No. 12-462

IN THE

Supreme Court of the United States

NORTHWEST, INC., and
DELTA AIR LINES, INC.,
Petitioners,
v.

RABBI S. BINYOMIN GINSBERG,
Respondent.

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

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BRIEF FOR INTERNATIONAL AIR TRANSPORT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The International Air Transport Association ("IATA") is a nongovernmental international trade association founded in 1945 by air carriers engaged in international air services.[1] Today, IATA consists of 240 member airlines from 118 countries representing 84 percent of the world's total air traffic.[2] IATA strives to represent, lead and serve the airline industry by advocating the interests of airlines across the globe, developing global commercial standards for the airline industry and assisting airlines in operating safely, securely, efficiently and economically. Since 1945, IATA has worked closely with governments and intergovernmental organizations to achieve and maintain uniformity in the development, implementation and interpretation of numerous public and private international air law treaties and agreements.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Petitioners filed a blanket consent to the filing of amicus curiae briefs with this Court. Respondent provided written consent to IATA's amicus curiae brief in support of Petitioners. A letter from Respondent's counsel evidencing such consent will be filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for a party authored this brief in whole or in part, and no one other than Amicus Curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The U.S. members of IATA are: Alaska Airlines, American Airlines, Atlas Air, Delta Air Lines, Federal Express, Hawaiian Airlines, JetBlue, United Airlines, UPS Airlines and US Airways. A list of IATA's full membership may be found at http://www.iata.org/about/members/Pages/airline-list.aspx?All=true (last visited July 15, 2013).

IATA has long been a champion of harmonized international rules that facilitate the development of an efficient international air transportation system. In keeping with its long-standing commitment to seeking global consistency in aviation regulation generally, IATA advocates the adoption of harmonized and reasonable approaches to the recognition of passenger rights. At its Annual General Meeting in June 2013, IATA's member airlines unanimously adopted a resolution recommending a set of core principles for national governments to follow when adopting consumer protection legislation and regulations. App. 1a-5a. IATA's core principles recognize the burden and confusion to passengers and airlines when multiple, inconsistent consumer protection regulations are in play, simply because the passenger and plane cross international borders. IATA believes that the core principles set forth in its recent resolution will help national governments harmonize their various consumer protection regimes.

The Ninth Circuit's decision threatens to disrupt and compromise the integrity of the Federal Government's oversight and regulation of international aviation by subjecting airlines to requirements imposed by the laws of fifty different states. If allowed to stand, the decision will prevent the United States from speaking with one coherent voice in its engagement with other governments on the need everywhere for harmonized, consistent regulation of international air commerce. Thus, if not reversed, the Ninth Circuit's decision will frustrate the realization of the objectives of IATA's member airlines, as reflected in the recent IATA resolution. IATA and its members have a direct and substantial interest in the issues raised by Petitioners. IATA is uniquely positioned to provide the Court an international per-

spective on this controversy and its implications for the global airline industry.

SUMMARY OF ARGUMENT

IATA agrees with the arguments of Petitioners and its fellow amici in support of reversal of the Ninth Circuit's decision. IATA files this brief to address the far-reaching *international* implications of the question presented. If not reversed, the Ninth Circuit's decision will establish a dangerous precedent for the international air transportation system and the United States' ability to participate meaningfully in the continuing evolution of that system.

The Ninth Circuit's decision ignores the fact that the preemption provision of the Airline Deregulation Act of 1978 ("ADA" or "Act"), Pub. L. No. 95-504, 92 Stat. 1705 (1978), applies to foreign air transportation and the complex array of international obligations that bind the United States to the deregulation of international air services.

A more considered analysis would have recognized that the purpose and effect of the preemption clause was not merely to prevent states from undoing the deregulation of *domestic* air transportation; it also prevents the states from attempting to regulate, and thereby undo the deregulation of, *foreign* air transportation as well. Since the enactment of the ADA and the International Air Transportation Competition Act of 1979 ("IATCA"), the policies and benefits of deregulation have been incorporated in "Open Skies" agreements with more than 100 trading partners of the United States. Those obligations specifically include the right of airlines to engage voluntarily in joint marketing arrangements such as airline alliances that include reciprocal participation

in loyalty programs like WorldPerks. The U.S. Department of Transportation ("DOT") has exclusive regulatory authority to oversee and regulate the fairness to passengers of the terms of such programs.

