No. 20-748

In the Supreme Court of the United States

PHI AIR MEDICAL, LLC, PETITIONER

v.

TEXAS MUTUAL INSURANCE COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

PHI Air Medical provides air-ambulance services to injured workers covered by the Texas Workers' Compensation Act (TWCA). It does so without negotiating prices with either insurers or workers in advance, and bills carriers an amount it deems appropriate. The TWCA requires insurers to pay a "fair and reasonable amount" for these services, and prohibits PHI from "balance billing," or billing injured workers the balance of PHI's unilaterally charged price that insurers did not pay. When PHI billed several insurers for air-ambulance services, those insurers paid 125% of the federal Medicare prices for air-ambulance services as fair and reasonable rates.

PHI sought administrative relief, principally arguing that the Airline Deregulation Act (ADA), which preempts state regulations that have a "significant impact" on "carrier 'rates, routes, or services,'" *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370-71 (2008) (discussing 49 U.S.C. § 41713(b)(4)), required insurers to pay its billed charges in full. After faulting PHI for "strategically declining to challenge" the TWCA's balance-billing prohibition, the Supreme Court of Texas held the ADA did not preempt the TWCA's reimbursement provisions. That court expressly refused to resolve whether the McCarran-Ferguson Act may have nonetheless saved those provisions from preemption.

The question presented is whether the Texas Supreme Court correctly held that TWCA's "fair and reasonable" reimbursement requirement, standing alone, is not preempted by the ADA.

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STATEMENT

I. Statutory Framework

This case arises from a dispute over reimbursement rates paid to air-ambulance companies by insurance carriers who provide coverage as part of Texas's voluntary workers'-compensation program.

A. The Texas Workers' Compensation Act

Over a hundred years ago, Texas created a workers'-compensation system to "meet the needs of an increasingly industrialized society": Many workers injured in industrial accidents were denied recovery due to difficulties proving negligence and overcoming certain traditional common-law defenses. *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 510-11 (Tex. 1995); *see SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 642 (Tex. 2015). This system allowed employees to recover compensation for workplace injuries without proving the employer's fault and regardless of their or their coworkers' negligence. *Garcia*, 893 S.W.2d at 510-11. In exchange, the employer's liability for work-related injuries was substantially limited. *Id.*

By the 1980s, however, this early regime began to break down. *Id.* at 512. "Medical costs for injured workers . . . began increasing at a much higher rate than medical costs outside the compensation system," which "helped cause compensation insurance premiums to more than double." *Id.* These spiraling costs of insuring against accidents "forced large businesses to locate operations elsewhere and forced small businesses to cease operations or opt out of coverage." *Id.*

In 1989, the Texas Legislature, overhauling the system, crafted the TWCA, Tex. Lab. Code §§ 401.001, *et seq*. Texas is "unique among the [S]tates in allowing

private employers to choose whether to subscribe." *Port Elevator-Brownsville, LLC v. Casados*, 358 S.W.3d 238, 241 (Tex. 2012) (citing Tex. Lab. Code § 406.002(a)). As a result, the TWCA regulates interactions among the system's four major stakeholders: employers, employees, insurance carriers, and medical-services providers. *See generally* Tex. Lab. Code ch. 413.

First, an employer chooses whether to buy a workers'-compensation insurance policy. *Lawrence v. CDB Servs., Inc.*, 16 S.W.3d 35, 41-42 (Tex. App.—Amarillo 2000), *aff'd*, 44 S.W.3d 544 (Tex. 2001). If the employer opts into the workers'-compensation system by purchasing such a policy, that employer cannot raise certain defenses to claims based on workplace injuries, but that employer's liability is limited. *Garcia*, 893 S.W.2d at 510-11. Employers who do not purchase a policy do not receive this liability limitation. *See id.*

Second, a covered employee with a compensable injury is granted the "exclusive remedy" of workers'-compensation benefits "in lieu of common-law remedies." *Apollo Enters., Inc. v. ScripNet, Inc.*, 301 S.W.3d 848, 860 (Tex. App.—Austin 2009, no pet.) (citing Tex. Lab. Code §§ 406.031, 408.001, .021, .028). The workers'-compensation framework "allows employees to receive 'a lower, but more certain, recovery than would have been possible under the common law.'" *SeaBright*, 465 S.W.3d at 642 (quoting *Kroger Co. v. Keng*, 23 S.W.3d 347, 350 (Tex. 2000)).

Third, private insurance carriers are liable for defined income benefits and all healthcare reasonably required for workplace injuries, without regard to fault or negligence. *Casados*, 358 S.W.3d at 241. Insurers and their workers'-compensation-insurance policies are

subject to state regulation. *See* Tex. Lab. Code § 406.051(a)-(b).

