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IN THE SUPREME COURT OF THE UNITED STATES
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NORTHWEST, INC., ET AL., :
Petitioners : No. 12-462
v. :
RABBI S. BINYOMIN GINSBERG :
- - - - - x

Washington, D.C.
Tuesday, December 3, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:12 a.m.

APPEARANCES:

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Petitioners.
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Petitioners.
ADINA H. ROSENBAUM, ESQ., Washington, D.C.; on behalf of
Respondent.

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P R O C E E D I N G S

(10:12 a.m.)

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

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

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

Under this Court's decision in *Wolens*, there are only two relevant questions here, and the Ninth Circuit got both of them wrong. The first question is whether a claim for additional benefits under a frequent flyer program, like flight upgrades, relate to prices, routes and services. This Court answered that question in the affirmative in *Wolens* and, indeed, underscored the questions not particularly close. The Ninth Circuit's ability to reach the contrary conclusion in the precise same context underscores how far they have strayed from this Court's precedence.

The second question is whether the Plaintiffs' claim here seek merely to enforce the parties' voluntary undertakings or, rather, seek to enforce State law to enlarge those undertakings and

1 enlarge the parties' bargain.

2 And it's to that question 2 we think
3 Respondent's own claims here make the case quite clear.
4 Respondent did bring a claim here to enforce the
5 parties' voluntary undertakings, a breach of contract
6 claim and lost on the merits. The implied preemption
7 claim is different. It seeks to impose a duty of fair
8 dealing and reasonableness and superimposed that on the
9 bargain, even where the parties to the contract have
10 essentially given one party absolute discretion.

11 JUSTICE GINSBURG: Mr. Clement, the argument
12 was made that if -- if the airline has an unreviewable
13 right to terminate this agreement for any reason or for
14 no reason, if that is so, then it's an illusory
15 contract. What -- what is your answer to that, if one
16 party can get out willy-nilly, why -- what kind of
17 bargain is it?

18 MR. CLEMENT: Well, there are a couple of
19 answers to that, Justice Ginsburg. The first is I think
20 although the focus on whether a contract is illusory is
21 sometimes used as part of the analysis under the implied
22 covenant for a bilateral contract. I don't think that
23 same analysis would apply to something like a frequent
24 flyer program, which I think would be properly
25 understood as a unilateral contract, where you don't

1 worry about those sort of illusory promises.

2 The second thing is I think you have to
3 understand in the context --

4 JUSTICE SOTOMAYOR: Did a unitary contract?

5 MR. CLEMENT: I'm sorry.

6 JUSTICE SOTOMAYOR: I'm not sure I
7 understand that point.

8 MR. CLEMENT: There -- there is a
9 distinction, if you go back to the Horne books on
10 contract law between a unilateral contract and a
11 bilateral contract. A unilateral contract is -- is a
12 typical sort of outstanding promise, that promise
13 doesn't require an exchange of consideration, and the
14 party who makes the promise has the ability to withdraw
15 the promise until there's -- there's performance
16 essentially relying on the promise. And that's why I
17 think it's actually a little bit of a mistake to apply
18 that doctrine to something like a frequent flyer
19 program.

20 JUSTICE KAGAN: I guess I don't understand
21 that, Mr. Clement, because I always thought that the way
22 these agreements worked were there were agreements that
23 if I flew a certain number of miles on your plan, I was
24 going to get a free ticket. And -- and it wasn't a gift
25 that I was getting a free ticket, it was because I did

1 something, I flew a certain number of miles. So that
2 there was an exchange with value on both sides.

3 MR. CLEMENT: Well, I -- I suppose you could
4 conceive of it that way. You could also conceive of it
5 as basically being a premium that's offered by the
6 company to reward your loyalty, but you've already
7 gotten full performance.

8 JUSTICE SCALIA: No. I think you have to
9 conceive of it that way, but that still makes it a
10 unilateral contract. It's not a promise in exchange for
11 another promise. It's a promise in exchange for the
12 performance of an act; that is, flying the airline, you
13 know, a certain number of miles. You're correct, it is
14 a -- a unilateral contract. Now, whether that -- that
15 means that there's no -- is there no such thing as an
16 illusory unilateral contract?

17 MR. CLEMENT: I don't think there really is.
18 You know, I looked at the -- the treatises for that, and
19 I just don't think that concept really applies in the
20 unitary -- the unilateral contract context.

21 JUSTICE KAGAN: I just don't see why that
22 would make sense. Because if I knew that it was really
23 up to you to give me the free ticket, maybe I was
24 willing to get it and maybe I wasn't. I don't think
25 that I'd be spending all this time in the air on your

1 planes. You know, I'd find another company that
2 actually gave me the free ticket.

3 MR. CLEMENT: That really, I think, gets to
4 the nub of this, because, of course, what you're
5 suggesting is that there would be a market solution to
6 this problem. And that's what the Airline Deregulation
7 Act is all about. Letting the market decide these
8 issues.

9 So if some airline really were crazy enough
10 to systematically turn on its most lucrative and loyal
11 customers, surely, the market would solve that. And, of
12 course, if a bunch of airlines did it, the Department of
13 Transportation stands ready to police that.

14 JUSTICE KAGAN: But usually what we say when
15 a contract has no consideration, we don't say, oh, we're
16 going to hold you to it anyway because the market will
17 solve it. We say the contract has no consideration,
18 it's illusory, in just the way that Justice Ginsburg
19 pointed out.

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

25 MR. CLEMENT: There -- there is

1 consideration -- I'm not sure anything turns on this --
2 but there is consideration because this is not something
3 where the airline says, look, we can do anything we
4 want. They say, look, if you present us with miles
5 while you're still in good standing in the program,
6 we'll give you upgrades, we'll let you into a lounge.
7 But if, pursuant to the contract, you abuse the program
8 in our sole discretion, then you lose your membership
9 status. And that's what's happened here.

10 JUSTICE SCALIA: You're not trying to
11 enforce the contract anyway. You -- you want to get out
12 of the contract. So you -- you ought to be happy to
13 have it pronounced an illusory contract, right? What do
14 you care?

