No. _____

In the
Supreme Court of the United States

PHI AIR MEDICAL, LLC,
Petitioner,

v.

TEXAS MUTUAL INSURANCE COMPANY; HARTFORD UNDERWRITERS INSURANCE COMPANY; TASB RISK MANAGEMENT FUND; TRANSPORTATION INSURANCE COMPANY; TRUCK INSURANCE EXCHANGE; TWIN CITY FIRE INSURANCE COMPANY; VALLEY FORGE INSURANCE COMPANY, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Airline Deregulation Act of 1978 ("ADA") broadly preempts any state law or regulation "related to a price, route, or service of an air carrier." 49 U.S.C. §41713(b)(1). Air-ambulance companies are federally licensed "air carriers." Nonetheless, the Texas Workers' Compensation Act dictates the amounts air-ambulance companies may charge and collect for air-transport services provided to individuals covered by workers' compensation. Specifically, workers' compensation insurers need only pay a "fair and reasonable" rate—calculated here to be 125% of the Medicare rate—and air-ambulance companies are forbidden from billing patients or their employers for the service. Given that such schemes dictate what the only party that can be charged must pay to air carriers, the Fourth, Tenth, and Eleventh Circuits have held that comparable state laws constitute impermissible rate regulation preempted by the ADA, but a divided Texas Supreme Court upheld the Texas system at issue here.

The questions presented are:

1. Whether the ADA preempts a state workers' compensation system that limits the prices an air-ambulance company can charge and collect for its air-transport services.

2. Whether the McCarran-Ferguson Act exempts such a system from ADA preemption.

PARTIES TO THE PROCEEDING

Petitioner, who was the respondent below, is PHI Air Medical, LLC.

Respondent insurance companies, who were petitioners below, are Texas Mutual Insurance Company, Hartford Underwriters Insurance Company, TASB Risk Management Fund, Transportation Insurance Company, Truck Insurance Exchange, Twin City Fire Insurance Company, Valley Forge Insurance Company, and Zenith Insurance Company.

Respondent Texas Department of Insurance, Division of Workers' Compensation was a petitioner below.

CORPORATE DISCLOSURE STATEMENT

PHI Air Medical, LLC is a d/b/a of PHI Health, LLC. PHI Health, LLC's two members are PHI Corporate, LLC, and Air Medical Equity Holding, LLC, both of which are wholly owned by PHI Group, Inc. No publicly held company owns 10% or more of the stock in PHI Group, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the Texas District Court, 53rd Judicial District; the Texas Court of Appeals, Third District; and the Texas Supreme Court:

- *Tex. Mut. Ins. Co. v. PHI Air Med., LLC*, No. D-1-GN-15-004940 (Tex. Dist.), judgment entered Jan. 11, 2017;
- *PHI Air Med., LLC v. Tex. Mut. Ins. Co.*, No. 03-17-00081-CV (Tex. App.), judgment entered Jan. 31, 2018;
- *Tex. Mut. Ins. Co. v. PHI Air Med., LLC*, No. 18-0216 (Tex.), judgment entered Jun. 26, 2020.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

In 1978, Congress abandoned a regime where federal regulators dictated what federally licensed air carriers could charge and collect for their services and enacted the Airline Deregulation Act ("ADA"). To prevent states from frustrating its deregulatory intent by supplanting discarded federal regulations with regulations of their own, Congress included an express preemption provision that forbids states from enacting or enforcing any laws "related to" an air carrier's rates, routes, or services. In a series of cases, this Court has emphasized that this language "express[es] a broad preemptive purpose" and preempts not just state efforts to directly regulate rates, routes, or services, but any state law that has "a connection with or reference to" those matters, even if the law is "of general applicability" and its effect on rates, routes, or services "is only indirect." *Morales v. Trans World Airlines*, *Inc.*, 504 U.S. 374, 383-84, 386 (1992).

The state law at issue here is plainly preempted. It not only *relates to* rates, but regulates them directly by dictating what a federally licensed air carrier can charge and collect for services. Air-ambulance companies are indisputably "air carriers" under the ADA and are federally licensed as such. Nonetheless, the Texas Workers' Compensation Act ("TWCA") dictates "the maximum amount payable" by workers' compensation insurance carriers to air-ambulance providers for air-transportation services, and it forbids air-ambulance providers from billing anyone else for those services. In determining the "maximum amount payable," state regulators and courts calculate a "fair and reasonable rate" by assessing a range of policy

factors, including the legislature's desire "to achieve effective medical cost control." Here, Texas calculated the rates for Petitioner PHI's emergency air-transport services to be 125% of the Medicare rate—which is far below PHI's actual, market-determined, billed rates.

This state-law scheme is thus not just "related to" air-carrier rates; it sets them directly by dictating what the one and only party that can be charged for the services must pay. ADA preemption cases do not come any more straightforward than that. Unsurprisingly, every other court that has addressed a similar scheme—including the Fourth, Tenth, and Eleventh Circuits—has found it preempted by the ADA. In the decision below, however, a divided Texas Supreme Court broke from that wall of authority. That decision is plainly wrong, and this Court should grant certiorari to correct the Texas Supreme Court's erroneous interpretation of federal law, eliminate the conflict with three federal courts of appeals, and restore the deregulation that Congress established.

This Court should also grant certiorari to confirm that the Texas regime is not condemned by the ADA only to be saved by the McCarran-Ferguson Act ("MFA"). The MFA protects state laws that were enacted to regulate "the business of insurance" from federal preemption. This Court's cases make clear that this narrow inversion of ordinary Supremacy Clause principles is quite limited: "the business of insurance" refers only to the policy relationship between insurers and insureds, and not the relationships between insurers and third-party providers. Accordingly, many of the courts that have found that the ADA preempts state efforts to dictate

air-ambulance rates have also rejected the argument that the MFA saves those laws. Similarly, outside the air-ambulance context, courts have held that state laws dictating the rates that medical providers may collect from insurers for their services are not covered by the MFA. The Texas Court of Appeals ruled for Petitioner on both the ADA and the MFA issues, and so both issues were pressed below and passed on by a majority of the Texas Supreme Court justices (albeit in concurring and dissenting opinions, as the majority erroneously found no ADA preemption). The Court may therefore wish to grant review on both questions presented to definitively resolve this case and to clarify that the ADA precludes state efforts like Texas' and nothing in the MFA saves them. At a minimum, however, the Court should not leave unaddressed the threshold ADA question given the split created by the Texas Supreme Court's erroneous decision.