Fourth, healthcare providers are entitled to seek payment directly from insurers, which provides a greater assurance of payment than might otherwise be available. *See id.* § 408.027(a); *see also Apollo*, 301 S.W.3d at 860. A health-care provider serving workers'-compensation claimants has no right to payment from its patients and cannot charge injured workers for costs not collected from insurers, commonly referred to as "balance billing." Tex. Lab. Code § 413.042(a). If a provider disagrees with the amount paid by the carrier for services rendered, it can challenge the payment amount and seek increased payment through an established dispute-resolution process. *Id.* § 413.031(a), (c). Under Texas law, an injured employee is neither a necessary nor proper party to such a dispute.

Today's workers'-compensation system is overseen by the Texas Department of Insurance, Tex. Lab. Code § 402.001(a), and "administer[ed] and operate[d]" by the Division of Workers' Compensation, *id.* § 402.001(b). The Division "adopt[s] healthcare reimbursement policies and guidelines." *Id.* § 413.011(a); *see also id.* §§ 408.028, 413.011, .012; *Apollo*, 301 S.W.3d at 852-53. It may promulgate a "fee schedule" for particular services by rule. Tex. Lab. Code § 408.028(f). If no fee guideline exists for a service, reimbursement must be "fair and reasonable." A fair and reasonable fee determination may rely on fees charged for similar treatment, but may not be based solely on a conversion factor from the amount paid by the federal Centers for Medicare and Medicaid Services. *Id.* § 413.011(d); 28 Tex. Admin. Code § 134.1(e)-(f). And it must take into account the "increased security of payment afforded" by the TWCA. Tex. Lab. Code

§ 413.011(d). The Division has not fixed payment rates for air-ambulance services.

If, as here, a dispute arises between a provider and the insurer regarding the appropriate reimbursement amount, the Division "adjudicate[s] the payment given the relevant statutory provisions and commissioner rules." *Id.* § 413.031(c). If the fee dispute "remains unresolved after a review," the provider is "entitled to a hearing" before the State Office of Administrative Hearings ("SOAH"). *Id.* §§ 413.031(k), .0311(d), .0312(e). After exhausting administrative remedies, a party "aggrieved by a final decision of the division or [SOAH] may seek judicial review" in Texas state court. *Id.* § 413.031(k-1).

B. The McCarran-Ferguson Act

As relevant to air-ambulance prices, Texas's workers'-compensation-insurance system implicates two major pieces of federal legislation. The oldest is the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011, *et seq.* This law was passed in direct response to *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which held for the first time that the Interstate Commerce Clause permitted Congress to regulate insurance contracts. Pet. 6-7. Designed specifically to reestablish the balance of federal power, McCarran-Ferguson protects from preemption state laws enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). McCarran-Ferguson therefore saves from preemption some state laws that would otherwise be preempted by virtue of those state laws' relationship to insurance regulation. *Id.*

C. The Airline Deregulation Act of 1978

Before 1978, federal law created cumbersome bureaucratic hurdles that prevented free-market

competition in the burgeoning commercial-aviation industry. In 1978, Congress enacted the Airline Deregulation Act (ADA) to further reliance on competitive market forces to provide better commercial air carrier fares, routes, and services for consumers. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

To ensure the States would not interfere with a national policy of deregulating commercial air carriers, Congress barred States from enacting or enforcing 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" under subpart II of the ADA. 49 U.S.C. § 41713(b)(1).

The preemption provision applies to air carriers authorized to provide air transportation by subpart II of the Airline Deregulation Act, which addresses economic regulations. 49 U.S.C. § 41713(b)(1). Air ambulances are exempted from that subsection's primary requirements—to hold a certificate of public convenience and necessity and comply with associated economic regulations. *See* 14 C.F.R. §§ 298.3(a)-(b), .21(c)(iv); *see also* 49 U.S.C. § 41101(a)(1) (providing that "an air carrier may provide air transportation only if the air carrier holds a certificate issued under this chapter authorizing the air transportation."). Operating under this *exemption* is the only sense in which air ambulances can be considered governed by the Act's economic regulations. Air ambulances hold Federal Aviation Administration safety certificates, but those are issued under a different part of the Act.

II. Procedural History

PHI provides air-ambulance services to patients, including those covered by workers'-compensation insurance. In this case, it disputes the reimbursement it

received for 33 such transports it provided to beneficiaries of workers'-compensation-insurance policies. Pet. App. 7. The insurance-carrier respondents paid 125% of the rate that Medicare would provide under such circumstances, considerably less than PHI initially billed the carriers, *id.* at 8.