15 MR. CLEMENT: Well, that is true. But I
16 suppose the argument might be that you could, as a
17 matter of breach of contract law, use this principle to
18 interpret the contract. And if that were an argument,
19 it's an argument that's made under Count 1 of this
20 complaint.

21 JUSTICE SOTOMAYOR: Mr. Clement, you're
22 making -- you're making an assumption. The claim here
23 is not whether he abused or didn't abuse the program.
24 His allegation is that the only reason you terminated
25 with a contract was because you wanted to get rid of

1 these high flyers in your merger negotiations with the
2 other airline. That's the same as saying they didn't
3 terminate me because I abused the program. They
4 terminated me because I was of a certain race or I was a
5 woman or I was handicapped or some other improper
6 consideration.

7 So are you suggesting that this contract
8 permits you to use that kind of self -- that kind of
9 ground, one not grounded in the contract, but grounded
10 in your whim and caprice?

11 MR. CLEMENT: Well, a couple of points,
12 Justice Sotomayor. First of all, I think it's -- it's
13 really important to emphasize that the claim about
14 pretext and this all being about the merger is actually
15 not something that's made in the breach of contract
16 count or the breach of implied covenant count. That's
17 pled actually in the misrepresentation counts. Counts 3
18 and 4 of the complaint that everybody recognizes are
19 preemptive.

20 Now, what's pled in contract Count 1, the
21 breach of contract count, is that under the contract,
22 somehow we don't have the ability to terminate somebody
23 without just cause. And that's the argument that the
24 district court rejected on the merits.

25 Now, the implied covenant count, Count 2, is

1 different. It says that under State law, there is a
2 duty of good faith and fair dealing and that duty is
3 superimposed on the contract even if the contract gives
4 one of the parties absolute discretion. And those
5 aren't my words. Those are the words of Count 2 of the
6 complaint at Joint Appendix page 51.

7 JUSTICE SOTOMAYOR: Even if you have
8 absolute discretion, isn't there a limit to that? Isn't
9 there a limit of reasonableness to that absolute
10 discretion? That's the whole question of -- otherwise,
11 you have a contract with no substance.

12 MR. CLEMENT: The way I would think about
13 it, Justice Sotomayor, is "absolute" might not quite
14 mean absolute. And the place to make that argument is
15 under the breach of contract rubric. That you can cite
16 Cardozo and Lady Duff-Gordon.

17 But when you get to saying even if the
18 contract's absolute, State law still superimposes a
19 reasonableness requirement on the contract, that's the
20 point at which preemption kicks in.

21 JUSTICE SCALIA: Is that entirely -- I mean,
22 suppose the contract said "in its absolute discretion
23 and subject to no obligation of good faith." Suppose it
24 said that. Would State law still impose an obligation
25 of good faith?

1 MR. CLEMENT: It might well, Justice Scalia,
2 because --

3 JUSTICE SCALIA: Well, it might well or it
4 would?

5 MR. CLEMENT: It depends on the State. So
6 the majority --

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

9 MR. CLEMENT: Okay, Minnesota. I -- as I
10 read the cases, the rule in Minnesota is that the
11 covenant of good faith and fair dealing is not waivable.
12 So there's a case that we found called New Amsterdam
13 Casualty. It's in the indemnity context, so I assume
14 that -- and it says that in the indemnity context a
15 covenant of good faith and fair dealing is not waivable.
16 So I don't think you could do that, which I think
17 underscores that this is not the parties agreeing to
18 this. This is having this condition superimposed on
19 them by State law.

20 JUSTICE KENNEDY: Is the choice we have here
21 only between State law and no relief? Or is there some
22 theory under which either Federal common law or appeal
23 to the DOT could give the flyer, the customer, some
24 relief? And, you know, we can all think of crazy
25 hypotheticals. Suppose the phone rings and he says:

1 I'm John Doe, I want to talk to you about my airline,
2 you've miscalculated. They said: Mr. Doe, we've heard
3 from you 15 times, you're -- you're out of this program.
4 It's a mistaken identity. There are two John Does. Can
5 the innocent, good faith John Doe do any -- anything at
6 all?

7 MR. CLEMENT: Yes. The -- the good faith
8 John Doe can do two things: One, as your question
9 suggested, he can go to the DOT. The DOT has the
10 authority to investigate complaints about frequent flyer
11 programs. It exercises that authority. It's discussed
12 at pages, I think, 20 and 21 of the SG's brief. They
13 heard something like 289 of these complaints last year.
14 So that's -- so that's one place you can go.

15 The other place you can go in the cases like
16 the mistaken identity -- I mean, if you followed up and
17 certainly if you went so far as to bring a routine
18 breach of contract claim, I assume that would get
19 addressed in that forum. Because airlines are not in
20 the interest -- do not have an interest in getting rid
21 of their most lucrative and loyal customers.

22 JUSTICE KENNEDY: Well, but -- in part of
23 that suit, wouldn't you have to -- the judge says,
24 what's the underlying substance and you say, well,
25 there's a duty of good faith dealing under Minnesota

1 law. And then you're right back where you started,
2 unless there's some -- unless there's some Federal
3 common law with Lincoln Mills or something like that?

4 MR. CLEMENT: No, I don't think there's
5 Federal common law. This Court I think essentially
6 rejected that in Wolens. I'm making a more practical
7 point, which is in a real case of mistaken identity I
8 think that would get sorted out in the process,
9 certainly at the point where a breach of contract action
10 was brought. Because, again, if there's -- if there's a
11 John Doe who really is a frequent flyer --

12 JUSTICE KENNEDY: I still don't understand
13 the substantive basis for the breach of contract suit if
14 you say we can't refer to State law.

15 MR. CLEMENT: You can refer to State law for
16 the breach of contract. You can't, we would submit, add
17 the implied covenant of breach of good faith because
18 that enlarges the bargain.

19 JUSTICE KAGAN: Well, Mr. Clement, suppose
20 that this complaint only had one count. And suppose
21 that they had said: Look, we have this contract and it
22 gives very substantial discretion, it gives -- you know,
23 by the words alone, it gives absolute discretion to
24 Northwest, but that can't really be right because
25 contracts have this implied covenant of good faith.