OPINIONS BELOW

The Texas Supreme Court's opinion is available at 2020 WL 3477002 and reproduced at App.1-82. The Texas Court of Appeals' opinion is reported at 549 S.W.3d 804 and reproduced at App.83-103. The judgment of the 53rd Judicial District Court of Texas is available at 2017 WL 2829336 and reproduced at App.104-106.

JURISDICTION

The Texas Supreme Court issued its decision on June 26, 2020. On March 19, 2020, this Court extended the deadline to file any certiorari petition due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the ADA and the MFA are reproduced in the appendix.

STATEMENT OF THE CASE

A. The Airline Deregulation Act

Until Congress enacted the ADA, air carriers were subject to pervasive regulation akin to that in other regulated industries. Federal regulators oversaw the rates, routes, and services for interstate travel, and states imposed substantial regulation on intrastate services. In particular, regulators dictated the rates that carriers could charge and collect. The resulting fares tended to be high, and competition was limited or non-existent. *See* H. Rep. No. 95-1211, at 1-4 (1978). Congress opted for a different approach in the ADA.

Congress enacted the ADA in 1978 to promote "efficiency, innovation, and low prices" for air transportation through "maximum reliance on competitive market forces." 49 U.S.C. §40101(a). The Act sought to guarantee that "prices, route structures, and the nature and variety of air services [would] be set by the independent forces of the free market and airline management decisions." S. Rep. No. 95-631, at 5 (1978).

"To ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S. at 378, the ADA includes an express preemption provision, which provides that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to

a price, route, or service of an air carrier." 49 U.S.C. §41713(b).

This Court has addressed the ADA's preemptive scope in three cases. In *Morales*, the Court held that the ADA preempted Texas' effort to regulate airline fare advertisements through its generally applicable consumer protection statutes. The Court's analysis focused on the statutory phrase "relating to," which reflected Congress' "broad pre-emptive purpose" and mirrored the language of the "deliberately expansive" preemption provision in the Employee Retirement Income Security Act of 1974. 504 U.S. at 383-84. The Court accordingly concluded that the ADA preempts all state laws "having a connection with or reference to airline rates, routes, or services." *Id.* at 384. Reinforcing the breadth of that standard, the Court explained that ADA preemption obtains even if the state law is "of general applicability," the law does not "actually prescrib[e] rates, routes, or services," the effect of the law on rates, routes, or services "is only indirect," or the law is "consistent" with federal law. *Id.* at 385-87.

This Court's two other ADA-preemption cases involved frequent flyer programs. In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), plaintiffs challenged American Airlines' efforts to make changes to its frequent flyer program. Even though the plaintiffs sought only money damages for the devaluation of their miles, the Court readily concluded that their claims "relate[d] to" airline rates and services. *Id.* at 226. The Court further explained that the "ban on enacting or enforcing any law 'relating to rates, routes, or services'" means that "States may not

seek to impose their own public policies … on the operations of an air carrier." *Id.* at 229 n.5.

Similarly, in *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014), an airline customer alleged that Northwest breached the implied covenant of good faith when it terminated his rewards program membership. The Court again had no trouble concluding that the plaintiff's claim "relate[d] to" airline prices and services, as he was seeking reinstatement in a rewards program that provided discounts on prices and upgrades on services. *Id.* at 284. The Court reiterated that the phrase "related to" expresses "a broad pre-emptive purpose," and it reaffirmed the "broad interpretation of" the provision adopted in *Morales* and *Wolens*. *Id.* at 280-81. The court found the implied covenant claim preempted by the ADA because it was "based on a state-imposed obligation." *Id.* at 285.[1]

B. The McCarran-Ferguson Act

The MFA saves certain state laws from preemption. Congress enacted the MFA in response to this Court's decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which for the first time subjected insurance companies to the federal antitrust laws. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). To allay fears that the application of federal law to insurance companies would undermine the traditional state

[1] The Court has also construed a comparable preemption provision in the Federal Aviation Administration Authorization Act (FAAAA) and emphasized its breadth. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008).

power to regulate the insurance industry, Congress enacted the MFA to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Id.* As relevant here, the MFA provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b).

The key phrase of this so-called reverse-preemption provision is "the business of insurance." This phrase refers not to all business matters that affect insurance companies, but only to "the relationship between the insurance company and its policyholder." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969). Laws regulating the "business of insurance" include, for example, laws regulating the kinds of policies that may be issued or laws addressing "the underwriting and spreading of risk." *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979). But federal laws do not regulate "the business of insurance" just because they affect insurers' bottom lines or involve an insurance company's interactions with third-party providers of services to insureds. *Id.* If they did, the MFA would frustrate a large body of federal law. How much an insurer pays third-party providers to fulfill its promises to its insureds might involve the "business of insurance companies," but it is not "the business of insurance" for MFA purposes. *Id.* at 217.

C. Factual and Procedural Background

1. PHI is one of the leading providers of emergency air-ambulance services in the United

States, providing critical, life-saving air transportation when ground transportation is not a viable option. App.4. Air ambulances play a life-saving role. Especially in rural areas without "readily accessible advanced-care facilities such as trauma or burn centers," air ambulances' capacity to transport "critically injured patients ... within the first hour after injury occurs—the so-called 'golden hour'—can significantly improve chances of survival and recovery." U.S. Gov't Accountability Office, GAO-17-637, *Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight* 1 (2017).

PHI is licensed to operate as an "air carrier" by the Federal Aviation Administration and is authorized to provide interstate air transportation as an "air taxi" by the Department of Transportation ("DOT"). App.4. The DOT has supervisory authority over air ambulances and, under the ADA, can correct unfair and anticompetitive behavior or other perceived marketplace distortions. *See* 49 U.S.C. §§40101(a)(9), 41712. In light of these federal licenses and federal oversight, courts have uniformly held that air-ambulance companies are "air carriers" under the ADA. *See, e.g.*, *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 763-64 (4th Cir. 2018).