By imposing state law covenants of good faith and fair dealing on the voluntary undertakings of airlines, the Ninth Circuit's decision would allow states to substitute their judgment for that of DOT. The decision, if not reversed, would result in the imposition on airlines of a patchwork of inconsistent requirements.

Most importantly, the Ninth Circuit's decision unconstitutionally allows the states to regulate the foreign commerce of the United States and compromises the ability of the United States to speak with one voice through the Federal Government in its conduct of international negotiations over the further harmonization of the rules governing international aviation markets. It would sanction the application of state common law doctrines to airline activities authorized under international obligations with nations that do not recognize the common law.

The international airlines are concerned that the Ninth Circuit's decision would create a new barrier to harmonized, internationally consistent consumer protection regulations. Because international air transportation services cross multiple borders, inconsistent consumer protection regulations create burdens for both passengers and carriers. Allowing states to impose a multiplicity of inconsistent requirements on those services would be a step backwards. Thus, the Ninth Circuit's decision, if not reversed, would frustrate the efficient development of the international air transportation system.

I. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY NARROWS THE SCOPE OF FEDERAL PREEMPTION CODIFIED IN THE ADA.

This case concerns the scope of preemption under the ADA. IATA agrees with Petitioners that the Ninth Circuit's construction of preemption under the ADA is impermissibly narrow and inconsistent with Congress's intent and this Court's prior precedent. The Ninth Circuit's decision also ignores the necessary application of ADA preemption to foreign air transportation. In doing so, the Ninth Circuit opens the door to the involvement of states in the regulation of foreign commerce, thereby compromising the ability of the United States to speak with one voice in the forging of a harmonized global framework for international air services.

A. Preemption Under the ADA Must Be Interpreted Broadly and Consistent With Its Application to Foreign Air Transportation.

Congress enacted the ADA to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." 92 Stat. at 1705. To encourage and support the newly deregulated and competitive marketplace, Congress expressly prohibited states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b).

As used in the ADA preemption provision, "air transportation" includes foreign air transportation.

See 49 U.S.C. § 40102(a)(5) (defining "air transportation" as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft"); 49 U.S.C. § 40102(a)(23) (defining "foreign air transportation" as "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft"). The United States' involvement and participation in foreign air transportation occurs primarily through its agreements with other nations. Thus, air transportation, which includes foreign air transportation, implicates the Federal Government's relationships with, and obligations to, foreign nations, and the ADA preemption provision must be read with its application to foreign air transportation in mind. The Ninth Circuit's failure to consider the effect of ADA preemption on foreign air transportation[3] is yet another reason why its decision must be set aside as inconsistent with

[3] The Ninth Circuit's analysis relies, in part, on the unexplained assumption that air transportation is a "field which the States have traditionally occupied." Pet. App. 6. The states never have "traditionally occupied" the field of air transportation as a general matter. Where foreign air transportation is involved, bringing with it considerations of international relations and foreign commerce, the Ninth's Circuit's assumption is even more incorrect. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) ("[f]oreign commerce is preeminently a matter of national concern"); *Brolan v. United States*, 236 U.S. 216 (1915) (the states have no standing in foreign relations); *see U.S. v. Locke*, 529 U.S. 89, 108 (2000) (there is no assumption of nonpreemption "when the State regulates in an area where there has been a history of significant federal presence").

this Court's broad interpretation of preemption under the ADA.[4]

B. The Deregulation of Foreign Air Transportation Is Enshrined in the International Obligations of the United States.

The 1978 Act marked a historic shift in government policy for air transportation both domestically and internationally. Congress declared "as being in the public interest and consistent with public convenience and necessity" that the provisions of the ADA should be carried out so as to place "maximum reliance on competitive market forces" to provide needed air transportation and determine the "variety and quality of, and . . . prices for, air transportation services." 49 U.S.C. § 40101(a). In 1980, Congress directed the Secretaries of State and Transportation to develop an international air transportation negotiating policy that would eliminate operational and marketing restrictions on airlines to the greatest extent possible. 49 U.S.C. § 40101(e); International Air Transportation Competition Act of 1979, § 17, Pub. L. No. 96-192, 94 Stat. 35, 42 (1980).

Since the 1980s, the U.S. government has sought to bring the benefits of deregulation to international air transportation markets. This initiative took the form of liberalizing the existing network of highly mercantilistic international agreements that, in the aggregate, formed an excessively restrictive global regime governing international air transportation and ran directly against core principles of U.S.