1 There's an implied duty to perform in good faith. And
2 that means that this discretion is narrowed in certain
3 kinds of ways, that they can't terminate my membership
4 for certain kinds of reasons. And that's all the
5 complaint said. There was just this one count. Do you
6 think that would be preempted?

7 MR. CLEMENT: I think the reliance on the
8 implied covenant in that context should be preempted. I
9 think that's the better rule. If this Court wanted to
10 adopt a narrower rule and say, look, it's really at the
11 point that you try to bring a separate implied covenant
12 claim, that's preempted, I suppose as a matter of
13 administrability you could do that. It might make some
14 sense, because, I mean, you do have to take a practical
15 look at this.

16 In the wake of Wolens, if you plead a
17 routine breach of contract claim, you're going to avoid
18 preemption. The only reason practically you run the
19 risk of preemption by pleading a separate claim is when
20 you're trying to really get outside of the terms of the
21 contract.

22 JUSTICE KAGAN: I guess what I'm suggesting
23 is that the implied covenant here, it's just an
24 interpretive tool. It says that there are certain kinds
25 of provisions that are written very broadly or very

1 vaguely, and an implied covenant comes in to help us
2 interpret those kinds of provisions. And viewed in that
3 way, it's just a contractual device that in light of
4 Wolens ought to be permitted.

5 MR. CLEMENT: Well, here's my thought on
6 that, which is I think even the Respondents admit that
7 in some States the implied covenant is much more than
8 simply a rule of construction for the explicit terms of
9 the contract. And I suppose if this Court wants to say
10 that the only way the implied covenant is not preempted
11 is when it's just a rule of construction for the
12 explicit terms of the contract, I suppose we could live
13 with that rule and I think we'd certainly win in this
14 case.

15 The reason I would suggest that the better
16 rule for this Court to adopt is that the implied
17 covenant should just be preempted even in that
18 circumstance is because in that circumstance it doesn't
19 add anything. If it really is just a rule of
20 construction for the express terms of the contract, you
21 could get in the same place with the citation to Cardozo
22 and Lady Duff-Gordon.

23 CHIEF JUSTICE ROBERTS: Counsel, could you
24 tell me where you think they concede that some States --
25 that their position would lead to a different result in

1 some States?

2 MR. CLEMENT: Well, I'm not -- it's -- it's
3 in the red brief and I think it's quite clear. I think
4 they -- they say -- I'll try to find the -- the point
5 where -- where I find this rebuttal. But I don't think
6 they do this. They basically say that some States do
7 apply this rule. They say that our claim is different.

8 And I'll get you the exact page.

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

12 MR. CLEMENT: Well, I may have misspoke.
13 What I meant was I think both parties agree, as they
14 would have to, that in some States the implied covenant
15 doctrine is used to directly impose public policy. And
16 so in Alaska that seems to be the case. In Montana that
17 seems to be the case.

18 JUSTICE GINSBURG: How about Minnesota? In
19 Minnesota, isn't it just a rule of construction of the
20 contract?

21 MR. CLEMENT: We don't believe so, Your
22 Honor. I think -- I'm not going to try to tell you that
23 Minnesota law is pellucidly clear on this. But
24 Minnesota -- the Minnesota Supreme Court case, the
25 Hennepin case that adopts -- recognizes the implied

1 covenant, cites the Restatement. The Restatement quite
2 clearly embraces a view of the implied covenant that
3 goes beyond merely constructing the express terms of the
4 contract.

5 JUSTICE ALITO: Is it the case that --

6 JUSTICE KENNEDY: I still -- I still have
7 this problem. You say don't -- now don't worry. You
8 can always bring an express contract action. And I say,
9 well, what law do you apply? Well, you -- you have no
10 State law and there's no Federal common law. I don't
11 understand how you can bring an action with no
12 substantive law to inform it.

13 MR. CLEMENT: I may have misspoke, Justice
14 Kennedy. The breach of contract claim that you bring --
15 the routine breach of contract claim you bring is a
16 State law claim. So we don't have any quarrel with
17 Count 1 of this claim, which views Minnesota State
18 contract law to interpret the express terms of the
19 contract.

20 Where we have a beef is with Count 2 of the
21 complaint that says, even if the contract gives the
22 parties absolute discretion, we are going to superimpose
23 a duty of good faith and fair dealing. And to complete
24 the answer, since Minnesota has adopted the Restatement,
25 the Restatement suggests that the way you find good

1 faith is you exclude the possibility of bad faith based
2 on community standards of fairness and decency.

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

7 JUSTICE SCALIA: Well, I suppose you could
8 say that it is assumed that parties to a contract
9 comport with community standards of fairness and
10 decency. You know, you can wiggle to there if you want.

11 MR. CLEMENT: You could try to wiggle there.
12 And my point would be the way to try to wiggle there is
13 interpreting the express terms of the contract. An
14 implied covenant is different. And I think if you take
15 a step back and think about this context: When an
16 airline reserves to itself the sole discretion to make a
17 judgment about frequent flyers or about taking an unruly
18 passenger off a plane, do you really want State courts
19 applying community standards of decency to judge that,
20 or is that something that should be judged by a
21 complaint to the Department of Transportation?

22 If I could reserve the remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Yelin.

25 ORAL ARGUMENT OF LEWIS S. YELIN,

1 FOR UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING THE PETITIONERS

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

5 In Wolens, this Court recognized that
6 Congress enacted the ADA to leave decisions concerning
7 airline prices, routes, and services to the business
8 judgment of air carriers subject to market forces and
9 limited oversight by the Department of Transportation.

10 In light of that statutory purpose, Wolens
11 held that claims based on the State common law of
12 contract are not preempted by the ADA to the extent they
13 seek to enforce the voluntary undertakings of the
14 parties.

15 CHIEF JUSTICE ROBERTS: What if you had a
16 decision by the Minnesota Supreme Court on common law
17 contract principles and it said, you know, when the
18 parties use the word "sole" in a contract, we interpret
19 that to mean subject to reasonableness constraint. The
20 parties here use the word "sole." Would the application
21 of that principle violate -- would that be preempted or
22 not?