PHI provides emergency air-ambulance services to patients around the country, including in Texas. App.4. PHI does not self-dispatch; instead, it deploys air ambulances at the request of first responders or third-party medical professionals. App.4. PHI transports all patients for whom care is requested in Texas, regardless of insurance status or ability to pay

(which PHI typically would not know at the time of transport). App.4. PHI's practical ability to recover its charges, however, depends largely on the patient's ability to pay, which often depends on the patient's insurance coverage. And when it comes to individuals injured on the job and covered by workers' compensation insurance policies, Texas law directly dictates who and what may be charged for air-ambulance services.

2. In 1989, Texas enacted the TWCA and created what is now the Division of Workers' Compensation (the "Division") to implement and enforce its provisions. App.5. The basic purposes of the TWCA are to save injured employees "the time and litigation expense inherent in proving fault in a common law tort claim" while providing employers with an "exclusive remedy defense against the tort claims of its employees for job related injuries." *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 349 (Tex. 2009).

The TWCA accomplishes these dual ends by encouraging employers to purchase workers' compensation insurance to cover employees injured on the job. If such insurance is purchased, the TWCA generally protects both the employer and employee from being billed for covered medical services. When a medical provider treats an injured employee covered by such a policy, the provider must submit its bill directly to the insurer, Tex. Lab. Code §408.027(a), and generally may not send any bill to the employee or employer, *id.* §413.042(a).

The TWCA does not leave the rates for such services to market forces or require the insurer to pay the provider's bill in full. Instead, the Division

promulgates fee guidelines establishing "the maximum amount payable to" a provider, 28 Tex. Admin. Code §134.1, calculated based on policy factors including the legislature's desire for "effective medical cost control." Tex. Lab. Code §413.011(d). Unless they have contracted for a different rate, insurers need only pay the state-dictated rate from the guidelines. If there is no applicable guideline for the type of services provided, the insurer need only pay a "fair and reasonable" amount, 28 Tex. Admin. Code §134.1(e)(3), (f), determined by reference to the same policy factors.

If the provider disagrees with the guidelines rate or the amount the insurer deemed "fair and reasonable," its only recourse is to the Division, *id.* §413.031(a), then the State Office of Administrative Hearings, *id.* §413.031(k), and then the Texas courts, *id.* §413.031(k-1). Whatever rate is approved or established in those proceedings becomes the "maximum amount payable to" a provider. *Id.* §134.1(a); *see* App.6 n.3. Medical providers, including air ambulances, are forbidden from billing the patient or the employer for the difference between the state-established rate and their actual market rate. Tex. Lab. Code §413.042(a).

3. Between 2010 and 2013, PHI provided air-ambulance services to patients covered by workers' compensation policies issued by Respondent insurers. App.7. As required by Texas law, PHI submitted its bills directly to Respondents. Instead of paying the amounts billed, Respondents paid 125% of the Medicare rate, contending that one of the Division's fee guidelines dictated that rate. App.7. That amount

is substantially lower than the actual, market-based rate PHI billed. For the 33 transports directly at issue here—only a small fraction of the more than 1,800 air-ambulance fee disputes currently pending before the Division—Respondents paid less than 30% of PHI's actual rates. *See* Attachment 1 to Decision and Order, *In Re Reimbursement of Air Ambulance Services Provided By PHI Air Medical*, No. 454-15-0681.M4, et al. (Tex. State Office of Admin. Hearings Sept. 8, 2015) ("SOAH Order").

PHI filed fee disputes with the Division, arguing that the ADA preempted the TWCA's state-dictated rates. App.7-8. The Division initially agreed and ordered Respondents to pay the billed amounts in full. App.8. Respondents appealed to the State Office of Administrative Hearings, where an ALJ reversed on the basis that the MFA rendered the ADA preemption provision inoperative. App.8. The ALJ then determined that a "fair and reasonable" rate would be 149% of the Medicare rate and that any higher rate would not "achieve effective medical cost control, as required by" Texas law. SOAH Order at 19.

PHI and Respondents both sought review in state trial court. App.9-10. The trial court granted summary judgment for Respondents, ruling that the ADA does not preempt the TWCA and that the insurers need only pay 125% of the Medicare rate, which it deemed "fair and reasonable." App.10.

PHI appealed and the Texas Court of Appeals reversed, holding that the TWCA's state-dictated rates are preempted by the ADA and not saved by the MFA. App.83-103. The court explained that "[t]he relevant statutes and rules set the rates that can be

recovered by PHI, as an air carrier, for transporting patients," and that the ADA accordingly "preempts those statutes and rules." App.91. The court then held that the MFA does not save the Texas regime, explaining that "the overarching focus of the [TWCA] is on ensuring prompt medical care for injured workers without those workers having to resort to the legal system, not on the relationship between the Insurers and their policyholders." App.98.

The Texas Supreme Court granted review and, in a divided decision, reversed. The court rejected ADA preemption because the TWCA "does not reference air carrier prices" or have "a significant effect on [PHI's] prices." App.17. The court acknowledged that "the fair and reasonable reimbursement amounts determined by the trial court and some administrative actors were less than the full amount [PHI] billed," but deemed that irrelevant. App.20. According to the court, "the full amount billed … is not the starting point for measuring significant effect." App.20. Instead, the court concluded that the relevant benchmark is the price that state contract law would imply absent an agreement on price—*i.e.*, "a fair or reasonable price." App.20-21. The court thus concluded that the TWCA's "fair and reasonable" standard has no significant effect on price. The court acknowledged that "some federal circuits have found preemption of workers' compensation rules regarding air ambulance services," but it insisted that "those cases are different." App.22.

Justice Bland did not join the majority opinion, but concurred in the judgment, joined by three justices who joined the majority opinion in full. The

concurring justices concluded that the MFA "shields" the TWCA "from federal preemption." App.53-54.

Justice Green dissented, joined by Chief Justice Hecht. The dissenters would have held that the ADA preempts the TWCA because the latter dictates rates for services provided by federally licensed air carriers. App.55. As they explained, the TWCA "clearly relates to PHI's prices because it controls the amount that PHI is entitled to collect from the insurer, the party from whom the TWCA prescribes reimbursement of medical benefits." App.61. The dissenters further concluded that the MFA did not save the TCWA, because the TWCA "regulates the relationship between the insurer and third-party service providers rather than the 'business of insurance.'" App.78-82.

