return. They complained AA's adhesion contract does not say it can charge consumers $300 each to change their reservations. They complained AA's confiscation of their money for nothing in return is unconscionable and otherwise not part of their agreement with AA under the rule against forfeitures and the principles of good faith and fair dealing. But they never complained against AA "for not fully refunding the price of nonrefundable airline tickets."

Thus, the 10th Circuit's focus on the *all wrong* conclusion of what Petitioners' complaint was, is just like doing surgery on the wrong body part. And, of course, the "surgery" produced a bad result, which courts, attorneys and consumers will continue to suffer under unless fixed by this Court.

2. Based Decision on an Unrelated Finding

The 10th Circuit found that the "nonrefundable" terms of AA's adhesion contract are sufficiently stated in a plain and expressly manner.[45] This finding is out-

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[44] *See*, Petitioners'/Plaintiffs' original Petition removed to District Court, par. numbers 11, 20, 23 and 24.

[45] *See*, Pet. App. 6 – 9.

of-place and not relevant to Petitioners' appeal nor the question presented.

Petitioners never alleged or argued AA's "nonrefundable" terms were ambiguous, hidden or masked. They alleged and argued AA's forfeiture and confiscation terms, and its $300 change fee charges, are not plainly stated and not what they agreed to, but Petitioners never alleged the money they paid was refundable or should be.

Petitioners argued they and other consumers never intended to agree, never would agree, and never did agree to the adhesion contract terms AA uses to confiscate consumers' money in exchange for nothing in return. But they never alleged or argued the money they paid was refundable. Therefore, the 10th Circuit's finding that the airlines' nonrefundable ticket terms are stated clearly enough in AA's adhesion contract is not related and not important to Petitioners' appeal nor the question presented.

3. Misconstrued an Important Fact

The 10th Circuit misconstrued an important fact saying, "The Robinsons have proffered no conflicting interpretation" of the airlines' adhesion contract terms. The fact is, Petitioners argued that conflicting interpretations of the adhesion terms do exist.[46] Moreover, their primary complaint was that the term "nonrefundable" does not mean, is not equal to, "forfeitable." The term "nonrefundable" used in the

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[46] *See*, for example, Petitioners/Plaintiffs' original Petition removed to District Court, par. numbers 11, 20, 23 & 24, and *see* Petitioners/Appellants' 10th Circuit Opening Brief, pp. 51 – 55.

Sales and Purchase Agreement portion of AA's adhesion contract is entirely different from the forfeiture and confiscation terms AA planted in the Other Terms and Conditions portion of its adhesion contract.[47] But it is not only AA that does this, it is done by all airlines.

Petitioners argued that the question these conflicting terms raise is, what is the money consumers pay for transportation on an aircraft? Is it merely *nonrefundable* or is it entirely *forfeitable*? The terms used by AA in different documents have different meanings and convey different messages.

Likewise, Petitioners argued the fact that the amount of the "change fees" AA charges for changing reservations is not stated in AA's adhesion contract leaves the interpretation of what the amount will be up in the air. Is it $25.00, $50.00, or $500.00? AA cannot maintain Petitioners agreed to a $300.00 "change fee" at the time they entered into their contract with AA because $300.00 is not specified anywhere in AA's adhesion contract.

Finally, Petitioners argued AA's adhesion contract terms produce an absurd result that no one with equal bargaining power would ever agree to. Hypothetically, if the tables were turned where Petitioners had kept control of their money and refused to pay AA under its forfeiture and confiscation terms. And then, in response, AA filed suit to enforce its forfeiture and confiscation terms. That is, AA filed suit to collect

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[47] Some airlines call it, *Contract of Carriage*, others call it, *Conditions of Carriage.*

money for services it did not provide and to collect extra money for a seat it had re-sold to another consumer. What result then? No Court of justice would ever enforce such absurd terms. Nevertheless, all airline companies get to confiscate money from consumers every day using such terms.

4. Failed to Ascertain the Intent of the Parties

The 10th Circuit's Order shows the Court did not use and apply the applicable contract laws, rules, and principles necessary to *ascertaining the intent of the parties*. In fact, there is no indication the Court put forth any effort at all to *ascertain the intent of the parties back at the time* the contract was made. This means it did not employ even the most basic of all contract rules.