23 MR. YELIN: In that context, I think not.
24 It depends on what the Court meant by the term
25 "reasonable." If the term "reasonable" incorporates

1 external standards such as community --

2 CHIEF JUSTICE ROBERTS: Well, "reasonable"
3 means -- I mean, you know, the -- the airline says
4 "sole" means sole. We don't have to explain why we did
5 it. And the Minnesota court said: No, when you say
6 "sole" it has to be reasonable. It can't be, for
7 example, for no reason. It has to be for some
8 articulated reason.

9 MR. YELIN: Yes, I understand,
10 Chief Justice, thank you. But I think "reasonable" can
11 have different focuses. It could be reasonable in light
12 of the expectations of the parties at the time that they
13 formed the contract or it could be reasonable in light
14 of community standards of decency, which are --

15 CHIEF JUSTICE ROBERTS: Well, let's say
16 going forward. Going forward, the parties know that
17 this decision is out there and they say "sole." So it
18 means they're using the term subject to the gloss that's
19 been put on it by the Minnesota Supreme Court. So what
20 about in that case?

21 MR. YELIN: I think subsequent, if there is
22 a gloss where -- and the -- I think that would be a
23 question of what the parties intended with the contract,
24 and I think there may well be an argument under that
25 scenario that the airline understood that the gloss was

1 going to be given, although I --

2 CHIEF JUSTICE ROBERTS: We would assume then
3 that the parties knew whenever they used the word
4 "sole," they actually meant subject to reasonableness as
5 interpreted by the Minnesota Supreme Court.

6 MR. YELIN: I think that may well be right,
7 Your Honor. But I -- I want to caution that an argument
8 like that can prove too much. An argument like that
9 could suggest, as Respondent argued in the lower court,
10 that any time a party enters into a contract, the party
11 endorses or at least accepts all normative principles of
12 contract law. That would include things like doctrines
13 of unconscionability and other doctrines that impose
14 extracontractual limitations on the parties' choices.

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

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

19 CHIEF JUSTICE ROBERTS: Okay.

20 MR. YELIN: I think it just --

21 CHIEF JUSTICE ROBERTS: Well, if you're
22 going to give me "reasonable" -- in other words, the
23 parties' express terms do not say "reasonable"; in fact,
24 the most natural reading is that it's not reasonable,
25 but they take the contractual -- the interpretation that

1 the Minnesota Supreme Court has adopted, I don't know
2 why the same rule wouldn't apply when the Minnesota
3 Supreme Court says there is an implied condition of
4 reasonableness across -- across the board, and that the
5 parties contract against that background just like they
6 do when there's a specific interpretation of the word
7 "sole."

8 MR. YELIN: I think the problem, Chief
9 Justice, is that the notion of the doctrine of the
10 implied covenant is extraordinarily broad and
11 encompasses a number of different concepts. It
12 encompasses notions of reasonableness and implying
13 limitations to discretionary grants of authority
14 reserved in contracts. It also encompasses in some
15 States concepts such as notions of fairness or which
16 extend beyond the intent of the parties.

17 JUSTICE ALITO: Let me change the
18 hypothetical slightly. Suppose the contract says that
19 one of the parties reserves sole discretion to do
20 something and then the contract goes on to say: And
21 then in exercising this discretion, we don't promise to
22 act in a reasonable manner. But the State court says
23 that, nevertheless, that has to be interpreted to mean
24 that the party can only perform in a reasonable manner.
25 Then what would the situation be?

1 MR. YELIN: I think the ADA would preempt
2 exactly that sort of claim or a claim based on that sort
3 of an argument. The -- the crux of the ADA is to leave
4 to the judgment of air carriers, subject to market
5 forces, decisions concerning rates, routes or services.
6 And I'd like to underscore this point by pointing out
7 that the interpretation that this Court gives to the ADA
8 is not only going to control frequent flyer programs;
9 it's also going to control things like contracts of
10 carriage, which are --

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

17 I also think frequent flyer programs are
18 simply price discounts. Given.

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

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

25 So, if I think those four things, what

1 standard do I use to separate when a State is and when
2 it is not using its contract law to regulate prices?

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

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

8 (Laughter.)

9 MR. YELIN: And I think the standard that
10 this Court could adopt and make very clear is that any
11 contract doctrine which seeks to interpret the intent of
12 the parties at the time of the contract's formation is a
13 valid standard to be applied in any suit and is not
14 preempted by the ADA. But any contract doctrine like
15 unconscionability and like in some States some instances
16 of the doctrine of the implied covenant, which seeks to
17 impose extracontractual terms like community
18 standards --

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

24 MR. YELIN: Justice Ginsburg, I think
25 there's a continuum. The -- the notion of the implied

1 covenant, as Justice Scalia explained for the D.C.
2 Circuit in the Tymshare decision, is a label with many
3 -- that encompasses many meanings. Some States, like
4 Illinois and Connecticut, use the doctrine purely, it
5 appears to us, as an interpretive device to discern the
6 intent of the parties. Other States at the other end of
7 the 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
17 I 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. Especially since
22 you discern the intent of the parties by simply saying,
23 well, parties intend to apply community standards,
24 right? And there'll be different community standards in
25 every State presumably. Some States are more honest

1 than others, right?

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

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

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

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

1 standards such as that, it would have been pretty clear
2 in any reservation --

3 JUSTICE SOTOMAYOR: Could I give you -- I'm
4 quoting the Minnesota --

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

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

19 JUSTICE GINSBURG: If we had --

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

25 MR. YELIN: This -- this is, in part,

1 precisely why we propose that the Court look -- adopt a
2 standard, which we don't think would be particularly --

3 JUSTICE SOTOMAYOR: So let's go back to a
4 simpler standard.

5 CHIEF JUSTICE ROBERTS: You -- go ahead.

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

12 MR. YELIN: That is an okay statement.

13 We --

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

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

21 CHIEF JUSTICE ROBERTS: Thank you. Thank
22 you, counsel.

23 Ms. Rosenbaum.

24 ORAL ARGUMENT OF ADINA H. ROSENBAUM

25 ON BEHALF OF THE RESPONDENT

1 MS. ROSENBAUM: Mr. Chief Justice, and may
2 it please the Court:

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

10 Our position, in contrast, is that
11 Northwest's actions breached its obligations under the
12 contract, specifically the contractual obligation to
13 perform in good faith. Because this is a question of
14 contract interpretation, Rabbi Ginsberg's claim is
15 not --

16 JUSTICE SOTOMAYOR: What was the lack of
17 good faith that you are claiming? That they thought he
18 was abusive, or are you saying -- what are you saying
19 was the bad faith, what action?