REASONS FOR GRANTING THE PETITION

The Texas Supreme Court's decision holding that the ADA does not preempt the TWCA's limits on whom and what air ambulances can charge and collect for their services is clearly wrong, conflicts with the decisions of three federal courts of appeals, and implicates an important and recurring national issue. Texas law dictates that PHI can recover only a "fair and reasonable" amount determined by state officials and set well below market rates for services rendered to patients covered by workers' compensation insurance. It further provides that neither the patients nor their employers can be charged for those services. Those limits plainly "relate to" rates, routes, and services under this Court's precedents. Indeed, the TWCA directly dictates the rates that a federally licensed air carrier can collect for its services in clear

contravention of the ADA's express preemption provision.

Until the decision below, every court to consider similar state efforts to dictate rates for air-ambulance services had found them preempted. The Fourth and Tenth Circuits reached that conclusion under identical circumstances involving state workers' compensation programs. The Eleventh Circuit reached that conclusion in the context of state-mandated limits on air-ambulance recovery for services provided to injured motorists. And numerous district courts and state courts of appeals have reached that conclusion in identical or similar contexts. The Texas Supreme Court stands alone, and the Court should grant review of the first question presented to eliminate the split and to restore Congress' deregulatory vision.

The Court should also review the second question presented, which asks whether the MFA saves this kind of rate regulation from preemption under the ADA. The MFA is an unusual provision, a sort of inverse Supremacy Clause, that preserves a narrow category of state laws—those that regulate the "business of insurance"—from federal preemption. Consistent with that unusual nature, its scope is limited: The "business of insurance" covers only the relationship between the insurer and the insured and does not extend to insurers' interactions with third parties, like healthcare providers. The TWCA's state-dictated rates plainly regulate the latter, as they dictate what an insurer must pay an air carrier and leave the insurer-insured relationship undisturbed. The Texas Court of Appeals ruled for Petitioner on

both the ADA and MFA issues and so both issues were pressed in the Texas Supreme Court, where a majority of justices passed on the MFA issue, albeit in concurring and dissenting opinions. The views expressed by four concurring justices depart from decisions of this Court and the federal circuits. Thus, this Court should grant review on both questions. At a minimum, however, this Court should grant review on the first question and resolve a clear split of authority on a recurring issue of national importance.

I. The Court Should Review The ADA Question.

A. The Decision Below Is Incorrect, Because Texas Impermissibly Dictates the Rates Air Carriers May Charge and Collect for Their Services.

1. While most of this Court's ADA cases have involved indirect efforts to regulate rates and services and have required this Court to delineate the bounds of "relates-to" preemption, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Texas has attempted to dictate precisely how much a federally licensed air carrier can charge for its core service. State officials determine a "fair and reasonable" rate based on policy considerations having little or nothing to do with market rates. What is more, Texas prevents the air carrier from charging patients or employers anything. Texas thus dictates what the one and only party a federally licensed air carrier can charge for a service must pay. That is indistinguishable from what federal regulators did in the "bad old days" before deregulation, *see* H. Rep. No. 95-1211, at 1-4, and is squarely preempted by the

ADA. The TWCA regulates rates directly, and *a fortiori* it impermissibly "relates to" prices and services.

The ADA expressly preempts any state law, regulation, or other provision "having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. §41713(b)(1). This language includes three criteria for preemption: a challenged provision must (1) affect an "air carrier"; (2) have the "force and effect of law"; and (3) be "related to" prices, routes, or services. The first two criteria are not disputed: PHI is a federally licensed "air carrier" operating under Subpart II of the ADA, and the TWCA's state-dictated rates—whether set by an agency or a court—have the "force and effect of law." *See* App.4.

The only disputed question is whether the TWCA's limitations on whom and what air ambulances can charge and collect are "related to" air-ambulance rates. Under this Court's precedents, that question is not close. As explained, by dictating who and what an air carrier may charge and collect for its core service, Texas sets the "fair and reasonable" rate for the service. That not only relates to rates, that is rate regulation pure and simple. At a bare minimum, however, that regulation self-evidently "relates to" rates. This Court has repeatedly adopted a "broad interpretation of" the ADA's preemption provision and held that it expresses "a broad pre-emptive purpose." *Ginsberg*, 572 U.S. at 280-81. A state law is thus "related to" air-carrier rates whenever it has a "connection with or reference to [air carrier] rates," even if the law is "of general applicability," or its effect

on rates "is only indirect." *Morales*, 504 U.S. at 384-87; *see also Rowe*, 552 U.S. at 371.

Under that expansive standard, it is clear as day that the TWCA's provisions are "related to" PHI's rates. For covered workers injured on the job, Texas law requires the air ambulance to send its bill directly to the insurer providing workers' compensation coverage to the patient's employer. Neither the injured employee nor the employer can be charged. Texas law then dictates the maximum amount that the air ambulance can obtain from the insurer for the service it provided, and Texas law forbids the air ambulance from recovering the difference between that state-determined amount and its actual, billed rate. The state-determined amount is the "maximum" rate that air ambulances can obtain for their services, 28 Tex. Admin. Code §134.1, and because air ambulances are prohibited from seeking payment from anyone else, the state-determined amount is the *only* rate that an air ambulance can collect for its services. In short, what Texas does in determining the "fair and reasonable" rate that an air carrier may receive for its service is materially indistinguishable from what federal regulators did in the pre-ADA world. It plainly relates to rates, and is just as plainly preempted.

The TWCA and its implementing framework likewise unquestionably have a "significant impact" on air-ambulance rates. *Morales*, 504 U.S. at 390. Moreover, by setting the maximum amount payable based on policy factors that expressly include the legislature's desire for "effective medical cost control," Tex. Lab. Code §413.011(d), Texas does not even hide

that it is "seek[ing] to impose [its] own policies … on the operations of" air ambulances, *Wolens*, 513 U.S. at 229 n.5, thereby "produc[ing] the very effect that the [ADA] sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces,'" *Rowe*, 552 U.S. at 372.