> "The paramount rule for the construction of a contract is to **ascertain the intent** of the parties at the time the contract was entered in to and to **give effect to the same** if it can be done consistent with legal principles."[48]

5. Created More Confusion and Uncertainty

The 10th Circuit declined to address preemption but then, to justify its decision, pointed to State contract rules and principles the District Court believed it was preempted from using. And at the same time, the Court failed or refused to use other more basic contract rules and principles, such as to *ascertain the intent of the parties*.

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[48] *Porter v. Mid-America Paving Co.*, 301 P.2d 1005, 1005 (Okla. 1956).

Ultimately, what does this mean? Does it mean courts are not preempted from using a State's contract rules and principles, or that they are preempted? No one knows, and no one can know, unless this Supreme Court answers the question presented with certainty.

6. Did Not Follow FRAP

The 10th Circuit's refusal to address whether the District Court's preemption conclusion was correct, (a) conflicts with the decisions of the Supreme Court, the 7th Circuit, and the 5th Circuit cited herein, and (b) was a failure to address an issue of exceptional importance. Thus, the Court's refusal does not comply with Rules 35 and 40 of the Federal Rules of Appellate Procedure.

7. Failed to Acknowledge the Perspective of Consumers

State courts, all of them, recognize the quandary adhesion contracts put consumers in. They recognize consumers, who have no bargaining power and possess only ordinary intelligence, in their everyday rushes of life do not read adhesion contract terms and would not understand them if they did.

> "That the terms of modern consumer contracts are not freely negotiated and are either not understood or not read by the consumer is already recognized."[49]

> "Classical contract theory holds that a contract is a bargain in which the terms have been

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[49] *Bilbrey v. Cingular Wireless, LLC*, 164 P.3d 131, 134-135 (Okla. 2007).

> worked out *freely* between parties that are equals. In many modern commercial transactions, this premise is invalid. Standard-form contracts and leases are often signed by consumer-buyers who understand few of the terms used and who often do not even read them. Virtually all of the terms are advantageous to the party supplying the standard-form contract or lease."[50]

Therefore, to protect consumers from abuses by businesses using adhesion contracts, State courts have stepped-up and stepped-in to level the playing field by developing new common-law rules and principles that govern contracts in general, and adhesion contracts in particular.

> "… [consumers] are susceptible to unpleasant surprises in adhesion contracts prepared for the protection of the corporation, not the consumer. The law has begun to take a more active role in **the protection of the consumer** against abuses. … As a result, **new rules** in such adhesion contracts have been applied **to protect the "reasonable expectations' of the parties.**"[51]

Importantly, these "new rules" are not aimed at airlines specifically. They are aimed at adhesion contracts across the board, no matter what business uses them in transactions with consumers. The

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[50] *Id*., at 134 – 135.

[51] *Id*., at 135.

question presented herein asks whether courts are allowed to use those "new rules" to construct and interpret airline adhesion contracts, just like they do every day in other disputes over adhesion contract terms?

Furthermore, under State contract laws, rules and principles, courts have a duty to put themselves as much as possible in the shoes of the parties, not just the shoes of one of the parties and not to remain in its own shoes. Judges are bound by duty to get in the shoes of both parties, which includes consumers possessing limited resources, limited education, limited experience, limited intelligence, and No Bargaining Power.

> "We must also bear in mind that it is **the duty of the court** to place itself, as far as possible, in the position of the parties **at the time** the contract was entered in to; then to consider the instrument itself as drawn, its purposes and the circumstances surrounding the transaction, and from a consideration of all these elements, **to determine upon what sense or meaning of the terms used their minds actually met**."[52]

Under this State contract principle, sometimes the words in a contract, placed there by the drafting party, simply do not matter all that much (are not controlling). And sometimes the meaning of the words and clauses highly educated and experienced justices arrive at might well be meaningless. If the minds of the parties never met on the same meaning of those words,

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[52] *Withington v. Gypsy Oil Co.,* 172 P. 634, at par. 8.

then the words used are not part of *the parties' agreement*. Just because certain wording is planted in an adhesion contract by the drafting party, does not mean both parties agreed on them.

The only words and meaning of words that truly matters in any dispute over contract terms, especially over adhesion contract terms, is the meaning upon which the minds of both parties actually met. This is one of the most basic rules of contract law in all 50 States.