PHI disputed whether this reimbursement rate was fair and reasonable before the Division and ultimately the State Office of Administrative Hearings, where the parties disagreed as to whether ADA preempted Texas's "fair and reasonable" payment standard and, if so, whether McCarran-Ferguson saved that standard. *Id.* at 87. The Office concluded that the TWCA's guarantee of fair and reasonable reimbursement is a regulation of insurance subject to the McCarran-Ferguson Act, not a regulation of commercial air traffic subject to the ADA. *Id.* Examining the facts of these 33 cases, the order determined that 149% of Medicare was "fair and reasonable" because it met statutory standards, reflected service costs plus profit, and neither unfairly subsidized nor required subsidization from other patients. *Id.* at 9.

Both the carriers and PHI sought judicial review. *Id.* at 9-10. The Division intervened in support of the carriers. *Id.* at 10. The trial court granted judgment in favor of the carriers and Division, determining that the carriers owed only 125% of the Medicare amount and that ADA preemption did not apply. *Id.* at 8.

The court of appeals reversed, finding that the TWCA falls within the scope of the ADA preemption, not the McCarran-Ferguson Act "reverse-preempt[ion]" provision. *Id.* The court of appeals did not discuss whether Texas's balance-billing prohibition was also preempted because PHI affirmatively asserted that it "only attacks that provision in the alternative" and

"would prefer to leave the balance-billing provision intact." *Id.* at 14 n.8.

The Texas Supreme Court reversed the court of appeals, holding that by its terms the ADA does not preempt the TWCA's guarantee of fair-and-reasonable reimbursement. Applying this Court's precedent, it examined whether "the price of PHI's service to injured workers is significantly affected by a reasonableness standard for third-party reimbursement of those services." *Id.* at 2 (citing *Morales*, 504 U.S. at 388). Concluding that the record did not support such a finding, the Texas Supreme Court held that "the ADA does not preempt" the rule. *Id.* at 2; *see id.* at 15-17 (citing *Morales*, 504 U.S. at 388; *Rowe*, 552 U.S. at 370-71). It further explained that PHI's "strategic[]" decision to challenge only part of the workers' compensation payment scheme had consequences, because preemption "should be decided by considering the state statutory and regulatory scheme as a whole, not just the particular provision that an individual litigant prefers to challenge." *Id.* at 23. Though four Justices would have held in the alternative that the McCarran-Ferguson Act protected the TWCA, *id.* at 33, the majority did not reach the issue. A two-Justice dissent would have found preemption. *Id.* at 55.

The case was remanded to the court of appeals for further consideration of at least two major issues: (1) the determination of what constitutes "fair and reasonable" payment for these 33 transports; and (2) petitioner's alternative claim that the ADA preempts the TWCA's provision prohibiting balance billing of the injured worker.

This petition followed.

REASONS TO DENY THE PETITION

Absent exceptional circumstances, this Court does not review interlocutory state-court judgments. *See* 28 U.S.C. § 1257(a) (conferring jurisdiction over "[f]inal judgments" of state courts); *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). Even in federal cases, this Court's "normal practice" is to "deny interlocutory review." *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting). This case illustrates why. Texas courts may still award air-ambulance carriers their full billed charges by invalidating the balance-billing ban—an issue not passed on below because of PHI's "strategic[]" decision not to do so—or by determining that those full billed charges are "fair and reasonable." Pet. App. 23. Moreover, this case presents a poor vehicle because the Supreme Court of Texas never passed on whether the McCarran-Ferguson Act saves Texas law from preemption—a vice that petitioner seeks to transform into a virtue by reframing this vehicle problem as a second "question presented."

There is no pressing need to address the only question actually presented in the judgment that petitioner asks the Court to review. The petition overstates any conflict that has—or even could—arise from the Texas Supreme Court's interpretation of Texas's unique workers'-compensation system. And in any event, the decision of the Texas Supreme Court correctly applied both the ADA's plain text and this Court's prior precedent.

I. The Court Should Deny Review Based on The Interlocutory Posture of This Case.

For more than a century, it has been this Court's "normal practice [to] deny[] interlocutory review" even of cases from lower federal courts, where no jurisdictional requirement of finality exists, and even when they

present significant statutory or constitutional questions. *Estelle*, 429 U.S. at 114-15 (Stevens, J., dissenting) (criticizing deviation from that rule to address novel Eighth Amendment claims as "inexplicable"). Lack of finality "alone [can] furnish[] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

This Court has recognized that the circumstances where it should grant interlocutory review are "very rare[] indeed." *Am. Constr. Co. v. Jacksonville T. & K.W. Ry.*, 148 U.S. 372, 385 (1893); *see Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostoock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (concluding that case was "not yet ripe for review by this Court" where it was remanded by the court of appeals); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (articulating narrow exceptions to final-judgment rule in context of review of state-court judgments).