20 MS. ROSENBAUM: The action was terminating
21 him from the program and taking away his miles --

22 JUSTICE SOTOMAYOR: Can't be that --

23 MS. ROSENBAUM: -- without possible cause.

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

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

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

4 JUSTICE SOTOMAYOR: That's --

5 MS. ROSENBAUM: The allegations in the
6 complaint are that --

7 JUSTICE SOTOMAYOR: So you are doing exactly
8 what he is saying. You are saying that their judgment
9 of abuse is not enough.

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

17 JUSTICE SCALIA: As I understand your
18 argument -- correct me if I am wrong -- he could be
19 terminated without reasonable cause if he happened to be
20 from a State or if the suit was brought under the
21 governing law of a State which imposed this obligation
22 of good faith as a matter of law. The State says:
23 Regardless of what the contract says, even if it says in
24 its sole discretion without any obligation of good
25 faith, even if it says that, as a matter of law, there

1 is an obligation of good faith. As I understand your
2 case, you acknowledge that in that State he would simply
3 be out of luck.

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

6 JUSTICE SCALIA: He would have no cause of
7 action, because this is obviously not an interpretation
8 of the contract; it is an imposition of a State
9 requirement.

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

12 JUSTICE SCALIA: Okay. I just --

13 MS. ROSENBAUM: -- were instead claiming
14 that the contract violated the law, instead of
15 that Northwest had violated the contract --

16 JUSTICE SCALIA: Wow, somebody's really been
17 given a raw deal. You know, that's still going to be
18 possible even if we rule for you here. It depends on
19 what State he's from, right?

20 MS. ROSENBAUM: Well, States tend, in
21 applying the covenant of good faith, to apply it in --
22 as a contract interpretation tool, as a way of giving
23 effect to the benefits of the bargain.

24 JUSTICE SCALIA: Some do, some don't. Some
25 do, some don't.

1 MS. ROSENBAUM: The vast majority of States,
2 and there is an appendix to the States' brief on this
3 issue, talk about the covenant of good faith as a way of
4 interpreting the contract, and Minnesota --

5 JUSTICE ALITO: Well, let me ask you this.
6 Suppose you have in Minnesota or one of the States where
7 you say the covenant is simply a way of effectuating the
8 intent of the parties, you have a contract between two
9 very tough and nasty businessmen. And they write right
10 in their contract, you know, we're going to comply with
11 the literal terms of this contract, but we do not
12 promise each other that we're going to proceed in good
13 faith or that we are going to deal with each other
14 fairly. We are going to take every advantage we can
15 under the literal terms of the contract.

16 Now, would that get rid of the covenant
17 under Minnesota law?

18 MS. ROSENBAUM: Generally, the covenant of
19 good faith cannot be waived. I think the question of
20 whether the principle that the covenant can't be waived
21 is itself an external principle of law is a much harder
22 question than the question here of whether the covenant
23 itself --

24 JUSTICE KAGAN: But if it can't be waived,
25 it sure seems as though it is operating independently of

1 the parties' reasonable expectations.

2 MS. ROSENBAUM: Again, I think you need to
3 separate out the principle that it can't be waived from
4 the underlying principle of what the covenant is doing,
5 which is giving effect to the bargain that the parties
6 entered into based on looking at the reasonable
7 expression -- the reasonable expectations of the
8 parties.

9 JUSTICE GINSBURG: In Wolens -- and this is
10 a case that you rely on and that allowed room for
11 contract claims -- the expression was "self-imposed
12 undertaking." And the airline says: We didn't impose,
13 we didn't take on this obligation, but the law reads it
14 into every contract whether we want it or not.

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

17 MS. ROSENBAUM: Well, the terms of the
18 contract are the self-imposed undertaking, and then this
19 is the tool that's being used to understand and
20 interpret the tools of the -- terms of the contract and
21 then to enforce them. And this is a widely used tool to
22 interpret terms of contracts, particularly when there
23 are discretionary terms within a contract. That's
24 something that's done in the vast majority of the
25 States, and in fact the discretionary -- the cases where

1 there are discretionary terms within a context is the
2 quintessential application of the covenant of good
3 faith. A lot of the early covenant of good faith claims
4 involved outputs or requirements contracts where the
5 specific amount in the contract was not set and the
6 covenant was applied to that sort of situation. And
7 scholars, in talking about the covenant, often
8 specifically note that it applies to discretionary
9 terms.

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

14 MS. ROSENBAUM: I think that that's a
15 situation that States struggle with given the at-will
16 employment doctrine and they've viewed the covenant and
17 the at-will employment doctrine as being in conflict
18 with each other.

19 Here, though, the covenant and the contract
20 or any other principle are not in conflict with each
21 other. The covenant is not being used to override any
22 terms in the contract. It is being used to help give
23 meaning to the terms in the contract and to identify
24 what the implicit restrictions are.

25 JUSTICE ALITO: Well, doesn't that

1 discrepancy show simply that the State has different
2 policies with respect to those two types of contracts?

3 MS. ROSENBAUM: I -- I don't think that it's
4 applying different types of policy. I think it's
5 interpreting the contract and what the contract means
6 differently in different situations.

7 JUSTICE KAGAN: I mean, it might be, right,
8 because people have different expectations in those two
9 different situations, and that the at-will employment is
10 so pervasive and so customary and so sweeping that the
11 policy, the rule of an implied covenant of good faith
12 doesn't apply there because we think everybody expects
13 it not to apply there.

14 MS. ROSENBAUM: Exactly. And I do think
15 that courts will sometimes say the covenant doesn't
16 apply when what they mean is that if the covenant did
17 apply and the court were looking at the reasonable
18 expectations of the parties based on the contract, there
19 would be no reasonable expectations --

20 JUSTICE ALITO: An at-will employment
21 contract is a contract that gives the employer sole
22 discretion as to whether to retain an employee. And
23 here we have a contract that says that the airline has
24 sole discretion to determine whether to terminate
25 somebody from the frequent flyer program. So what is

1 the difference?