The 10th Circuit's Order shows all the Court did was look at the words in AA's adhesion contract and make conclusions, all in AA's favor. It is clear, the Court spent no time ascertaining the intent of both parties, and spent no time ascertaining upon what meaning of the words used the minds of both parties actually met.

8. Failed/Refused to Use Key Rules

The 10th Circuit either failed or refused to use and apply two important, and key, State contract rules and principles, (a) the general intent of the parties' controls, and (b) approximate contract terms the parties would have agreed to if they had foreseen the future dispute.

A. General Intent Controls

The 10th Circuit did not use and apply the State contract rule that particular contract clauses are to be judged by and are subordinate to the general *intent of the parties*.

> "A particular clause will not control if it is violative of the parties' general intent even though it is persuasive in isolation."[53]

Under this rule, the airlines' forfeiture and confiscation clauses might be persuasive in isolation, but they do not control if they violate the *general intent of the parties*.

Although the 10th Circuit Court's Order shows it spent no time ascertaining the general intent of the parties, the parties' general intent is obvious under any standard of reasonableness. Clearly, the airlines intended to provide Petitioners transportation on an aircraft in exchange for the money Petitioners paid. And, clearly, Petitioners intended to be transported on an aircraft in exchange for the money they paid. AA's (and all airlines') forfeiture and confiscation clauses violate that general intent.

B. Approximate Contract Terms

The 10th Circuit did not use and apply the State contract interpretation principle of *Approximating Contract Terms*. This contract construction rule has been used and explained by the 7th Circuit Court of Appeals.

> "… the **overriding purpose of contract law**, … is to give the parties what they would have stipulated to expressly **if at the time** of making

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[53] *Golsen v. ONG W., Inc*., 1988 OK 26, 756 P.2d 1209, 1213 (Okla. 1988).

> the contract **they had had complete knowledge of the future**…."[54]
>
> "The concept of the duty of good faith is a stab **at approximating the terms** the parties would have negotiated **had they foreseen the circumstances** that have given rise to their dispute."[55]

Undoubtedly, if Petitioners *had had complete knowledge of the future and had foreseen the circumstances* under which AA could and would confiscate their money for nothing in return, it never was and never would be within their intent and agreement AA could do that. Where, When, and How in this world did it ever become possible for a common carrier to accept payments from members of the public in exchange for services it promised to provide, but then never have to provide those services and get to keep the money anyway?

9. Misused Specific State Contract Rules and Principles

The 10th Circuit misused specific State contract rules and principle mentioned in its Order, namely - the *Doctrine of Unconscionability*, the *Rule Against Forfeitures*, *Good Faith and Fair Dealing*, and *Quasi Estoppel*.

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[54] *Market Street Associates v. Dale Frey*, 941 F.2d 588, 595-596 (7th Cir. 1991).

[55] *Id.,* at 595.

First, the Court used them to judge the *all wrong* conclusion that Petitioners' complaint was "for not fully refunding the price of nonrefundable airline tickets." Second, it used them to judge whether the "nonrefundable" terms of AA's adhesion contract were stated clearly enough. Both judgments were mistakes because Petitioners never complained about the fact the money they paid was "nonrefundable."

In their pleadings, Petitioners argued the District and 10th Circuit Courts could and should use these specific rules *to ascertain and effectuate the intent of the parties*. They argued these rules are intended to and could help courts do that.[56] However, the 10th Circuit apparently refused to use these rules *to ascertain the intent of both parties*, just as it refused to address preemption altogether.

A. The Doctrine of Unconscionability

The Texas Supreme Court has declared – unconscionable contracts are unenforceable under Texas law, and has stated further, that the principle behind the doctrine of unconscionability "has been recognized and applied by this Court for well over a century."[57] The goal of a Court using this rule is to ascertain not only the intent of the parties, but also their sophistication, their knowledge and understanding of what was being agreed to, and what bargaining power they had, if any. Oklahoma's

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[56] *See*, Petitioners/Appellants' 10th Circuit Opening Brief, pp. 15, 26 – 43, and Petitioners/Appellants' 10th Circuit Reply Brief, pp. 2 - 10.

[57] S*ee, In re Poly-Am., L.P.,* 262 S.W. 3d 337, 348 -349 (Tex. 2008).

