No. 20-748

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 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

BRIEF OF *AMICUS CURIAE* AIR METHODS CORPORATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Air Methods Corporation ("Air Methods") is an air ambulance company that provides emergency medical services to individuals across the United States, including in Texas. Air Methods, like Petitioner PHI Air Medical LLC, responds to calls from first responders and third-party medical professionals to transport injured or critically ill patients to the closest appropriate hospital or from one hospital to another. Air Methods employs pilots as well as paramedics and nurses to treat patients during transport. Air Methods transports patients regardless of the ability to pay. Some patients are covered by state workers' compensation systems like the one at issue here. Between 2016 and 2019, Air Methods transported thousands of patients in Texas, including patients covered by Texas's workers' compensation regime.

SUMMARY OF ARGUMENT

Air Methods' capacity to rapidly transport critically ill patients, including those injured on the job, can significantly improve chances of survival and recovery,

[1] Counsel of record received timely notice of the intent to file this *amicus* brief, and the parties have provided written consent to the filing of the brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and their counsel made a monetary contribution to its preparation or submission.

especially in rural areas that lack readily accessible advanced-care facilities. Indeed, a large portion of Air Methods' transports is from rural areas to hospitals hundreds of miles away, often in different states. Before providing such emergency services, air ambulances do not —and cannot—verify a patient's ability to pay or investigate whether the injury may be covered under workers' compensation laws. When Air Methods learns that services fall within such laws, it submits a claim for payment to the appropriate authority.

But in Texas, the workers' compensation system restricts Air Methods' rates to what the state regulators consider "fair and reasonable." This state-law regulation of an air carrier's rates is preempted by the Airline Deregulation Act ("ADA"). This Court should grant the Petition and review the issues presented under both the ADA and the McCarran-Ferguson Act ("MFA"), both of which merit this Court's review.

First, the Texas Supreme Court's decision is inconsistent with the free-market principles laid out in the ADA. The ruling exposes air ambulance companies like Air Methods to considerable state law regulation of its rates and violates the ADA's express preemption provision. Worse, the Texas Supreme Court's opinion conflicts with precedent from multiple federal circuit courts.

Second, the concurring opinion of several Texas Supreme Court justices further compounded the error by concluding that the MFA reverse preempts the

ADA. Because the ADA contains an express preemption provision and because cost-savings measures in workers' compensation schemes do not regulate "the business of insurance," the concurring opinion erred here, too.

This case presents a prime opportunity for this Court to resolve a split regarding the ADA's application to workers' compensation schemes and provide much-needed guidance to both federal and state courts charged with interpreting the ADA and MFA. The Court should grant the Petition.

ARGUMENT

I. The Texas Supreme Court Misinterpreted and Misapplied the ADA.

Air Methods provides emergency air ambulance services around the country, including in Texas, pursuant to authorization and regulations promulgated by the Federal Aviation Administration ("FAA") and the U.S. Department of Transportation ("DOT"). Air carriers like Air Methods are subject to extensive federal regulations and oversight by the FAA and the DOT regarding their aircraft and medical equipment, operations, personnel, training, maintenance, recordkeeping, safety, and other aspects of its business.[2]

[2] Air Methods is an air carrier under the ADA. *See*, *e.g.*, *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1060 (10th Cir. 2019). Air Methods holds air carrier operating certificates issued by the FAA and is authorized by the DOT to operate as an air carrier.

Air ambulance companies respond to calls from first responders or medical professionals to transport injured or critically ill patients. In the course of providing these emergency services, air ambulance companies like Air Methods do not verify a patient's ability to pay or investigate whether his or her injury might be covered under workers' compensation laws. When Air Methods discovers that a service falls within such workers' compensation laws, it submits a claim for payment to the appropriate state authority, like the Texas Division of Workers' Compensation ("Division").

As outlined in the Petition, Texas state law purports to cap the amount air ambulances can recover for services provided to workers' compensation claimants to what state law considers "fair and reasonable." Pet. at 15. But this state law is expressly preempted by the ADA for the reasons outlined in the Petition.

Indeed, Air Methods successfully raised an ADA challenge to a similar state workers' compensation system in Wyoming. In *EagleMed v. Cox*, 868 F.3d 893 (10th Cir. 2017), the Tenth Circuit reviewed Wyoming's Workers' Compensation Act ("Wyoming Act"), which was enacted "to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to . . . employers." WYO. STAT. § 27-14-101(b). The Wyoming Act created a state-mandated monopolistic workers' compensation

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See 49 U.S.C. § 44705 (describing FAA issuance of air carrier operating certificates); 14 C.F.R. Pts. 119, 135, 298.

system.[3] Covered employees receive medical and hospital care, ambulance service, and disability or death benefits when they are injured in the course of their employment. *Id.* §§ 27-14-102(a)(vii), (xi), (xii), -401(a), (e), -403 -406, -601. These "rights and remedies . . . are in lieu of all other rights and remedies against [the] employer." *Id.* § 27-14-104(a).