2 MS. ROSENBAUM: Well, it's a difference in
3 the context and what the term "sole discretion" means in
4 different contexts is going to vary based on the
5 context, and based on what someone entering into that
6 contract reasonably would have expected that contract to
7 mean based on the terms of the contract.

8 So in the employment context, an employee,
9 given the wide acknowledgment of the at-will employment
10 doctrine, might not expect that they could only be
11 terminated for cause.

12 JUSTICE BREYER: Well, you would
13 agree -- it's the same question I asked the government;
14 I would like your answer. I imagine that you would
15 agree that a State says the following: We read
16 into -- like common law courts used to do all the time,
17 for a transportation company we believe the price must
18 be fair and reasonable, and a contract in our State for
19 transportation prices has to set a fair and reasonable
20 price and I personally think many fares are not
21 reasonable. They are too high. All right. And
22 therefore we have substituted the judges and the States
23 for setting prices instead of the parties.

24 All right. You agree that would be
25 preempted?

1 MS. ROSENBAUM: We agree that that does
2 not --

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

7 MS. ROSENBAUM: I think our standard is very
8 similar to the one that the United States said. It's
9 about whether the covenant is going to -- whether the
10 claim is looking at whether the parties breached the
11 contract or whether it's looking at whether the contract
12 itself violated the law.

13 So it's a question of whether the claim is
14 actually interpreting the contract, and trying to get at
15 what the parties -- what their agreement was, or whether
16 the claim is really that the contract as the parties
17 agreed to it violated the law.

18 JUSTICE GINSBURG: Suppose the supreme court
19 of the State had an opinion that said we're going to be
20 candid about this. The covenant of fair dealing and
21 good faith, it's not in this contract, but we will read
22 it into every contract. That is, if the State supreme
23 court said, it's externally imposed, this is a rule that
24 we will read into every contract because of the policy
25 in our State that people should deal with each other

1 fairly. Suppose that was the controlling decision of
2 the Minnesota Supreme Court. Then you're out; is that
3 right?

4 MS. ROSENBAUM: Yes. If a State says that
5 it's imposing external notions of policy, that would
6 fall on the other side of the line drawn in Wolens,
7 which looked at enforcing terms of the agreement versus
8 imposing external State policies. But that --

9 JUSTICE KAGAN: That would be weird, isn't
10 it, because in such a State, there might be a contract
11 where the parties reasonably did expect this implicit
12 term that limits something, a very broad conferral of
13 discretion to operate. And yet, just because this State
14 supreme court has framed its argument in a particular
15 kind of way, they don't get the benefit of that.

16 MS. ROSENBAUM: I think it would depend on
17 how the claim was framed and how the court interpreted
18 that claim and whether in interpreting that claim, the
19 court was looking at the reasonable expectations of the
20 parties based on the terms of the contract and based on
21 their desire to be bound by an enforceable contract. Or
22 whether it thought it was imposing -- overriding the
23 parties' contract and imposing external notions of
24 fairness.

25 CHIEF JUSTICE ROBERTS: And that's no

1 clearer than the -- the government's view, and it seems
2 to me to be a particular problem when you're talking
3 about the objectives of the ADA to say that the rule
4 varies from State to State. Particularly since, of
5 course, we're dealing with airlines that go to a lot of
6 different States. I mean, it seems to me that the
7 loosest State from the point of view of the preemption
8 is going to set the standard.

9 MS. ROSENBAUM: I don't think that -- that
10 the rule itself is varying from State to State. I think
11 that the rule would be the same across States. That
12 when a claim is --

13 CHIEF JUSTICE ROBERTS: Yes. It's a general
14 rule that it depends upon the particular circumstances.
15 That's the same rule, but in its application, it
16 certainly varies from State to State.

17 MS. ROSENBAUM: I don't think that it
18 necessarily would because in all the States, a claim
19 that's seeking to get at the expectations and intents of
20 the parties would not be preempted where as one imposing
21 external notions of fairness would.

22 JUSTICE BREYER: That isn't what your --
23 your complaint that I think -- paragraph 56, which I
24 think is the key paragraph says, that the -- under
25 the -- the law is, "The contract law that you want to

1 enforce is even where a party to a contract is given
2 absolute discretion, it must exercise that discretion in
3 good faith in a manner consistent with the reasonable
4 expectations of the other party or parties."

5 Now, that's, I think, what they're objecting
6 to. Because there, it sounds to me like I go in to, you
7 know, get a ticket, my reasonable expectation is they're
8 not going to charge me what they're going to charge, you
9 know. I mean, it's unbelievable. But there -- but, you
10 see, that's my reasonable expectation, and I'm the other
11 party.

12 And so that clause sounds as if you could,
13 under State contract law, govern the price according to
14 my reasonable expectation, namely, the consumer, that
15 might be a great idea, but I don't think that's the idea
16 behind this act. That's what -- what -- that's what I
17 just read you. So what do you say about that?

18 MS. ROSENBAUM: Well, I think there's a
19 difference between expectations, subjective expectations
20 and reasonable expectations. And the concept of
21 reasonable expectations in the complaint is -- is an
22 objective standard of what -- based on this contract and
23 based on the context, what -- how the contract should be
24 interpreted and what implicit terms there are in the
25 contract that need to be interpreted and then enforced

1 and that can, in fact, be breached by the other party.

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

5 MS. ROSENBAUM: I think you should apply the
6 presumption against preemption of State law because it
7 does apply.

8 JUSTICE SCALIA: But the whole purpose of
9 the ADA was to preempt State laws. I mean, I can
10 understand applying that presumption to other statutes
11 which say nothing about preemption. The whole purpose
12 of the ADA was to deregulate airlines, was to say there
13 was going to be no Federal regulation. Let the free
14 market handle it and there be will be no State
15 regulation. And you want us to apply a presumption
16 against preemption to that statute?