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[4] See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), for the proposition that the ADA preemption provision should be construed broadly.

aviation policy.[5] Beginning in 1992, the United States pioneered a new generation of "Open Skies" agreements that took the liberalization initiative to an entirely new level. Defining "Open Skies," 57 Fed. Reg. 19,323 (May 5, 1992) (order requesting comments); In re Defining "Open Skies," 1992 WL 204010 (D.O.T. Aug. 5, 1992) (final order). Today, the United States has Open Skies agreements with more than 100 of its trading partners, including the European Union. *See* U.S. Dep't of State, *Open Skies Agreements*, http://www.state.gov/e/eb/tra/ata/ (last visited July 18, 2013).

Open Skies agreements strive to "expand international passenger and cargo flights by eliminating government interference in commercial airline decisions about routes, capacity and pricing." U.S. Dep't of State, *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation* (Mar. 29, 2011), http://www.state.gov/r/pa/pl/159347.htm. The United States' model Open Skies agreement champions the promotion of "an international aviation system based upon competition among airlines in the marketplace with minimum government interference

[5] The conventional approach dating back to the end of the Second World War was to dole out market access through carefully calibrated, highly reciprocal arrangements, limiting both the destinations to be served and the number of carriers that could serve them, and authorizing government regulation of both price and capacity. Beginning in the late 1970s, however, the United States negotiated for the reduction, and ultimately elimination, of most of the economic regulation that compromised service quality and impeded industry growth. This approach was reflected in DOT's 1995 statement on international air transportation policy. Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841 (May 3, 1995).

and regulation" as a primary goal. U.S. Dep't of State, *Current Model Open Skies Agreement Text* (Jan. 12, 2012), http://www.state.gov/documents/organization/114970.pdf.

With respect to pricing, the model agreement provides that the United States and the other contracting country or countries "shall allow prices for air transportation to be established by airlines . . . based upon commercial considerations in the marketplace." *Id*. It defines "price" as "any fare, rate or charge for the carriage of passengers . . . *and the conditions governing the availability of such fare, rate or charge*."[6] *Id*. (emphasis added). It identifies DOT as the "aeronautical authority" generally responsible for the administration of the model agreement on behalf of the United States. *Id*.

In sum, deregulation now is enshrined in both domestic and *international* law and policy.

C. The International Obligations of the United States Generally Authorize Joint Marketing Arrangements, Such as Airline Alliances and Their Loyalty Programs.

The ability of domestic and foreign air carriers to enter into cooperative marketing arrangements is a

[6] These "conditions" include, of course, the earning and redeeming of frequent flyer miles. Thus, the Ninth Circuit's effort to distinguish frequent flyer programs from airline prices is inconsistent with the way "price" is defined in the Open Skies agreements of the United States.

defining feature of U.S. Open Skies agreements,[7] and one that is implemented increasingly through broad alliance agreements between air carriers.[8] The United States' conclusion of the U.S.-Netherlands Open Skies Agreement in 1992 opened the door for Northwest and KLM, a Dutch airline, to seek and obtain antitrust immunity from DOT to broaden the scope of the carriers' alliance. Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines, No. OST-95-579-34, 1993 WL 13035350 (D.O.T. Jan. 11, 1993); *see* Ard-Pieter de Man, et al., *Managing Alliance Dynamics: The Case of KLM and Northwest Airlines*, at 8 (May 2008), http://www.strategic-alliances.org/storage/pdf/KLM-NWA.pdf.

The Northwest/KLM alliance became the template for arguably one of the most important developments in aviation history: the globalization of international air transportation.[9] Airline alliances allow interna-

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[7] Article 8, paragraph 7 of the model agreement provides:

> In operating or holding out the authorized services under this Agreement, any airline of one Party may enter into cooperative marketing arrangements . . . with
>
> a. an airline or airlines of either Party;
>
> b. an airline or airlines of a third country; [and
>
> c. a surface transportation provider of any country.]

Model Open Skies Agreement Text*, supra*.

[8] Of course, cooperative marketing arrangements between actual and potential competitors may require approval and antitrust immunity granted by DOT. *See* 49 U.S.C. §§ 41308 and 41309.