Among the services covered under the Wyoming Act are ambulance services (including air ambulance services), which—prior to the Tenth Circuit's decision in *Cox*—were, at that time, limited to a "reasonable charge . . . at a rate not in excess of the rate schedule established by the director." WYO. STAT. § 27-14-401(e).[4] Under 401(e), the Wyoming Workers' Compensation Division ("Wyoming Division") adopted a fee schedule that set forth what it considered a "reasonable charge," and that fee schedule governed Air Methods' rates for all transports covered by the Wyoming Act.[5]

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[3] All employers of employees engaged in extrahazardous occupations must participate in the system, WYO. STAT. §§ 27-14-102(a)(viii), -207(a); others may opt into it as provided in the Act, *id.* § 27-14-108(j)-(q).

[4] The Wyoming legislature subsequently modified subsection 401(e) to remove its application to air ambulances.

[5] The Wyoming Division adopts rules and regulations providing fee schedules for various services covered under the Act. *See*, *e.g.*, WYO. STAT. §§ 27-14-401(b), 802(a); *see also* Rules, Regulations & Fee Schedules of the Wyo. Workers' Safety & Comp. Div. Ch. 9 ("Fee Schedules"), *available at* soswy.state.wy.us/rules/rules/7341.pdf.

Air Methods challenged Section 401(e) and the related fee schedule as preempted by the ADA. Ultimately, the Tenth Circuit concluded that the ADA preempted the Wyoming Act and related fee schedule to the extent they applied to air ambulance companies like Air Methods. *Cox*, 868 F.3d at 902. The court explained:

> 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 Workers' Compensation Act, and thus the district court did not need to also decide whether the statute and rule also had a significant economic effect on airline rates, routes, or services.

Id.

Moreover, and as explained in the Petition, the Texas Supreme Court's distinction between the Texas statute and Wyoming statute was wrong. *See* Pet. at 24-25. The Texas Supreme Court distinguished *Cox* on the basis that the challenged "provisions . . . 'expressly establish a mandatory fixed maximum rate that will be paid by the State for air-ambulance services,' and thus there was no need to apply the *Morales* significant-effect standard." Pet. App. at 22. That was an erroneous assumption. The Wyoming Act mandated only a "reasonable charge," which the Wyoming Division was then free to adopt in the form of a fee schedule pursuant to its own standards of reasonableness. The Wyoming legislature itself did not set a specific

reimbursement rate for air ambulances, but instead left that to the discretion of the Wyoming Division. This is precisely the same framework that Texas has adopted.

Central to the ultimate outcome in *Cox* was the fact that Air Methods did not, and does not, have a choice when it comes to transporting patients covered by workers' compensation regimes. Allowing states to require air carriers to seek reimbursement for their services through state workers' compensation systems and then regulate those air carriers in a manner that relates to their rates is directly contrary to the ADA's express and broad preemptive purpose.

The Fourth Circuit in *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018), considered the same issues raised in *Cox* as applied to West Virginia's workers' compensation regime. And for the same reasons articulated in *Cox*, the Fourth Circuit concluded that the ADA preempted the West Virginia workers' compensation system's regulation of air ambulances. *Id.* at 767-68 ("The regulatory scheme only exists because West Virginia was attempting to lower payments for air ambulance services. . . . If such actions involving an air carrier are not 'related to price,' it is unclear what meaning the phrase would have left.").

In fact, Texas Mutual Insurance Company ("Texas Mutual")—one of the Respondents to the Petition—filed *amicus* briefs in both *Cox* and *Air Evac EMS*, raising the same arguments it made to the Texas Supreme Court on both the ADA and MFA. Both the Tenth and

Fourth Circuits considered, and soundly rejected, Texas Mutual's arguments. *See Cox*, 868 F.3d at 904 (rejecting arguments that air ambulance companies should not fall within express preemption provision of ADA and that MFA precludes federal preemption of Wyoming workers' compensation); *Air Evac EMS, Inc.*, 910 F.3d at 767-68 (holding that workers' compensation regulation of air ambulances preempted by ADA).[6]

The regulation of air carriers like Air Methods should be left to the market and, when necessary, to the Federal Government, as the ADA envisions. The Fourth Circuit in *Air Evac EMS* expressly recognized that "[t]he balance of state and federal responsibility created by the ADA is a complex balance in an exhaustively debated field that Congress has struck. As to that, [courts] take no sides. Our own decision is not one of policy, but of law. That must be in the end what matters." 910 F.3d at 770. The Tenth Circuit was likewise unwilling to wade into any policy questions. *Cox*, 868 F.3d at 904. Questions of policy must be left to Congress.

The Texas Supreme Court's decision threatens to undermine the central purpose of the ADA—deregulating the air carrier industry. The Court should therefore grant the Petition and resolve the split created by the Texas Supreme Court.[7]

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[6] *Air Evac EMS* did not involve any questions related to the MFA.