17 MS. ROSENBAUM: I do think the presumption
18 applies. I don't think it's necessary to any outcome in
19 this case. Because whether or not it applies in Wolens,
20 this Court held that claims are about holding airlines
21 to the terms of their agreement are not preempted and
22 that's what the covenant of good faith claim is about.

23 JUSTICE GINSBURG: Well, it's one thing to
24 read the terms in the agreement. It's another thing to
25 say it's an underlying premise that good faith and fair

1 dealing will control. Are you taking issue with the
2 good faith and fair dealings standard being amorphous,
3 being susceptible to different interpretations by
4 different judges, by different juries?

5 MS. ROSENBAUM: I think there is a fair
6 amount of uniformity across the States in how they
7 actually apply the covenant of good faith, and in terms
8 of applying it as an interpretation of the contract, and
9 then especially in cases where one party is claiming
10 that all of their performance under the contract is in
11 their sole discretion and that they're free not to
12 perform under the contract at all, you know, essentially
13 where the contract would be illusory in applying the
14 covenant specifically under those circumstances to
15 ensure that there is meaningful performance that's
16 required under the contract.

17 JUSTICE GINSBURG: Is an employment at-will
18 contract illusory?

19 MS. ROSENBAUM: I don't believe that's an
20 illusory contract. But I think rather than it being
21 important whether there are specific require -- whether
22 specifically this contract is illusory, I think the fact
23 that one party is claiming that it had no duty to
24 perform under the contract shows that the contract had
25 reasonable implicit limitations in it. That the parties

1 would have reasonably expected that they were
2 contracting to there being some sort of performance
3 under the contract.

4 And, in fact, the principles at issue here
5 are remarkably similar to the principles that were at
6 issue in Wolens itself. And this Court there recognized
7 that those were contract construction issues.

8 JUSTICE GINSBURG: That's because the
9 contract was silent. Here it isn't. Here the contract
10 says "sole discretion." In Wolens, the question was
11 retroactivity, and the contract said nothing one way or
12 the other about it.

13 MS. ROSENBAUM: Well, in Wolens, the
14 question was an express reservation of rights and the
15 contract didn't say whether or not it applied
16 retroactively. So the question was whether there were
17 implied limitations on the express reservation of
18 rights.

19 JUSTICE SCALIA: Would this contract produce
20 a different result if it did not contain the words "in
21 its sole discretion"?

22 MS. ROSENBAUM: The interpretation of the
23 contract might be different, but the reasonable
24 expectations --

25 JUSTICE SCALIA: Well, you'd -- you'd --

1 you'd still apply the very same doctrine of
2 reasonableness, right? So the words "in its sole
3 discretion" become superfluous.

4 MS. ROSENBAUM: I think there may be a
5 larger amount of deference that's given to the airline
6 in that a party would reasonably expect would be given
7 to the airline because of the sole discretion language.
8 And that's obviously a question for the merits, what
9 exactly is the meaning of the sole discretion language.

10 JUSTICE SCALIA: Yes. I guess different
11 States will treat that differently as well, right?

12 MS. ROSENBAUM: I think question is less
13 State-by-State and really more case-by-case and
14 context-by-context of what does sole discretion language
15 mean when used -- and where do you apply limitations on
16 it.

17 JUSTICE SCALIA: I find it hard to believe
18 that you're doing nothing but interpreting a contract
19 when you -- you give it the same outcome, whether it
20 says in its sole discretion or does not say in its sole
21 discretion. I -- I find it hard to grasp how what
22 you're doing in that -- in that case is simply
23 interpreting the contract.

24 MS. ROSENBAUM: I don't think that there
25 would necessarily be the same outcome in every single

1 situation, whether or not the claim -- whether or not
2 the contract said "sole discretion" or not. There may
3 be more deference given to the airline because of the
4 discretionary term; but in both situations, the question
5 would be, what does this contract mean? And contracts
6 include both their express terms and their implied terms
7 and the covenant of good faith is going to interpreting
8 implied terms, to identifying them within the contract
9 and then enforcing them within the contract.

10 If an airline were able to just insert "sole
11 discretion" or "sole judgement" within its contract, it
12 would be able to entirely circumvent the rule that this
13 Court set forth in Wolens. Just by adding "sole
14 discretion" to its contract, it would never be held to
15 any contractual duties or requirements.

16 JUSTICE ALITO: May I ask you a question
17 about something slightly different? An amicus brief
18 submitted in support of your position by California and
19 some other States points out at some length that there
20 are now a lot of frequent flyer programs in which a lot
21 of miles are earned by making purchases other than
22 for -- for flights and in which miles can also be spent
23 for things other than flights. Do we have to worry
24 about that in this case?

25 MS. ROSENBAUM: We think that that's another

1 reason why this claim is not preempted, is because it
2 has to do with membership in a frequent flyer program,
3 rather than being -- rather than, like in Wolens, having
4 to do specifically with access to flights or --

5 JUSTICE ALITO: What are the facts relating
6 to this particular plan? Can you earn miles by doing
7 things other than flying? Can you spend miles on things
8 other than flying?

9 MS. ROSENBAUM: There are not very many
10 facts in the record about the plan, but the contract
11 does refer to airline miles -- sorry, to airline
12 partners from whom one could earn miles and then use
13 miles also.

14 JUSTICE GINSBURG: The plaintiff --

15 MS. ROSENBAUM: Delta, which is merged
16 into --

17 JUSTICE GINSBURG: And the plaintiff used
18 the frequent flyer program, whatever else it might be
19 used for, he used it to get lower prices on flights,
20 right?

21 MS. ROSENBAUM: He did, yes. And that is
22 something in the record. But --

23 JUSTICE SCALIA: Why does -- it relates to
24 prices. Even if you get credit for miles from staying
25 in certain hotels, it still has the effect of lowering

1 the price for your airline ticket. And likewise, if you
2 can use your frequent flyer miles to get cheaper hotel
3 rooms, that effectively lowers the price of your airline
4 ticket, doesn't it? I mean, it doesn't seem to me to
5 make any difference whether the only thing you get from
6 the frequent flyer mileage is, you know, is airfares or
7 other goodies. They are all price.