The Chief Justice articulated this Court's general presumption against review of interlocutory decisions in *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (*Veasey II*), where the en banc Fifth Circuit concluded that Texas's undisputed interest in protecting against voter fraud did not justify requiring a voter to present an ID at the polls largely because the law did not apply to mail-in ballots where fraud is "far more prevalent." *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) (*Veasey I*). The Fifth Circuit remanded, however, "for further proceedings on an appropriate remedy." *Veasey II*, 137 S. Ct. at 613 (Roberts, C.J., respecting the denial of certiorari). This Court denied immediate review despite the undisputed national importance of the question presented, *id.*, because, as the Chief Justice explained,

"[t]he issues will be better suited for certiorari review" "after entry of final judgment." *Id.*

Similarly, *Wrotten v. New York* involved a question about the use of video testimony at a criminal trial in a way that implicated the Confrontation Clause. 560 U.S. 959, 959 (2010). *Wrotten* raised an "important" question in a "strikingly different context" from this Court's closest precedent. *Id.* Nonetheless, the Court denied review because the New York Court of Appeals remanded "for further review, including of factual questions." *Id.* As Justice Sotomayor explained, denial of review was warranted because "procedural difficulties" arise "from the interlocutory posture," which impeded the Court's ability to give full consideration to the constitutional question. *Id.*

Veasey and *Wrotten* are far from unique. This Court has repeatedly refused to review interlocutory decisions from state courts, like the decision below. *See, e.g.*, *Jefferson*, 522 U.S. at 81 (dismissing for want of jurisdiction where state supreme court had resolved a legal issue but remanded for further proceedings); *Johnson v. California*, 541 U.S. 428, 432 (2004) (per curiam) (similar); *Florida v. Thomas*, 532 U.S. 774, 781 (2001) (similar). And even in federal cases, the Court has repeatedly opted to wait until the lower courts have completed their review of all claims and defenses and ruled on the requested remedies. *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari); *see also, e.g.*, *Nat'l Football League v. Ninth Inning, Inc.*, No. 19-1098, 2020 WL 6385695, at *1 (U.S. Nov. 2, 2020) (Kavanaugh, J.) (citing *Veasey II*); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J.); *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1107 (2006) (Stevens, J.).

This rule reflects the reality that litigation is inherently unpredictable, and later developments may change the character of—or entirely obviate the need to address—the question presented. *See* William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). Again, this can be seen in *Veasey II*. That case never returned to the Court because "[d]uring the remand, the Texas Legislature passed a law designed to cure all the flaws" identified by the plaintiffs. *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018) (*Veasey III*). Because "[t]he Legislature succeeded in its goal," *id.*, this Court did not need to address difficult questions about whether the superseded statute complied with federal law.

The only issue that the Texas Supreme Court decided—in part because of petitioner's "strategically declining" to present others, Pet. App. 23—was that the ADA does not preempt state laws requiring insurers to make "fair and reasonable" payment to air-ambulance providers within the workers'-compensation system. The court "remand[ed] for the court of appeals to address other issues it did not reach." *Id.* at 32. These issues include at least one legal and one factual question that could obviate the need for this Court's review.

A. Petitioner's theory depends on a provision of the TWCA that has not yet been addressed.

Petitioner admits that, under this Court's precedent, the TWCA is not preempted unless it has a "'significant impact' on air-ambulance rates." Pet. 17 (quoting *Morales v, Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)). To argue that such an effect exists, petitioner relies on the combined effects of the TWCA's "fair and reasonable" payment standard *and* its prohibition of balance-billing injured workers. *Id.* at 17, 25. Indeed,

petitioner recognizes as much, citing the balance-billing prohibition repeatedly. *E.g.*, *id.* at 15 ("What is more, Texas prevents the air carrier from charging patients or employers anything."); *id.* at 16 (faulting state law for "dictating who and what an air carrier may charge and collect"); *id.* at 17 ("Neither the injured employee nor the employer can be charged."); *id.* at 19 ("[S]tate officials dictate the maximum amount that an air carrier can recover from the only party it can charge"); *id.* at 21 (citing "the only party they can charge"). Yet only the fairness standard was addressed by the court of appeals and subsequently presented to the Texas Supreme Court. Pet. App. 14.