[7] As discussed in the Petition, the Eleventh Circuit's analysis of both the ADA and MFA issues is consistent with the Fourth

II. The Concurring Opinion of Several Texas Supreme Court Justices Misinterpreted and Misapplied the MFA.

The Court should also grant the Petition and address whether the MFA saves the Texas workers' compensation statute from preemption by the ADA. A concurring opinion from several Texas Supreme Court justices incorrectly concluded that the state workers' compensation regime regulates the business of insurance and is thus protected by the MFA. This conclusion is wrong and—yet again—conflicts with the Tenth Circuit's decision in *Cox*.

In *Cox*, the Wyoming Division argued to the trial court that the Wyoming workers' compensation system regulated the business of insurance and was thus saved from preemption by the MFA. On appeal, Texas Mutual (Respondent here) made this same argument as an *amicus*. But the Tenth Circuit in *Cox* correctly held that the Wyoming workers' compensation statute and related fee schedule were not protected by the MFA. The concurring opinion therefore contradicts the Tenth Circuit's decision in *Cox*. *Cox* got it right.[8]

As outlined in the Petition, the MFA does not save the Texas workers' compensation statute. Indeed, the MFA "does not seek to insulate state insurance regulation from the reach of all federal law." *Barnett Bank v.*

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and Tenth Circuits. *See Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259 (11th Cir. 2018).

[8] So, too, did the Eleventh Circuit, albeit not in the context of workers' compensation. *See Bailey*, 889 F.3d at 1274.

Nelson, 517 U.S. 25, 39 (1996). Instead, it "seeks to protect state regulation against inadvertent federal intrusion[.]" *Id.*; *see also* 15 U.S.C. § 1011 (expressing Congress's purposes "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"). The MFA does not save the Texas workers' compensation regime for three main reasons.

First, the ADA *expressly* preempts any state law relating to air carrier rates, routes, and services. Accordingly, Congress's intent is clear, and there is no "inadvertent" federal intrusion on state regulation. *Barnett Bank*, 517 U.S. at 39. States cannot evade Congress's mandate that air carrier prices be regulated only at the federal level by including provisions that regulate air carrier prices in a state workers' compensation program—or even in a state insurance program.

Second, the Texas statute—like the Wyoming statute—does not regulate the "business of insurance." Reverse preemption under the MFA applies to "the 'business of insurance,' not the 'business of insurers.'" *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979); *see also Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259, 1274 (11th Cir. 2018) ("Because the balance billing provision concerns the relationship between the insured and medical providers—not the relationship between the insurer and

insured—the MFA does not reverse the ADA's preemptive effect in this case.").

Third, even if state workers' compensation programs involve the "business of insurance," the state regulation of a provider's rates, like the regulation of air ambulances' rates here, are "legally indistinguishable" from any other business decision the state might make to reduce costs. *Royal Drug*, 440 U.S. at 215. Simply put, cost-saving arrangements related to an insurer's purchase of goods or services from a third party do not serve to underwrite or spread policyholders' risks; instead, they "only minimize the costs [the insurer] must incur to fulfill its underwriting obligations." *St. Bernard Hosp. v. Hosp. Serv. Ass'n of New Orleans, Inc.*, 618 F.2d 1140, 1145 (5th Cir. 1980).

As the Tenth Circuit held in *Cox*, cost-savings efforts designed to "minimize the costs" that an insurer has to carry is not the business of insurance. 868 F.3d at 905 ("The state statute and fee schedule at issue in this case do not serve to underwrite or spread policyholders' risks; rather, they 'only minimize the costs [the insurer] must incur to fulfill its underwriting obligations[.]'"). Such cost-savings efforts, like the ones found in the Texas workers' compensation system, are not protected by the MFA.

The Court should grant the Petition, correct the MFA analysis in the concurring opinion, and hold that the MFA does not save the Texas workers' compensation statute from preemption.

III. The Petition Raises Important Federal Questions.

Air Methods provides lifesaving services to patients, including those covered by state workers' compensation regimes. Air Methods doesn't assess a patient's ability to pay—or whether the patient may be a workers' compensation claimant—before providing life-saving medical transport. Between 2016 and 2019, Air Methods transported thousands of patients in Texas, including patients covered by Texas's workers' compensation regime. Allowing state regulation to force air ambulance companies to provide their services at severely reduced rates will have a chilling effect on the industry and will interfere with the ability to provide injured workers with the emergency medical care that they need. Piecemeal regulation by the States threatens to destabilize this entire industry, leaving patients without vital healthcare services. Moreover, all of these consequences result from states' blatant disregard of the ADA, a clear federal statute that demonstrates Congress's intent to leave regulation of air carriers to the Federal Government.

CONCLUSION

The Court should grant the Petition, reverse the Texas Supreme Court's opinion on the ADA, and reject the concurring opinion's analysis of the MFA. Doing so would properly reaffirm the broad preemptive purpose

of the ADA by leaving regulation of air carriers to the market and to the Federal Government.

Respectfully submitted,

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