[9] Warren L. Dean, Jr. & Jeffrey N. Shane, *Alliances, Immunity, and the Future of Aviation*, 22 Air & Space Law., no. 4, 2010 at 1, 17, available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/voelcker_sven_AirSpace_22.pdf.

tional carriers to offer passengers the benefits of a global network by providing for integrated air transportation services on participating carriers to destinations worldwide.[10]

Today, three major airline alliances exist: the Star Alliance (including United Airlines and US Airways), SkyTeam (including Delta/Northwest) and Oneworld (including American).[11] In 2009, these three alliances transported 84 percent of U.S. transatlantic passengers and 72 percent of U.S. transpacific passengers.[12] Through these alliances, the joint venture partners integrate not only their service networks, but also their marketing activities – and most importantly, their frequent flyer programs.[13]

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[10] Prior to the development of alliances, passengers had been required to purchase individual itineraries from different carriers connecting through interline arrangements.

[11] These alliances have been reviewed and approved by DOT. U.S. Dep't of Transp., *Airline Alliances Operating with Antitrust Immunity* (Jan. 17, 2013), http://www.dot.gov/sites/dot.dev/files/docs/All%20Immunized%20Alliances.pdf. The immunized alliances operate subject to the continuing oversight of DOT. 14 C.F.R. § 303.06.

[12] Jan K. Brueckner, et al., *Alliances, Codesharing, Antitrust Immunity and International Airfares: Do Previous Patterns Exist?*, 1 n.1 (July 2010), http://www.darinlee.net/pdfs/bls2.pdf; *see* William Gillespie & Oliver M. Richard, *Antitrust Immunity and International Airline Alliances*, 5 (U.S. Dep't of Justice Feb. 2011), http://www.justice.gov/atr/public/eag/267513.pdf.

[13] Frequent flyer programs are an essential marketing tool in a deregulated, competitive environment. Sanjai Velayudhan, *Airline Alliances & Frequent Flyer Programs*, http://www.itcinfotech.com/Uploads/GUI/knowledgecentre/Airline_alliances_and_Frequent_Flyer_Programs.pdf (last visited July 26, 2013); *see* Rex S. Toh, *Toward an International Open Skies Regime: Advances, Impediments, and Impacts*, 3 J. of Air Transp. World Wide 61, 66 (1998).

D. Northwest's WorldPerks Program, Like the Loyalty Programs of Other International Carriers, Is by Its Very Terms International and Directly Relates to the Prices Program Participants Pay for Foreign Air Transportation.

Prior to seeking antitrust immunity in 1992, Northwest and KLM already had entered into several international joint venture arrangements aimed at coordinating their airline services, including their frequent flyer programs. Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines, OST-1995-579-1, at 2-3 (Sept. 9, 1992). As with other alliances, the air carriers' frequent flyer programs were integrated into the joint venture itself. The antitrust immunity sought and obtained by Northwest and KLM following the U.S.-Netherlands Open Skies Agreement enabled closer cooperation between the carriers and created new benefits for the passengers of both airlines, including Respondent.

As a member of the WorldPerks[14] program from 1999 to 2008 and also a frequent domestic and international traveler, J.A. 34, Respondent was aware of and benefited from the program's international features. Most notably, the rules of the program allowed Respondent to accumulate and redeem miles on the international service of Northwest's alliance partners,[15] J.A. 67-68, 70, which Respondent

[14] The very name of Northwest's frequent flyer program, WorldPerks, signaled the program's international nature.

[15] Today, Delta/Northwest is a member of the SkyTeam alliance, which includes nineteen international airlines.

did. By using miles earned as a WorldPerks program participant, Respondent was able to travel internationally on flights operated by Northwest and its international alliance partners for a fraction of the price of a regular ticket. Thus, Respondent directly benefited from the liberalized international air transportation system that resulted from the Open Skies agreements negotiated by the United States. The preemption clause of the ADA clearly precludes the application of state law to the price-driven loyalty programs contemplated in these diplomatic instruments.

II. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY WOULD USURP DOT'S EXCLUSIVE AUTHORITY TO ADDRESS UNFAIR AND DECEPTIVE PRACTICES IN AIR TRANSPORTATION.

A. Congress Vested DOT with Consumer Protection Authority Over Interstate and Foreign Air Transportation.

Congress assigned responsibility for consumer protection and enforcement for both interstate and foreign air transportation exclusively to DOT. Specifically, DOT has the authority to prohibit and punish unfair and deceptive practices in air transportation and in the sale of air transportation. 49 U.S.C. § 41712(a). Under this authority, DOT may prohibit, by regulation or on a case-by-case basis, conduct or practices of a carrier that it determines is

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SkyTeam Members, http://www.skyteam.com/en/About-us/Our-members/ (last visited July 28, 2013).

unfair. *See Am. Airlines, Inc. v. N. Am. Airlines, Inc.*, 351 U.S. 79, 80 (1956).[16]