That is because petitioner "strategically declin[ed] to challenge" the balance-billing prohibition "in this [the Supreme Court of Texas] Court." Pet. App. 23. PHI did so because it "would rather be paid by the insurers than by its customers," *id.* at 14, and it expressly disclaimed to the court of appeals that "it would prefer to leave the balance-billing prohibition intact." *Id.* at 14 n.8. The Supreme Court remanded the question of whether the ADA preempts Texas's ban on balance billing, among others, "for the court of appeals to address." *Id.* at 32.

That remand may stymie petitioner's preference for this Court's immediate intervention; if so, it is the result of petitioner's own strategic choices, and not a cause for this Court to depart from acting as "a court of review, not of first view." *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (per curiam) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). This Court should deny review and allow the Texas courts to first address the combined impact of various provisions of the TWCA before it takes up the question.

Allowing Texas courts to resolve this question as an initial matter is especially important given that the propriety of balance billing is a significant question in its own right. An injured employee's forfeiture of common-law claims against the employer in exchange for certainty of payment of medical bills is fundamental to the Texas workers'-compensation system. *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 441 (Tex. 2012). Indeed, removing employees' common-law causes of action *without* such a quid pro quo—the provision of "more limited but more certain recovery"—would arguably violate the open-courts provision of the Texas Constitution. *See Garcia*, 893 S.W.2d at 521-22. By the time an injured employee is transported by petitioner, that employee has already given up the right to those common-law claims. Thus, the continued viability of the prohibition against balance-billing is critical to the successful maintenance of Texas's workers' compensation scheme. Moreover, it is the balance-billing issue that has "become a subject of national concern." Pet. App. 14. Indeed, Congress recently considered a statute to avoid so-called "surprise billing" at the federal level—separate and apart from the ADA or McCarran-Ferguson Act. *See also* No Surprises Act, Pub. L. No. 116-260, div. BB, tit. 1, 134 Stat. 1182 (2020).

B. Resolution of the question presented will not provide PHI with the relief it seeks.

Review is also premature because open legal and factual questions mean that PHI cannot obtain here what it sought below—namely, "an order requiring the insurers to reimburse its billed charges fully under state law." Pet. App. 25. Both a legal and factual problem prevent them from doing so.

1. Petitioner seeks to have the benefit of reimbursement under the workers'-compensation system—for example, prompt payment—while dodging the flexible, but essential, scrutiny of a "reasonableness" standard. Such attempts to "have it both ways" under state law are precluded by *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 265 (2013), which petitioner entirely ignores.

In *Dan's City*, the plaintiff, a car owner, sued a towing company complaining that the company had not complied with requirements under New Hampshire law. *Id.* at 255, 258-59. The towing company asserted that plaintiff's claims were barred by a federal preemption clause similar to the ADA's. *Id.* at 264-66. The Court held that "if such state-law claims are preempted, no law would govern resolution of a [disposal dispute] or afford a remedy for wrongful disposal." *Id.* at 265. Thus, preemption would remove not only the plaintiff's remedy but also "the sole legal authorization for a towing company's disposal [of vehicles] that go unclaimed." *Id.* Likewise here, the petitioner "relies on Texas law requiring that private insurers reimburse it for air-ambulance services to injured workers, yet it argues that the Texas standards governing the amount of that reimbursement are preempted." Pet. App. 3. Thus, the Texas Supreme Court correctly concluded that even if the ADA preempted the challenged TWCA provisions, "it does not—and, as a constitutional matter, could not—provide PHI the remedy it seeks." *Id.* at 13.

As a result, petitioner must look to some other law that creates a right to full reimbursement of billed charges. Lower courts agree that the ADA—which is not aimed at medical reimbursement at all—does not do so. *See* Pet. App. 20; *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 767 (4th Cir. 2018). Instead, "any such possible

duty would exist as a creation only of state, not federal law." *EagleMed LLC v. Cox*, 868 F.3d 893, 906 (10th Cir. 2017). And as the Texas Supreme Court correctly recognized, federal law cannot *direct* Texas to order payment of full billed charges, because such commandeering would violate the Tenth Amendment. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-76 (2018). Petitioner does not address this alternative holding, let alone explain how this Court could grant relief without reviewing it.

2. To what reimbursement PHI is entitled under Texas law remains an open factual question for the Texas courts to resolve. Under Texas law, the Division has exclusive jurisdiction to assess disputes over reimbursement levels under the TWCA, subject to judicial review. *See Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 803 (Tex. 2001). The ADA does not set reimbursement rates or tell the Division how to adjudicate these 33 disputed cases. Instead, the case needs to be remanded to the lower courts to determine, among other things, whether the rates that PHI received were—as a question of fact—reasonable. As the Supreme Court of Texas expressly stated, "under the fair and reasonable standard, it is possible that the amount of PHI's reimbursement . . . could be . . . the full amount PHI billed." Pet. App. 21. That factual determination would eliminate the need for this Court's review in this case. The existence of such an open factual question counsels heavily against granting review. *E.g.*, *Wrotten*, 560 U.S. at 959.