2. The Texas Supreme Court reached a contrary conclusion only by erring at every turn. At the outset, the court (mis)read *Morales* as establishing a rigid "test," under which a state provision is preempted only if it either (1) "expressly references" air-carrier rates, routes, or services or (2) has a significant effect on air carrier rates, routes, or services. App.15-16 (brackets omitted). But this Court has never applied such a cramped approach to ADA preemption, including in *Morales*; instead, it has been at pains to emphasize the ADA's "broad pre-emptive purpose." *Ginsberg*, 572 U.S. at 284; *Wolens*, 513 U.S. at 223; *Morales*, 504 U.S. at 384. Accordingly, the Texas Supreme Court's preemption analysis was flawed from the start.

Regardless, the court's reasoning fails on its own terms, as state officials administering the TWCA set rates directly. The court concluded that PHI did not satisfy the first prong of its supposed "test" because "Texas's fair and reasonable standard for reimbursement is generally applicable: it does not reference air carrier prices." App.17; *see also* App.22 (distinguishing cases where "the state rules at issue expressly referenced air ambulance prices"). But the fact that the TWCA empowers state officials to set the "fair and reasonable" rates for all manner of services, including the air-ambulance service performed by federally licensed air carriers, and is not addressed

exclusively to the services of air carriers, makes no difference. *Morales* rejected any distinction between airline-specific laws and generally applicable laws as "utterly irrational." 504 U.S. at 386. The Court correctly recognized that "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Id.* Indeed, all three of this Court's ADA preemption cases have involved generally applicable laws in their particularized application to air carriers. *See Ginsberg*, 572 U.S. 273 (breach of implied covenant claim); *Wolens*, 513 U.S. 219 (consumer fraud law).

The court's conclusion that the TWCA's caps on payments to air ambulances do not have a "significant effect" on air ambulances' rates is even more mystifying. App.17-22. Applying the TWCA, state officials dictate the maximum amount that an air carrier can recover from the only party it can charge for a service. The effect on rates does not get any more significant or direct than that. What is more, the maximum rate calculated by Texas officials is well below market levels. Indeed, it is undisputed that 125% of the Medicare rate is less than 30% of the actual amounts that PHI billed for its services. *See* pp.10-11, *supra*. If such a substantial reduction in payments for services rendered does not have a "significant effect" on an air carrier's rates, "it is unclear what meaning the phrase would have left." *Cheatham*, 910 F.3d at 767-68.[2]

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[2] To the extent the real concern of Texas officials or the Texas Supreme Court was that market forces do not operate fully in the market for air-ambulance services based on the "dynamics of the

The Texas Supreme Court concluded otherwise for two equally misguided reasons. First, the court drew a dubious distinction between the "price" that PHI charges and the "rates" that insurers pay. Because the TWCA does not forbid PHI from *asking* to be paid the full price for its services, the court concluded that the TWCA does not significantly affect PHI's prices, even though the TWCA forbids PHI from actually *collecting* anything above the maximum rate. App.17-19. That reasoning is spurious. As the dissent recognized, "[i]t does not matter whether PHI cannot recoup the price of its services because it is limited in what it can charge or because the insurer is limited in what it must pay." App.57-58. A state law that told air carriers they could charge anything they wanted for passenger service, but could only collect much lower state-approved rates, would plainly be preempted. The TWCA is no different. The court's distinction also fails as a textual matter. Congress defined "price" in the ADA to mean "a rate, fare, or charge." 49 U.S.C. §40102(a)(39). Nothing in that expansive and disjunctive definition suggests a state can evade preemption by regulating the rates air carriers can collect, but not the prices they can charge.

The court's second rationale for finding no "significant effect" was its view that "the full amount billed for air ambulance services is not the starting

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air transportation industry," that only underscores the problem. *Morales*, 504 U.S. at 389. The entire pre-ADA regime was premised on the view that the prices for the services of air carriers could not be left to market forces. The ADA rejected that premise and included an express preemption provision to prevent re-regulation by states employing a different policy view about when and where market forces could be trusted.

point for measuring significant effect." App.20. In the court's view, because air-ambulance patients do not negotiate a price in advance, the law would "impl[y] a fair and reasonable price," which is the proper benchmark for assessing "significant effect." App.20-21. But that process of state courts implying a fair and reasonable price would itself be preempted. *See*, *e.g.*, *Ginsberg*, 572 U.S. at 286 (holding that the ADA preempts state-law efforts to "impl[y]" "community standards of decency, fairness, or reasonableness" into parties' contracts); *see Schneberger v. Air Evac EMS, Inc.*, 749 F.App'x 670, 678 (10th Cir. 2018) ("[A]n Oklahoma state-law claim that requires a court to determine a reasonable price for air-ambulance services self-evidently affects the price of those services."). In short, the Texas Supreme Court's strained efforts to find that a statute that empowers state officials to determine a "fair and reasonable" rate that is the maximum that air carriers can collect from the only party they can charge does not have a "significant effect" on prices are wholly unpersuasive.[3]

[3] In all events, it is not even correct that the "fair and reasonable" price that Texas courts could infer as a matter of contract law would be the same as the maximum rate set under the TWCA. Whereas the contract-law standard seeks to provide each party with the benefit of its bargain in accordance with general contract principles, *see Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966), the TWCA standard directs that prices be set "to achieve effective medical cost control" and in light of "increased security of payment," Tex. Lab. Code §413.011(d).

B. The Decision Below Squarely Conflicts With Decisions From The Fourth, Tenth, and Eleventh Circuits.

Until the decision below, courts had uniformly held that the ADA preempts state efforts to dictate who and what can be charged and collected for air-ambulance services. The Tenth Circuit did so with respect to Wyoming's Worker's Compensation Act in *EagleMed LLC v. Cox*, 868 F.3d 893 (10th Cir. 2017). Air-ambulance providers who treat injured workers in Wyoming are required to submit bills directly to the state Workers' Compensation Division and are prohibited from billing injured workers. *Id.* 897-99. As in Texas, the state dictates the amount paid to providers, and the approved rates for air-ambulance services are well below market rates. *Id.* The Tenth Circuit had no trouble concluding that Wyoming's state-dictated rates were "related to" airline rates and therefore preempted: "The state statute and rule at issue in this case expressly establish a mandatory fixed maximum rate that will be paid by the State for air-ambulance services provided to injured workers covered by the Worker's Compensation Act." *Id.* at 902.