DOT's regulatory authority to prohibit airline practices that it deems unfair or deceptive extends to a carrier's frequent flyer program and the agreements underlying such frequent flyer program.[17] It regulates these programs in many formal and informal ways. DOT has exercised its authority over frequent flyer programs through written guidance and enforcement proceedings. In 2003 and again in 2012, DOT issued guidance on the advertisement of "free" fares. U.S. Dep't of Transp., *Guidance on the Use of the Term "Free" in Air Fare Advertisements and Disclosure of Consumer Costs in Award Travel* (May 17, 2012), http://airconsumer.dot.gov/rules/Use

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[16] In 2011, DOT exercised this regulatory authority by issuing a regulation prohibiting air carriers from:

> impos[ing] any contract of carriage provision containing a choice-of-forum clause that attempts to preclude a passenger, or a person who purchases a ticket for air transportation on behalf of a passenger, from bringing a claim against a carrier in any court of competent jurisdiction, including a court within the jurisdiction of that passenger's residence in the United States (provided that the carrier does business within that jurisdiction).

14 C.F.R. § 253.10. This provision directly proscribes, in air transportation, a forum-selection clause of the kind upheld by this Court in the case of ocean cruise lines. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding forum-selection clause in a passenger cruise ticket).

[17] *See* FAA Modernization and Reform Act of 2012, § 408, Pub. L. No. 112-95, 126 Stat. 11 (2012) (providing that the Secretary of Transportation "may investigate consumer complaints regarding . . . the rights of passengers who hold frequent flyer miles or equivalent redeemable awards earned through customer-loyalty programs").

%20of%20the%20word%20free%20in%20fare%20advertisements.pdf; U.S. Dep't of Transp., *Disclosure of Additional Fees, Charges and Restrictions on Air Fares in Advertisements, Including "Free" Airfares* (Sept. 4, 2003), http://www.dot.gov/sites/dot.dev/files/docs/20030904.pdf.[18] DOT's 2012 guidance specifically addressed frequent flyer award travel.

DOT has conducted formal and informal enforcement proceedings on frequent flyer programs. On multiple occasions, DOT has sanctioned airlines for failing to comply with DOT's fare disclosure regulations with respect to frequent flyer award travel. *See*, *e.g.*, *British Airways PLC*, OST-2012-0002, 2012 WL 7151875 (Oct. 1, 2012) (consent order) (finding airline in violation of DOT consumer protection regulations regarding fare advertisements where airline did not disclose airline surcharges imposed in connection with air fares based on mileage awards); *Société Air France*, OST-2012-0002 (Nov. 1, 2012) (consent order), http://www.dot.gov/sites/dot.dev/files/docs/eo_2012-11-1.pdf (enforcement proceeding concerning carrier's failure to properly disclose applicable taxes and fees charged to consumers booking frequent flyer award tickets). In 1994, DOT issued guidance to the airline industry on the adequate disclosure of seat availability for frequent flyer award travel. *See* Letter from Sec. of Transp. Federico Peña to Major and Nat'l U.S. Air Carriers and to Air Travel Industry Associations and Labor Unions (Dec. 20, 1994), http://airconsumer.ost.dot.gov/rules/19941220.htm.

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[18] DOT construed its 2003 guidance to apply to frequent flyer mileage award travel. *British Airways PLC*, 2012 WL 7151875.

DOT's authority to approve and immunize international alliance agreements from the U.S. antitrust laws, 49 U.S.C. §§ 41308 and 41309, and continuing oversight of approved alliance agreements, 14 C.F.R. § 303.06, also provide ample opportunity for DOT's review of consumer protection concerns.

Finally, DOT works with the U.S. Department of Justice to analyze proposed airline mergers and acquisitions from the perspective of protecting the interests of consumers. DOT's review may include an analysis of the merger's effect on frequent flyer programs. Statement of Nancy E. McFadden (General Counsel, U.S. Dep't of Transp.) Before H. Comm. on Transp. & Infrastructure (June 13, 2000), http://testimony.ost.dot.gov/test/pasttest/00test/McFadden1.htm. Where the airlines' frequent flyer reciprocity agreements are, in DOT's judgment, unfair to consumers, DOT asks the airlines to modify those agreements. *Id*.

B. The Ninth Circuit's Decision Would Usurp the Regulatory Authority of DOT Over Interstate and Foreign Air Transportation.