II. There Is No Compelling Need for Review.

There is no compelling need for this Court to deviate from its ordinary practice of denying interlocutory review. The Texas Supreme Court's analysis of the ADA turns heavily on unique aspects of Texas law. That court

likewise did not pass on the effect of the McCarran-Ferguson Act on Texas law, not only preventing that court from creating a circuit split on the topic, but obligating petitioner to spend nearly a third of its petition on a question not addressed by the decision petitioner asks this Court to review.

A. The lower courts' ruling regarding the ADA is consistent with other jurisdictions.

The decision below was anchored in the specific provisions of the Texas workers'-compensation scheme and does not create a split among jurisdictions. The Texas Supreme Court considered and distinguished petitioner's cited authorities regarding the scope of the ADA's preemption provision, Pet. 22-24, based on the particularities of Texas law, as well as the record and pleadings in this case, Pet. App. 22-25 (discussing *Cheatham*, 910 F.3d at 758; *Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259, 1270 (11th Cir. 2018); *EagleMed*, 868 F.3d at 898). The TWCA's fact-driven "fair and reasonable" reimbursement methodology distinguishes this case from other decisions in several ways.

1. As an initial matter, the Texas Supreme Court correctly noted that the TWCA is not the type of anticompetitive regulation of air services targeted by the ADA. Pet. App. 22, 24. Indeed, the TWCA does not mention air-ambulance reimbursement; it provides rules of general effect for all medical-service providers. This distinguishes this case from the cases on which petitioner primarily relies—*Cheatham*, 910 F.3d at 758-59, and *EagleMed*, 868 F.3d at 898—as well as the Eighth Circuit's recent decision in *Guardian Flight LLC v. Godfread*, Nos. 19-1343, 19-1381, 2021 WL 983084, at *1.

2. This distinction can be seen most starkly in *Bailey*, where the Eleventh Circuit addressed a Florida

motor-vehicles statute that would have *prohibited* an air-ambulance company from collecting a "reasonable fee." 889 F.3d at 1262. No party in that case had contested the "reasonableness" of the air-ambulance bill, and the plaintiff had "inferentially admit[ted]" that the air-ambulance company was "entitled" to the full payment unless the challenged balance-billing provision barred it. *Id.* at 1269 n.22. There is no conflict between (a) the Eleventh Circuit's conclusion that the ADA preempts Florida's *prohibition* of a reasonable fee and (b) the Texas Supreme Court's conclusion that the ADA does not preempt Texas's *requirement* of a fair and reasonable fee.[1]

3. Petitioner's other authorities similarly do not yield a square split requiring this Court's review because they applied a *fixed*-fee schedule to air-ambulance reimbursement, rather than looking to *fair and reasonable* reimbursement on a case-by-case basis. *See Cheatham*, 910 F.3d at 759, 769 n.3; *EagleMed*, 868 F.3d at 905. For instance, in *EagleMed*, Wyoming's state fund would reimburse "$3,900.66 plus $27.47 per statute mile" for air-ambulance services. 868 F.3d at 898. The Tenth Circuit held that the ADA preempts such a "mandatory fixed maximum rate that will be paid by the State for air-ambulance services." *Id.* at 902.

By contrast, "Texas does not have fixed maximum reimbursement limits." Pet. App. 24. Indeed, as the Texas Supreme Court explained, having "fair and reasonable" payment standard does not necessarily preclude payment of full billed charges or a significant percentage thereof—if, through the adjudicative process, it is

[1] There is also no conflict in the ruling over whether a balance-billing prohibition is preempted because, as discussed above (at 10-12), no such prohibition was addressed by the Texas Supreme Court.

determined that the nature and extent of the services provided make those charges "fair and reasonable." *Id.*

4. Finally, petitioner is wrong to claim that the "decision below jeopardizes the ongoing viability" of the air-ambulance industry because other States *might* adopt a a framework similar to Texas in the future. Pet. 35-36. As an initial matter, this argument is hyperbolic: Workers' compensation comprises a small portion of total air-ambulance transports. *See* Pet. App. 4 (noting that discounts for Medicare and Medicaid patients have driven costs). And Texas's workers'-compensation scheme is designed to be flexible by requiring "fair and reasonable" reimbursement for even those transports. *Supra* at 3-4. Throughout this proceeding, Texas's system has awarded PHI more than it would have been paid under Medicare and Medicaid, and much higher than what can be recovered from uninsured individuals. Pet. App. 21. And, upon remand, the courts may order yet more than the 125% of Medicare's rate to which PHI is already entitled.