The Fourth Circuit reached the same conclusion with respect to West Virginia's workers' compensation system in *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018). Under the West Virginia workers' compensation system, state law sets the "maximum allowable recovery" for air-ambulance services provided to private employers' injured employees. *Id.* at 758. The state uses a similar rate-setting mechanism for the medical expenses of its own

employees. *Id.* Like the Tenth Circuit, the Fourth Circuit readily concluded that such state-dictated rates were preempted: "The challenged West Virginia laws clearly have a connection to air ambulance prices" because they "directly reference air ambulance payments" and "establish the maximum amounts" that air-ambulance companies may collect. *Id.* at 767. There was "nothing subtle or indirect" about West Virginia's approach, *id.*, which "simply dictated a relatively low reimbursement rate and prohibited any additional recovery," *id.* at 758. "If such actions involving an air carrier are not 'related to price,' it is unclear what meaning the phrase would have left." *Id.* at 767-68.

The Eleventh Circuit likewise concluded that the ADA preempts state-law limits on reimbursement to air-ambulance providers, albeit in the context of injured drivers, rather than injured workers. *See Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259 (11th Cir. 2018). Florida's Motor Vehicle No-Fault Law requires car insurance policies to provide personal injury protection for persons injured in automobile accidents. *Id.* at 1262. As relevant here, Florida law limits an insurer's payment for "emergency transport and treatment" to 200% of the Medicare rate and prohibits the air-ambulance provider from billing the driver for amounts above that rate. *Id.* at 1262-63. An air-ambulance company challenged the latter prohibition, and like the Fourth and Tenth Circuits, the Eleventh Circuit was "without doubt" that the state law was preempted: Because the challenged provision "prohibits medical providers from charging in excess of the fee schedule amount, [it] operates as a 'state-imposed regulation' on air

carrier rates" and is therefore preempted. *Id.* at 1270, 1272.[4]

The decision below is squarely in conflict with these decisions. Wyoming, West Virginia, Florida, and Texas all sought to impose maximum rates that insurers must pay for air-ambulance services and prohibited air-ambulance companies from charging anyone else for the difference between those state-dictated rates and the market rates. The three federal courts of appeals to consider such state efforts all reached the common-sense conclusion that such state laws impermissibly dictate rates and certainly "relate to" rates. The Texas Supreme Court, in contrast, found no preemption problem with Texas' materially indistinguishable scheme. The Texas Supreme Court stands alone and in error.

The Texas Supreme Court offered three supposed distinctions between this case and the circuit precedents, but none withstands scrutiny. First, the court noted that the state laws in those cases "expressly referenced air ambulance prices, triggering a different part of the *Morales* preemption test." App.22. But as explained, the court's conception of the "*Morales* preemption test" and its different parts was flawed, and a state-law regime is equally problematic whether it set maximum rates for air ambulances in

[4] Several other courts have reached the same conclusion. *See, e.g.*, *Guardian Flight, LLC v. Godfread*, 359 F.Supp.3d 744, 754-56 (D.N.D. 2019), appeal filed (Feb. 20, 2019); *Air Evac EMS, Inc. v. Sullivan*, 331 F.Supp.3d 650, 659-64 (W.D. Tex. 2018), appeal filed (Sept. 5, 2018); *EagleMed, LLC v. Travelers Ins.*, 424 P.3d 532, 539-40 (Kan. Ct. App. 2018), review granted (Dec. 19, 2018).

particular or for all providers, including air ambulances. *See* pp.18-19, *supra*.

Second, the court noted that the state-law systems in the federal cases "established a maximum fee cap." App.22. But Texas law, just like the laws in Wyoming, West Virginia, and Florida, establishes a maximum fee cap for air-ambulance services—a "fair and reasonable" amount based on statutory factors and calculated here to be 125% of the Medicare rate. To the extent the Texas legislature itself did not set a specific reimbursement rate for air ambulances (as Florida's legislature did), but left even more discretion with state officials to set a "fair and reasonable" maximum rate, that certainly does not make the resulting rate regulation any less preempted.

Third, the Texas Supreme Court stated that the federal decisions were distinguishable because the air-ambulance companies there "challenged a prohibition on billing." App.22. But here PHI challenged the prohibition on billing the patient or employer in the alternative. *See* App.14 n.8 ("PHI sought a declaration in the alternative that the balance-billing prohibition is preempted."). That is the precise same procedural posture as in *Cox* and *Cheatham*. In both those cases, the air-ambulance companies, just like PHI here, challenged the billing prohibition in the alternative to their principal challenges to the state-dictated payment caps. *See* Amended Complaint ¶44, *EagleMed LLC v. Wyoming ex rel. Dep't of Workforce Servs.*, No. 15-cv-00026 (D. Wyo. June 18, 2015); Amended Complaint ¶¶89-93, *Air Evac EMS, Inc. v. Cheatham*, No. 16-cv-05224 (S.D. W. Va. Aug. 25, 2016).

Nor is the distinction with the Eleventh Circuit's *Bailey* decision material. To be sure, the company there focused its challenge on the prohibition on billing the injured motorist for the difference between market rates and the maximum that could be charged to the insurance carrier. But it is the combined effect of the state-dictated maximum rate an insurer must pay and the prohibition on billing others that creates the undeniable preemption problem. Either provision standing alone may impermissibly "relate to" rates, but together they not only relate to rates but dictate rates by specifying how much the only party that can be charged for a service provided by an air carrier must pay. Which aspect of the regime a challenger focuses on might impact the remedy, but it makes no difference as to whether the combined effect of the provisions is preempted. And it certainly does not provide a basis for denying a conflict when the Texas Supreme Court alone upheld the combined effect of the two provisions, and the Fourth and Tenth Circuits reached the opposite conclusion in the identical procedural posture.

In short, three federal courts of appeals have addressed materially similar state schemes and concluded that the ADA preempts the same sort of state-established rates at issue here. The Texas Supreme Court not only reached the opposite result but did so by erroneously construing and applying a federal law of national scope, intended to provide national uniformity, in an industry with national operations. To restore a consistent and correct interpretation of federal law and eliminate the uncertainty created by the decision below, the Court should grant certiorari.