Supreme Court set forth a basic test for finding unconscionability this way:

> "The basic test of unconscionability of a contract is whether under the circumstances existing at the time of making the contract, and in light of the general commercial background and commercial need of a case, clauses are so one-sided as to oppress or unfairly surprise one of the parties. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party."[58] [59]

In *Wolens*, Justice O'Connor argued that finding a contract term to be unconscionable may be viewed as a court simply deciding a party did not agree to it.

> "In other words, a determination that a contract is unconscionable may in fact just be a determination that one party did not intend to agree to the terms of the contract."[60]

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[58] *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976)

[59] The test for unconscionability set forth by the Texas Supreme Court is essentially the same. *See, In re Palm Harbor Homes,* 195 S.W.3d 672, at 678 (Tex. 2006).

[60] *Wolens*, at 249 (from Justice O'Connor's dissent).

B. Implied Covenant of Good Faith and Fair Dealing

Simply put, the implied covenant of good faith and fair dealing, when used as a tool of contract interpretation, requires that neither party act to injure the other party's reasonable expectations nor impair the other's rights to receive the benefit of their bargain.

> "The common law imposes this implied covenant upon all contracting parties, that neither party, because of the purposes of the contract, will act to **injure the parties' reasonable expectations** nor **impair the rights or interests of the other to receive the benefits** flowing from their contractual relationship."[61]

Applying Justice O'Connor's reasoning to this rule, a court's determination that adhesion contract terms *impair a party's right to receive the benefits of their bargain* may in fact just be a determination that one party did not intend to agree to the terms.

C. The Rule Against Forfeitures

In both Texas and Oklahoma, courts do not support forfeitures resulting from or through contract terms. In Texas, forfeitures are not favored and courts must use the utmost effort to avoid forfeitures.

> "Since forfeitures are not favored, courts are inclined to construe the provisions in a contract as covenants rather than as conditions. If the

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[61] *First National Bank and Trust Company of Vinita v. Jack Kissee*, 1993 OK 96, 859 P.2d 502, 509 (Okla. 1993).

> terms of the contract are susceptible of an interpretation which will prevent a forfeiture, they will be so construed." [62]

The negative view Oklahoma Courts have of forfeitures is more severe. Oklahoma's Supreme Court has ruled, "*equity abhors forfeitures*" and "*forfeitures are obnoxious to judicial minds.*"[63] Applying Justice O'Connor's reasoning to this rule, a court's determination that adhesion contract terms are *obnoxious to judicial minds* may in fact just be a determination that one party did not intend to agree to the terms.

D. Quasi Estoppel

This contract rule precludes a party from asserting to another's disadvantage a right inconsistent with a position previously take by him. A party cannot accept the benefits of a transaction then subsequently take an inconsistent position to avoid corresponding obligations.[64]

The facts of the subject case fit squarely into the mold of the quasi estoppel rule, which may be broken down as follows:

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[62] *Gulf Const. Co., Inc. v. Self*, 676 S.W.2d 624, 628 (Tex. Civ. App. - Corpus Christi 1984) citing *Henshaw v. Texas National Resources Foundation*, 216 S.W.2d 566 (Tex. 1949).

[63] *Koutsky v. Park Nat. Bank*, 1934 OK 99, 29 P.2d 962 at 962 (Okla. 1934).

[64] *Mulvey v. Mobil Producing Texas and New Mexico Inc.,* 147 S.W.3d 594, 607 (Tex. App.-Corpus Christi 2004).

(a) AA received a benefit (money) from Petitioners;

(b) AA once held the position it was obligated to provide a return benefit (transportation on an aircraft) to Petitioners;

(c) AA now takes a different and inconsistent position claiming it is not obligated to provide the return benefit Petitioners paid for, but gets to keep their money anyway.

Applying, once again, Justice O'Connor's reasoning to this rule, a court's determination that adhesion contract terms are an *inconsistent position in attempt to avoid corresponding obligations* may in fact just be a determination that one party did not intend to agree to the terms.

Accordingly, the 10th Circuit's narrowly-focused use of these rules was not in step with what the rules are intended for, which is, to ascertain the intent of the parties.

REASONS FOR GRANTING THIS PETITION

There are several good reasons to grant this petition and answer the question presented directly and clearly.