More fundamentally, the notion that States may take different approaches in their laws—as Texas has done in its workers'-compensation scheme—is not a bug in the system. It is a feature: This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015). If Congress grows concerned about the impact of this private-insurer model of workers' compensation, it can address it at the appropriate time—precisely as it did for the commercial airline industry in the ADA. That possibility does not give this Court grounds—let alone an urgent need—to expand the preemptive reach of the ADA

before the Texas courts can even decide how much reimbursement PHI will receive.

B. The Texas Supreme Court's decision not to pass on the application of the McCarran-Ferguson Act counsels against review.

Similarly ephemeral is the supposed need to address the scope of the McCarran-Ferguson Act's anti-preemption provision. Through certiorari alchemy, petitioner seeks (at 28-36) to transmute the lead of a question on which a lower court did not pass into the gold of a clear circuit split. Like all alchemy, it fails.

1. Petitioner frames the effect of the McCarran-Ferguson Act as a second question presented because it correctly recognizes that even if the ADA preempted Texas law, McCarran-Ferguson could serve as an alternative basis to uphold the Texas Supreme Court's judgment. Indeed, that issue was presented to the Texas Supreme Court, which declined to pass on it.

The McCarran-Ferguson Act provides a safe harbor for state laws enacted "for the purpose of regulating the business of insurance," prohibiting their preemption by federal statute unless the federal law "specifically relates to the business of insurance." 15 U.S.C. § 1012(b); *see also Humana Inc. v. Forsyth*, 525 U.S. 299, 306-07 (1999). Its first clause recognizes that state laws aimed at regulating the relationship between insurer and insured regulate the business of insurance—including state laws governing the performance or terms of insurance contracts. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 504 (1993); *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969). The TWCA satisfies these straightforward criteria for two reasons.

First, the TWCA prescribes the terms of private workers'-compensation-insurance contracts. The "type

of policy which [can] be issued" is at the "core of the 'business of insurance.'" *Nat'l Secs.*, 393 U.S. at 460. And a law that "prescrib[es] the terms of the insurance contract" is a "direct[]" regulation of the "business of insurance." *Fabe*, 508 U.S. at 502-03. Under Texas law, private workers'-compensation insurers' "contract for coverage must be written on a policy and endorsements approved by the Texas Department of Insurance." Tex. Lab. Code § 406.051(b); *see also* Tex. Ins. Code § 2052.002(a). The metric for determining reimbursement is set by state law in this instance, but it remains fundamentally part of the insurance contract: State workers' compensation law sets the payment responsibility taken on by an insurer pursuant to the—otherwise silent—insurance contract. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 130 (1982) ("If the policy limits coverage to 'necessary' treatments and 'reasonable' charges for them, then that limitation is the measure of the risk that has actually been transferred to the insurer.").

Second, the TWCA affects the performance, reliability, and enforcement of insurance contracts. The "actual performance of an insurance contract" is an "essential" part of the "business of insurance." *Fabe*, 508 U.S. at 505. Likewise, a policy's "reliability, interpretation, and enforcement" is part of the "core" of the "business of insurance." *Nat'l Secs.*, 393 U.S. at 460. The TWCA mandates the insurance carrier's performance of its payment obligations under workers'-compensation-insurance contracts and furthers compliance with those obligations by authorizing administrative remedies and sanctions. *See* Tex. Lab. Code § 409.023; *see also id.* §§ 415.002, .0215, .023. And the TWCA ensures the reliability of workers'-compensation insurance in serving as an adequate

substitute for common-law claims. *See Garcia*, 893 S.W.2d at 521-22.

Petitioner's authorities do not change that result. Pet. 28-32 (citing *Pireno*, 458 U.S. at 129; *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)). *First*, those cases were decided under an antitrust exception to the McCarran-Ferguson Act, which is construed more narrowly than the general rule at issue here. *Fabe*, 508 U.S. at 504. *Second*, air-ambulance payment pursuant to TWCA terms *integrated into the insurance contract itself* bears scant resemblance to the third-party arrangements entered into after and separate from the insurance contracts in those cases. *See Pireno*, 458 U.S at 130; *Royal Drug*, 440 U.S. at 230 n.37. *Third*, *Fabe* instructs that state laws governing the performance of insurance contracts per se satisfy the test laid out in *Pireno*. 508 U.S. at 503-04. The TWCA does that, and it is a law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

Because the McCarran-Ferguson Act has not yet been addressed and forms an independent basis to affirm, this is a poor vehicle to decide the scope of ADA preemption. *Jander*, 140 S. Ct. at 595.