The Ninth Circuit's decision would usurp DOT's authority to determine what is, and is not, fair to airline consumers by conferring on state courts the ability to impose a variety of state-defined covenants of good faith and fair dealing upon airline frequent flyer program agreements, like Northwest's WorldPerks program agreement.[19] The General

[19] In this case, Respondent was not without a potential remedy at DOT. While DOT is not equipped to adjudicate breach of contract claims, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 230 (1995), it is equipped and authorized to address

Terms and Conditions of the WorldPerks program, to which Respondent agreed when he became a WorldPerks member, allowed Northwest to cancel Respondent's participation in the program for "improper conduct as determined by Northwest in its sole judgment." J.A. 64-65. By allowing Respondent to proceed on an implied covenant of good faith and fair dealing claim, the Ninth Circuit placed the determination of the propriety of Northwest's exercise of its "sole judgment" in the hands of a judge and jury. For an international airline partner not familiar with the application of common law doctrines, the result suggested by the Ninth Circuit's decision is that a contract provision vesting full discretion in the airline is unenforceable.

Congress vested the responsibility for these types of determinations in DOT, and in DOT such determinations must be made. Otherwise, the international air transportation system, which relies heavily on joint market arrangements such as airline alliances and their frequent flyer programs to compete in the global marketplace for air services, will be hobbled by a patchwork of inconsistent requirements.

Perhaps more importantly, if affirmed, the Ninth Circuit's decision will establish a precedent that extends far beyond the terms and conditions of an airline's frequent flyer program. It promises to unravel the deregulated framework of international air transportation by displacing DOT as the single

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allegations of unfairness in airline practices and to prohibit any contract of carriage provision reflecting those practices, 49 U.S.C. § 41712(a).

authority empowered to maintain oversight of those services.[20]

III. THE NINTH CIRCUIT'S DECISION UNCONSTITUTIONALLY INTRUDES UPON THE FEDERAL GOVERNMENT'S AUTHORITY OVER FOREIGN AIR TRANSPORTATION AND IMPAIRS THE ABILITY OF THE UNITED STATES TO SPEAK WITH "ONE VOICE" IN MATTERS OF FOREIGN AIR TRANSPORTATION.

A. The Ninth Circuit's Decision Does Not Respect the Supremacy of the Federal Government's Authority Over Foreign Air Transportation.

It is well understood that Congress has the power to preempt state law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Congress expressly exercised its preemption power in the ADA. 49 U.S.C. § 41713(b). Congress chose to exercise its preemption power for both interstate and foreign air transportation. Congress also instructed the Executive Branch to extend the benefits of deregulation to foreign air

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[20] The Ninth Circuit's decision opens the door for the imposition of extra-contractual obligations on an air carrier, not just in the context of an airline's frequent flyer program, but also in the context of any other airline terms and conditions of carriage that a state court concludes do not have a "significant impact" on federal deregulation. *See* Pet. App. 32-33. Thus, state courts would be free to impose obligations under state law beyond what air carriers include in their contracts of carriage. This result is manifestly inconsistent with the Federal Government's policy of deregulating international air services and would involve the states in imposing patchwork obligations on the foreign commerce of the United States.

transportation. 49 U.S.C. § 40101(e); International Air Transportation Competition Act of 1979, § 17. Therefore, the preemption language of the ADA must be understood consistent with the well-settled recognition that state law must yield to federal law where, "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 372-73 (internal citations omitted).

> What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:
>
> > "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

Id. at 373 (internal citations omitted).

Through the ADA, Congress intended that the United States "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." 92 Stat. at 1705. Congress determined that express preemption of state law was

necessary to encourage and support this new competitive marketplace, so that states could not "undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378; *see Wolens*, 513 U.S. at 228 ("Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws."). Given the international scope of air transportation, Congress's objectives must be viewed with an eye toward their international implications.

The Ninth Circuit's decision unconstitutionally intrudes upon the supremacy of the Federal Government's authority over foreign air transportation. The decision opens the door for state common law claims, like the implied covenant of good faith and fair dealing, to conflict with Federal Government policy and regulation. Under the guise established by the Ninth Circuit, the several states, by applying their own particular versions of the implied covenant of good faith and fair dealing, will "regulate" an airline's application and enforcement of its international customer loyalty program.