II. The Court Should Also Review Whether The MFA Saves The TWCA's State-Dictated Rates From Preemption.

This Court should also grant certiorari to address whether the MFA saves the TWCA's state-dictated rates from ADA preemption. While the majority opinion below did not reach the MFA question given its incorrect ADA holding, this Court can and should include this question in the scope of its review, as the MFA question logically arises if the ADA question is answered correctly, as evidenced by the Texas Court of Appeals decision in this case. That court correctly held that the ADA preempted the TWCA and then considered and rejected Respondents' argument that the MFA nonetheless saved the TWCA from preemption. Because the Court of Appeals resolved both issues in PHI's favor, the parties fully briefed both issues below. The dissenting justices addressed both issues, further underscoring that a correct resolution of the ADA question naturally prompts the MFA question. Moreover, the concurring opinion representing the views of four justices addressed the MFA issue at length. Thus, there is no obstacle to this Court's review, *see, e.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (Court may address federal-law issue "properly presented to" state court); *Kansas v. Hendricks*, 521 U.S. 346 (1997), and ample reason for this Court to review the question now, as the interpretation offered by the four concurring justices is wrong and directly conflicts with decisions from the Sixth, Tenth, and Eleventh Circuits, indicating that remand would likely generate another split and delay this Court's ultimate resolution of the question.

A. The TWCA's State-Dictated Rates Do Not Regulate the "Business of Insurance."

The MFA provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance … unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). The MFA is an unusual provision that inverts the normal operation of the Supremacy Clause and, if read broadly, could insulate almost every business transaction involving an insurer from federal regulation. The key term is "the business of insurance," which this Court has read narrowly to refer specifically to "the relationship between the insurance company and the policyholder." *Nat'l Sec., Inc.*, 393 U.S. at 460. Provisions regulating "the business of insurance" are ones that "secure the interests of those purchasing insurance policies," such as by fixing premiums or enforcing insurers' promises to their policyholders. *Id.* Laws not focused on the insurer-insured relationship, like those regulating an insurer's payments to third parties, are outside the MFA's scope. *Id.*

This Court has repeatedly emphasized the importance of interpreting "the business of insurance" narrowly, as a "broad" interpretation could encompass "almost every business decision of an insurance company." *Royal Drug*, 440 U.S. at 217. For example, while an insurance company's bottom line is no doubt affected by its agreements with pharmacies, health-care-providers, and even "automobile body repair shops or landlords," treating those agreements as part of "the business of insurance" would be "plainly

contrary to the statutory language," which focuses on "the relationship between the insurance company and the policyholder." *Id.* at 216-17, 232. This Court's cases thus distinguish between "the business of insurance," to which the MFA applies, and "the business of insurance companies," to which it does not. *Id.* at 211. When determining whether a challenged provision regulates the former or the latter, the focus is on the specific provision, not the law as a whole. *Fabe*, 508 U.S. at 509 n.8.[5]

The MFA question in this case is squarely resolved by this Court's decision in *Royal Drug*. In *Royal Drug*, Blue Shield offered insurance policies that allowed policyholders to obtain prescription drugs from participating pharmacies for $2 per prescription. 440 U.S. at 209. In its separate agreements with the participating pharmacies, Blue Shield promised to reimburse the pharmacies for the costs of acquiring the drugs. *Id.* at 209. The issue in *Royal Drug* was whether these insurer-pharmacy

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[5] This Court's decisions in *Royal Drug* and *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), involved the second clause of §1012(b), which exempts "the business of insurance" from the antitrust laws, while this case and *Fabe* involve the first clause of §1012(b), which exempts from preemption "law[s] enacted … for the purpose of regulating the business of insurance." While the latter language is broader, the meaning of "the business of insurance" is the same in both, and a state law enacted for the purpose of regulating the relationship between insurance companies and third-party providers is not "enacted … for the purpose of regulating the business of insurance." *See Fabe*, 508 U.S. at 505 ("[L]aws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance.").

agreements were part of "the business of insurance," such that they were exempt from antitrust scrutiny under the MFA. Blue Shield argued that they were, because the agreements were the means by which Blue Shield fulfilled its promise to provide $2 prescription drugs to its insureds. *Id.* at 213-15.

This Court rejected Blue Shield's argument. It was a "fallacy," the Court explained, to "confuse the obligations of Blue Shield under its insurance policies"—*i.e.*, ensuring that policyholders would get their prescription drugs for $2—with the insurer-pharmacy agreements, "which serve only to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations." *Id.* at 213. From the perspective of policyholders, the arrangement between Blue Shield and the pharmacies was irrelevant—as long as the policyholders could obtain prescription drugs for $2, they were "basically unconcerned with arrangements made between Blue Shield and participating pharmacies." *Id.* at 214. To be sure, Blue Shield's minimization of costs "may well inure ultimately to the benefit of policyholders in the form of lower premiums," but the same could be said of "countless other business arrangements that may be made by insurance companies to keep their costs low," and therefore does not transform the pharmacy agreements into the "business of insurance." *Id.* at 214-15.

This case is no different. The insurance policies at issue here are held by Texas employers. In those policies, Respondents agreed to pay for air-transport services if someone working for the policyholder got injured on the job. As long as the insurers fulfill that

promise, employers are "basically unconcerned" with the arrangement between the insurers and the air-ambulance providers. *Id.* at 214; *see* App.72-81. The relationship between the insurer and the air-ambulance provider, and the question whether the former pays the latter a market rate or a state-dictated rate, do not concern the "business of insurance" any more than the relationship between Blue Cross and the pharmacies.

The same result follows through application of the three factors this Court has distilled from *Royal Drug* to identify "the business of insurance." *See Pireno*, 458 U.S. 119. The first *Pireno* factor is whether the challenged provision "has the effect of transferring or spreading a policyholder's risk." *Id.* at 129. As the dissenting opinion below explained, "the TWCA's reimbursement scheme does not spread or transfer policyholders' risk," but instead merely "limits the amount that an insurance company must pay" to satisfy its obligation to cover that risk. App.78-80 & n.7; *see Royal Drug*, 440 U.S. at 214 n.12 (explaining the "important distinction between risk underwriting and risk reduction").