8 MS. ROSENBAUM: This is a claim just about
9 his membership in the program overall, and that is a
10 membership where people who have the same claim as him
11 could be earning miles on their credit card, spending
12 miles on hotel rooms. And once there is a claim where
13 someone can bring it who has no relationship with air
14 travel whatsoever, where they can bring the exact same
15 claim, it's hard to see how that claim is related to
16 prices, routes, or services of air travel. And there's
17 certainly been no showing here that --

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

21 MS. ROSENBAUM: No, I'm saying
22 that someone --

23 JUSTICE SCALIA: The person who gets the
24 discount for the hotel room is the person who bought the
25 airline ticket, right?

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

3 JUSTICE GINSBURG: Your point is that you
4 can get frequent flyer miles by purchases other than
5 airplane transportation.

6 MS. ROSENBAUM: Yes. And then also use them
7 for purposes other than airline transportation.
8 Reportedly, more miles are earned now on the ground than
9 on flight, through means other than travel than
10 actually through --

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

13 MS. ROSENBAUM: He, himself --

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

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

18 JUSTICE BREYER: No, I know. But I mean,
19 what we are taking about is what Count 2 of the
20 complaint says. I think that's their objection. But as
21 far as Count 2 of the complaint says, it's about airline
22 miles, I take it, and airline miles are used on
23 airlines, etcetera.

24 MS. ROSENBAUM: Well, his claim --

25 JUSTICE BREYER: Well, if there is something

1 else in this complaint, tell me and I will have to
2 figure out whether we go beyond the complaint.

3 MS. ROSENBAUM: His claim is about his
4 membership in the program itself. And the program
5 itself can be used, including the accrued miles that are
6 earned under the program, can be used for purposes
7 besides airline flights.

8 JUSTICE BREYER: Does it say that in the
9 complaint?

10 MS. ROSENBAUM: No.

11 JUSTICE BREYER: No.

12 MS. ROSENBAUM: It does not specifically
13 say, but the contract does refer to the airline partners
14 and this was decided --

15 JUSTICE BREYER: And an airline partner, I
16 take it, is another airline?

17 MS. ROSENBAUM: No, I think airline partners
18 can be the people with whom they partner with, to whom
19 they sell their miles.

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

22 MS. ROSENBAUM: This was decided on a motion
23 to dismiss, so all there is, is the complaint, but there
24 is --

25 JUSTICE BREYER: All there is, is the

1 complaint and it doesn't talk about it in the complaint.
2 What I'm thinking about, obviously, is we might preserve
3 that question for another day.

4 MS. ROSENBAUM: The complaint does include
5 the contract, that does refer to the partners, but does
6 not, I don't think, define exactly who the partners are.

7 But this Court doesn't have to reach the
8 question of whether or not the claim relates to prices,
9 routes, and services, because it can decide this case
10 based on the line drawn in *Wolens* of whether or not this
11 claim enforces the terms of the -- enforces the terms of
12 the contract, which under Minnesota law the covenant of
13 good faith does. Cases in Minnesota have referred to
14 this as a breach of contract claim. And I want to
15 respond to Justice --

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

22 MS. ROSENBAUM: Well, there are separate
23 regulations that apply to safety under the ADA, so --
24 and separate preemption doctrines that apply to safety
25 under the ADA. But besides that, this would apply to

1 matters besides -- to matters besides frequent flyer
2 miles and other sole discretion, issues in which the
3 contract leaves an issue to the sole discretion of the
4 airline.

5 I do want to respond to Justice Kennedy's
6 question about whether someone can go to the Department
7 of Transportation. The Department of Transportation
8 does have authority over unfair and deceptive practices
9 by airlines, but this is -- that's very different than
10 the claim that we're pursuing here. That's a claim by
11 an airline -- sorry, by the government, that doesn't
12 give remedies to the specific consumer who was hurt.
13 And that also looks at whether the practice is unfair or
14 deceptive. And our claim here isn't that this was an
15 unfair practice. The claim here is that this is a
16 practice or these were actions that violated the
17 contract and what's being applied here are contract law
18 principles about interpreting the covenant of good
19 faith.

20 And the same thing was true also in Wolens.
21 At the time of Wolens, the Department of Transportation
22 had the same ability to pursue claims for unfair or
23 deceptive practices, but the Court recognized that that
24 did not override the need for there to be a contract
25 dispute resolution regime by the State courts. And

1 that's the same -- the same is true here whether or not
2 the contract term at issue is expressed or implied.

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

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

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

1 MS. ROSENBAUM: Well, one thing this Court
2 said in Wolens was that having -- being able -- for
3 people to be able to trust their contracts was something
4 that promoted the purposes of the ADA. And we think
5 that is true whether the terms that are being relied on
6 are expressed terms of contracts or, like here, the
7 implicit understood terms of the contract that the
8 contract is going to be performed in good faith.

9 Unless the Court has any other questions,
10 thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Three minutes, Mr. Clement.

13 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

14 ON BEHALF OF THE PETITIONERS

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

16 First just a couple of loose ends. The
17 concession that I was referring to before is on Page 15
18 and 16 of the red brief, I think it was reiterated at
19 the podium.

20 Also this argument that somehow frequent
21 flyer miles programs have changed or something and are
22 different because there are partners, the same arguments
23 were made by the plaintiffs in Wolens in their brief to
24 this Court that somehow these don't relate to prices and
25 routes and services because you have rental cars and

1 hotels as partners. So I think this Court has already
2 crossed that bridge.

3 Three --

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

10 MR. CLEMENT: I'm not sure it would be
11 different in a claim brought against the airlines. I
12 mean, maybe if you want to sue the credit card partner,
13 the ADA has nothing to do with that. But I would say
14 that if you're suing an airline, the Airline
15 Deregulation Act speaks to it. But if the Court want to
16 reserve THAT, I suppose it could.

17 I do want to make -- underscore that the
18 implied covenant doctrine is very different from other
19 interpretative tools. It is non-waivable and, I think,
20 in a world where you are trying to determine the
21 difference between self-imposed undertakings and things
22 imposed by State law, non-waivability is a huge strike
23 against it being voluntary. It also just is, you can
24 bring in separate implied covenant claims. You know, no
25 one -- I've never heard of a contra proferentem claim,

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

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

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