The United States has international obligations relating to air transportation services. As previously noted, it is a party to over 100 Open Skies agreements with foreign nations that obligate the United States to minimize regulation of foreign air transportation. Also, the United States is a party to the Convention on International Civil Aviation, which requires signatory nations to "collaborate in securing the highest practical degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services." Convention on International Civil Aviation, art. 37, Dec. 7, 1944, 15 U.N.T.S. 102. DOT must

abide by and act consistent with these obligations. *See* 49 U.S.C. § 40105(b)(1)(A) (DOT is required to act "consistently with obligations of the United States Government under an international agreement"). The states are not free to compromise these obligations. *Zschernig v. Miller*, 389 U.S. 429, 438 (1968). Yet the Ninth Circuit's decision assumes such a freedom.

As a result, the Ninth Circuit's decision impairs the ability of the Federal Government to speak with "one voice" in matters relating to foreign air transportation, particularly the adoption and enforcement of consumer protection regulations. It stands as an obstacle to the Federal Government's successful conduct of U.S. international aviation relations and the continued accomplishment of Congress's full objectives under the ADA. In such a case, state law must yield. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.") (internal citations omitted); *S.-Cent. Timber Dev., Inc. v. Wunnike*, 467 U.S. 82, 100 (1984) ("[I]t is crucial to the efficient execution of the Nation's foreign policy that the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments."); *Japan Line, Ltd.*, 441 U.S. at 449 (Foreign Commerce Clause protects the National Government's ability to speak with "one voice" in regulating commerce with foreign countries); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) ("the Federal Government must speak with one voice when

regulating commercial relations with foreign governments"); *U.S. v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.") (internal citation omitted).

B. The Adverse Consequences of the Ninth Circuit's Flawed Preemption Analysis, if Affirmed, Would Be Long-Term and Far-Reaching.

The Ninth Circuit's decision has long-term, far-reaching and potentially disastrous consequences for the international air transportation system. State-by-state jurisprudence that effectively changes the terms of an airline's loyalty program or otherwise regulates an air carrier's agreements, conduct and activities likely will discourage carriers' participation in international alliances. Decreased participation in international alliances will result in increased travel time and decreased travel flexibility and choice for airline passengers. Airlines may choose to limit their participation in other airlines' loyalty programs or in alliances altogether, rather than deal with the uncertainty as to how a particular judge or jury will apply common law implied covenants to a particular dispute.

In fact, as the Ninth Circuit itself has recognized, the application of common law rules to international air transportation services is a concept that is "alien" to the vast majority of the nations that comprise the international aviation trading partners of the United States.[21] *Hosaka v. United Airlines, Inc.*, 305 F.3d

[21] In this regard, it would be difficult for a nation unfamiliar with the application of U.S. common law to perceive the Ninth

989, 999 (9th Cir. 2002) (finding that the negotiating history and text of the Warsaw Convention, a principal instrument of the international aviation system, precluded a federal court from applying the federal common law doctrine of forum non conveniens). There, the Ninth Circuit noted that because forum non conveniens was a creature of the common law, it would have been alien to the civil law jurists representing the majority of countries participating in the negotiation of the Warsaw Convention. *Id*.

State regulation, whether it is based upon common or statutory law, has no legitimate role with respect to international air transportation services. [22]

IV. THE NINTH CIRCUIT'S DECISION IS A BARRIER TO HARMONIZED, INTERNATIONALLY CONSISTENT CONSUMER PROTECTION REGULATIONS.

The Ninth Circuit's decision also is a barrier to the implementation of IATA's core principles on consumer protection regulations. These principles have as their mainstay the notion that airlines and consumers benefit from harmony and consistency in how national governments define and enforce an airline's obligations to its passengers. App. 1a-5a. The Ninth Circuit's decision, however, champions

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Circuit's decision as anything other than a state court's substitution of its judgment for that of the air carrier with respect to the cancellation of a participant's membership in the frequent flyer program.

[22] The legislative history of the ADA and this Court's precedent clearly demonstrate that the ADA's preemption provision encompasses common law claims. *See Brown v. United Airlines, Inc*., Nos. 12–1543, 12–2056, 2013 WL 3388904, at *4-5 (1st Cir. July 9, 2013).

discord. IATA's members adopted the core principles to remedy and prevent the proliferation of differing passenger rights regimes around the globe. App. 1a. The achievement of consistency and uniformity in consumer protection regulations cannot occur if the United States cannot adopt a unified and authoritative position on these issues. IATA's core principles must be implemented at a national or regional (multi-national) level. The state courts are neither competent to consider nor able to effect consistent consumer protection regulation on a case-by-case, state-by-state basis.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' brief, the judgment of the court of appeals should be reversed.