The second *Pireno* factor is whether the challenged provision forms "an integral part of the policy relationship between the insurer and the insured." 458 U.S. at 129. Here, as already discussed, the TWCA's state-dictated rates "affect[] the amount an insurance company must pay a service provider, not whether the policyholder's contract is performed." App.73. The insured employers are "basically unconcerned" with the TWCA rates, as long as they do not have to pay for air-ambulance services themselves.

The third *Pireno* factor is "whether the practice is limited to entities within the insurance industry." 458 U.S. at 129. Here, the TWCA obviously extends beyond the insurance industry, as "payments to air-ambulance transports are not to entities within the insurance industry." App.80. Just as the payments to pharmacists in *Royal Drug* "involve[d] parties wholly outside the insurance industry," 440 U.S. at 231, the state-dictated rates here involve third-party providers outside the insurance industry, *viz.*, air-ambulance providers. In sum, all three *Pireno* factors make clear that the TWCA's state-dictated rates do not regulate "the business of insurance" and therefore are not saved from preemption by the MFA.

B. The Sixth, Tenth, and Eleventh Circuits Have All Found the MFA Inapplicable in Comparable Circumstances.

The four concurring justices nevertheless concluded that the MFA saves the TWCA's limits on payments to air ambulances from ADA preemption. That determination conflicts with decisions from multiple courts of appeals. In *Cox*, after finding a comparable scheme preempted under the ADA, the Tenth Circuit addressed the argument that the MFA "precludes federal preemption of the state statute and rate schedule at issue here." 868 F.3d at 904. The court dispatched that argument, explaining that even if "Wyoming's state-run workers' compensation system establishes a type of insurance," the challenged rate schedules do "not serve to underwrite or spread policyholders' risks; rather, they only minimize the costs the insurer must incur to fulfill its underwriting obligations." *Id.* at 904-05 (alteration

omitted). "As such, they do not regulate the business of insurance within the meaning of the [MFA]." *Id.* (alteration omitted).

The Eleventh Circuit reached the same conclusion in *Bailey*, 889 F.3d 1259, after finding ADA preemption. The court explained that the prohibition on billing the injured driver, as opposed to the insurance company, for air-ambulance services does not regulate "the policy relationship between insurer and insured," and therefore does not regulate the "business of insurance." *Id.* at 1274. Instead, the "provision restricts how much a medical provider may charge an insured after his auto insurer has paid and left the picture." *Id.* Just as a law affecting the allocation of costs between the insurer and a third-party air-ambulance provider is not part of the "business of insurance," a law affecting the allocation of costs between the insured and a third-party air-ambulance provider is not part of the "business of insurance." *Id.*

The Sixth Circuit has likewise held outside the air-ambulance/ADA context that limits on reimbursement to medical providers do not regulate the "business of insurance." *Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802 (6th Cir. 2006). In *Genord*, a Michigan law required insurers to enter into reimbursement agreements with medical providers, and those providers had "to accept payment at the regulated rate." *Id.* at 804. In response to RICO allegations based on its handling of claims from providers, Blue Shield asserted that the MFA precluded RICO's application to the billing arrangements. *Id.* at 804-05. The Sixth Circuit

rejected that contention, explaining that the "billing arrangements do not transfer or spread policyholder risk" and that "policyholders are largely unconcerned with how the doctors get paid, so long as the policyholders are provided with gynecological services." *Id.* at 809.

The four concurring justices reached the opposite conclusion, which is not only wrong but raises the prospect that leaving the MFA issue for remand will precipitate another split among the lower courts warranting this Court's review. Moreover, because the ADA ruling is plainly wrong, and every jurist to find ADA preemption (both the court of appeals judges and the dissenting justices) has reached and rejected Respondents' MFA argument, judicial economy favors granting both questions. Accordingly, if this Court grants certiorari on the first question presented, it should also grant certiorari on the second question and hold that the MFA does not shield the TWCA's state-dictated rates from ADA preemption.

III. The Questions Presented Are Exceptionally Important.

This case implicates an exceptionally important and recurring national issue. Air ambulances provide critical, life-saving medical services to more than 500,000 patients each year around the country. With "their ability to land at accident sites and quickly shuttle [patients] to landing areas at or near hospitals," air ambulances reduce transport times and "significantly improve chances for survival and recovery." GAO-17-637 at 1. These life-saving services have never been more critical. Hundreds of rural hospitals have either closed or downsized in

recent years, meaning that many more critically ill and injured patients in rural areas must be transported to urban medical centers for life-saving treatments.

The decision below jeopardizes the ongoing viability of this critical and growing industry. Because air ambulances serve every patient without regard to ability to pay, many air-ambulance bills—typically those issued to uninsured patients—go unpaid. Moreover, a large percentage of patients receiving air-ambulance services are covered by Medicare or Medicaid, and the federal government sets reimbursement levels at or below cost. *See* GAO-17-637 at 8 ("Medicare rates for air ambulance service were last updated in 2002."). State-created constraints pegging rates recoverable from insurers to these artificially depressed, non-market-based rates threaten air ambulances' financial viability and their ability to continue serving every patient in need of care. *See id.* at 17. For example, with respect to the approximately 1,800 fee disputes pending before the Division, *see* p.11, *supra*, more than $75 million is at stake. By dictating below-market rates for a substantial portion of patients, Texas not only defies the ADA's deregulatory command but threatens the dynamic that make air-ambulance services available to all patients.

Over the past several years, states across the country have repeatedly attempted to flout the ADA's deregulatory command by regulating air-ambulance rates through schemes like the TWCA. Until the decision below, those efforts had been uniformly unsuccessful, which provided at least a mild deterrent

to copycat efforts. *See, e.g.*, *Cheatham*, 910 F.3d 751; *Cox*, 868 F.3d 893. The Texas Supreme Court's decision now provides a roadmap for states and state courts to circumvent the ADA and begin regulating what Congress has deemed off-limits. This Court should grant the petition, eliminate the division among the lower courts, and restore the deregulatory environment that Congress established.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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