1. The Answer to the Question Presented Will Clear Up Confusion and Uncertainty Among the Courts.

There is confusion and uncertainty among the courts on what the answer to the question presented is. And the reason for the confusion and uncertainty is because this Supreme Court has not yet answered the question directly and clearly.

For example, despite what the *Morales, Wolens*, *Ginsberg,* and 5th and 7th Circuit Courts' opinions say, the District Court dismissed Petitioners' action believing it was preempted from adjudicating it.

> "But I want it to be understood by all concerned that my ruling today is a preemption ruling based on ADA preemption and I find ADA preemption is fatal to the claims asserted by plaintiff in both of these cases."[65]

> "I would love to apply some of those principles, but it is my conclusion that the ADA preemption, as applied by the Supreme Court in the cases I have mentioned, precludes me from doing so."[66]

Additionally, according to what Justice O'Connor saw over 20 years ago, more lower courts have made similar decisions thinking they were preempted.

> "The lower courts seem to agree; as far as I know, no court to have considered ADA pre-emption since we decided *Morales* has suggested that **enforcement of State contract law** does not fall within §1305 if the necessary relation to airline rates, routes, or services exists."[67]

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[65] Pet. App. 19.

[66] Pet. App. 16.

[67] *Wolens*, at 241 (from Justice O'Connor's dissent).

2. The Answer to the Question Presented is of Utmost Importance to Courts Being Able to Do Their Jobs.

According to what Justice O'Connor foresaw and foretold over 20 years ago, the answer to the question presented is of utmost importance to lower courts being able to do their jobs.

> "If Courts are not permitted to look to these aspects of contract law in airline-related actions, they will find the cases difficult to decide."[68]

3. Lower Courts Are Looking and Hoping For An Answer to the Question Presented with Certainty.

As expressed by the District Court, lower courts are looking for an answer to the question presented and are hoping it will be answered with certainty.

> "That, I hope, tees up these two cases … for some sort of consolidated treatment by the Court of Appeals. I think that would be entirely appropriate. And we'll find out with certainty a more authoritative voice than mine where we stand."[69]

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[68] *Wolens*, at 249 (from Justice O'Connor's dissent).

[69] Pet. App. 20.

4. Answering the Question Presented Will Finally Get the Supreme Court "*Off the Fence.*"

In *Wolens*, the Supreme Court intentionally took a *"middle of the road"* position on the question presented and has been *on the fence* ever since then.

> "Justice Stevens reads our *Morales* decision to demand only minimal preemption; in contrast, Justice O'Connor reads the same case to mandate total preemption. The **middle course we adopt** seems to us best calculated to carry out the congressional design; it also bears the approval of the statute's experienced administrator, the DOT."[70]

Justice O'Connor criticized the Court's *middle of the road* position arguing it threatened to swallow up all contract law.

> "Thus, the Court's allowance that "[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 [citation omitted], **threatens to swallow all** of contract law."[71]

The question presented herein provides this Court the opportunity to *"get off the fence"* and address this threat head-on. And, finally, come what may, either the threat will be realized or dissolved. And all the courts,

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[70] *Wolens*, at 234.

[71] *Wolens,* at 248 (from Justice O'Connor's dissent).

attorneys, and parties involved in airline-related actions will be better off because of it.

5. The Question Presented Provides this Court an Opportunity to Construct a Closer Working Out of the Principles.

Over 20 years ago, this Court acknowledged more airlines' contract dispute cases are needed to settle this area of law.

> "And while we adhere to our holding in *Morales*, we do not overlook that in our system of adjudication, principles seldom can be settled on the basis of one or two cases, but require a closer working out."[72]

Only one airlines' contract case has been handled by the Supreme Court since making that statement. One case in over 20 years, and the *principles* involved are still not *settled*. This case provides this Court a perfect opportunity to construct a *closer working out* of the *principles* involved, and perhaps to even *settle* them.

CONCLUSION

This petition for writ of certiorari should be granted so that, essentially, all confusion and uncertainty among the courts, attorneys, airlines and consumers will be eradicated as to whether State contract laws, rules and principles may be used and applied *to ascertain the intent of the parties* in order to resolve disputes over airline adhesion contracts.

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[72] *Wolens*, at 234-235.

Respectfully, Petitioners offer-up to this Supreme Court their contract dispute with AA for a *closer working out of the principles*.

Respectfully submitted,

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