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APPENDIX

APPENDIX

International Air Transport Association Resolution on IATA Core Principles on Consumer Protection

June 2013

RESOLUTION ON IATA CORE PRINCIPLES ON CONSUMER PROTECTION

AFFIRMING member airlines' commitment to the safety and comfort of passengers and to the provision of quality service;

RECOGNIZING that, in accordance with the contract of carriage, airlines strive to get passengers to their destinations on time and are highly incentivized, from a reputational and financial standpoint, to do so;

EXPRESSING CONCERN regarding the proliferation of passenger rights regimes across the globe, with around 40 regimes coming into effect in the last decade;

ACKNOWLEDGING that the resulting overlapping web of passenger rights regimes creates difficulties for airlines and confusion for customers due to a lack of certainty as to which particular regime applies and the potential application of more than one regime in a given situation;

UNDERLINING the unintended consequences of certain existing regimes, such as increasing consumer costs, reducing connectivity and increasing cancelled flights by instituting penalties and the obligation to pay compensation to passengers for delays;

NOTING the existence of an international air carrier liability regime established by the Warsaw Convention 1929 and its amending protocols (the Warsaw system) and the Montréal Convention 1999, which was adopted with a view to replacing the Warsaw system;

SEEKING a united government and industry approach to passenger rights that works for a global business and strikes a balance between ensuring adequate consumer protection and overburdening the industry and its customers with the costs of excessive regulatory compliance;

The 69th IATA Annual General Meeting:

1. ***CALLS UPON*** States to become parties to Montreal Convention 1999 as soon as possible.

2. ***ENDORSES*** the IATA Core Principles on Consumer Protection as the global industry position on best practice for national and regional passenger rights regimes.

3. ***URGES*** governments and regulatory authorities who are developing or revising passenger rights regimes to use these principles as a framework, and to acknowledge voluntary industry commitments where applicable;

4. ***ENCOURAGES*** all member airlines in jurisdictions where such regimes are being considered to proactively enter into the debate on the basis of these principles.

5. ***REQUESTS*** the International Civil Aviation Organization (ICAO) to use these principles as the basis for any ongoing ICAO initiatives on consumer protection.

PROPOSED CORE PRINCIPLES ON CONSUMER PROTECTION

- National and regional legislation should be consistent and in accordance with the international treaty regimes on air carrier liability, established by the Warsaw Convention 1929 (and its amending instruments) and the Montreal Convention 1999;
- National and regional legislation should not interfere with another States' ability to make legitimate policy choices. Passenger rights legislation, in accordance with the Chicago Convention 1944, should only apply to events occurring within the territory of the legislating State, or outside that territory with respect to aircraft registered there.
- Passenger rights legislation should allow airlines the ability to differentiate themselves through individual customer service offerings, thereby giving consumers the freedom to choose an airline that corresponds with their desired price and service standards. Governments should consider acknowledging voluntary industry commitments; government regulations should form the "lowest common denominator" and market forces should be allowed to determine additional standards of service levels.
- Passengers should have access to information on their legal and contractual rights and clear guidance on which regime applies in their specific situation;
- Passengers should have clear, transparent access to the following information:

  - o fare information, including taxes and charges, prior to purchasing a ticket;
  - o The airline actually operating the flight in case of a codeshare service;
- Airlines should employ their best efforts to keep passengers regularly informed in the event of a service disruption;
- Airlines will establish and maintain efficient complaint handling procedures that are clearly communicated to passengers;
- Airlines should assist passengers with reduced mobility in a manner compatible with the relevant safety regulations and operational considerations;
- Passenger entitlements enshrined in regulations should reflect the principle of proportionality and the impact of extraordinary circumstances;
  - o There should be no compromise between safety and passenger rights protection
    - ▪ Safety-related delays or cancellations, such as those resulting from technical issues with an aircraft, should always be considered as extraordinary circumstances such as to exonerate air carriers from liability for such delays and cancellations;
  - o The industry recognizes the right to rerouting, refunds or compensation in cases of denied boarding and cancellations, where circumstances are within the carrier's control;

  - The industry recognizes the right to re-routing, refunds or care and assistance to passengers affected by delays where circumstances are within the carriers control;
  - In cases where delays or disruptions are outside an airline's control, governments should allow market forces to determine the care and assistance available to passengers;
  - The responsibilities imposed by the regulator, related to both care and assistance as well as compensation, must be fairly and clearly allocated between the different service providers involved and should not impact on the contractual freedom of all service providers.
- Passengers should be treated comparably across transport modes, taking into account the particularities of each;
- Legislation should be clear and unambiguous