2. Hence why petitioner instead frets that the "prospect that leaving the [McCarran-Ferguson Act] issue for remand will precipitate another split among the lower courts warranting this Court's review." Pet. 34. This is, of course, an implied concession that no split on the question exists. Petitioner must concede as much because the Texas Supreme Court expressly stated that it "[did] not decide whether the McCarran-Ferguson Act applies." Pet. App. 10. Because it did not, petitioner cannot justify this Court's intervention by pointing to the conclusion of the "four concurring justices" and arguing that it

"conflicts with decisions from multiple courts of appeals." Pet. 32. And to grant certiorari based on what the Texas Supreme Court *might* do at some *future* point perfectly inverts this Court's maxim that it acts as a "court of review, not of first view."

Even if the Texas Supreme Court were someday to adopt the concurrence's approach, it would not necessarily create a split with other jurisdictions. As discussed above, Texas's workers'-compensation system is unique: It operates through private insurance companies rather than state funds, and participation by employers is voluntary. Tex. Lab. Code § 406.002(a). In Texas, then, the workers'-compensation contract is a commercial insurance contract. This fact distinguishes Texas's workers'-compensation system from those cited by petitioner.

For example, like the Wyoming system at issue in *EagleMed*, the Tenth Circuit found that reimbursement under Wyoming's workers'-compensation system was not the "business of insurance." 868 F.3d at 904-05. The court there observed that the Wyoming Supreme Court described its workers'-compensation system as establishing "an industrial-accident fund—financed by [non-insurance] industry and underwritten by the State." *Id.* at 897.

Petitioner's other authorities (at 32-24) are similarly not on point. *Bailey* did not address workers' compensation. 889 F.3d 1259. Nor does the recent *Guardian Flight* decision. 2021 WL 983084, at *1. And *Genord v. Blue Cross & Blue Shield of Michigan* does not deal with air ambulances or the ADA. 440 F.3d 802 (6th Cir. 2006). Thus, they do not provide the basis to find a circuit split on whether the McCarran-Ferguson Act operates to protect state workers'-compensation laws from preemption.

3. The Court should be especially wary of taking up the scope of the McCarran-Ferguson Act before the Texas Supreme Court has done so because the McCarran-Ferguson inquiry often turns on tricky questions of state law. *See Michigan v. Long*, 463 U.S. 1032, 1039 (1983). Whether McCarran-Ferguson applies turns on the *purpose* behind a state statute. 15 U.S.C. § 1012(b). State-law interpretive tools are deployed to determine the "purpose" of a particular state law. *Fredericksburg Care Co. v. Perez*, 461 S.W.3d 513, 518 (Tex. 2015). For that reason, circuit courts construing the McCarran-Ferguson Act have looked to state law (and in particular state-court precedents) to determine whether a state statute was passed with "the purpose of regulating the business of insurance." *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590-92 (5th Cir. 1998) (crediting the view of the Oklahoma courts that the challenged Act "is designed to protect" "*policyholders of an insolvent insurer*"). Indeed, petitioner's own authority does so. *See EagleMed*, 868 F.3d at 903. Here, no Texas appellate court has examined whether the provisions challenged by PHI were passed for the purpose of regulating insurance—and this Court should not do so in the first instance.

III. The Decision Below is Consistent with this Court's Precedent and is Otherwise Correct.

Finally, even if the Court were inclined to ignore all of the prudential bars to review, the Texas Supreme Court correctly concluded that the TWCA does not fall within the scope of the ADA's prohibition of state laws "related to a price, route, or service" of an air carrier that is subject to the Act's economic regulation. 49 U.S.C. § 41713(b)(1). This provision "ensure[s] that the States would not undo federal deregulation with regulation of

their own." *Morales*, 504 U.S. at 378. The Texas Supreme Court correctly held that the challenged provisions fall outside the scope of ADA preemption. Pet. App. 2-3, 18.

1. As discussed above (at 4-5), the ADA was passed in an effort to promote a more competitive market in commercial air travel. It includes a stated purpose to avoid "conditions" that would "tend to allow" airlines "unreasonably to increase prices." 49 U.S.C. § 40101(a)(10). This Court has repeatedly looked to that purpose in determining how broadly to construe its preemption provision. *See, e.g., Morales*, 504 U.S. at 385-86. This Court has only found regulation impacting the market for commercial airline tickets preempted. *See Nw., Inc. v. Ginsberg*, 572 U.S. 273, 284 (2014); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 226-27 (1995); *Morales*, 504 U.S. at 383-84. But this Court has recognized that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to be preempted. *Morales*, 504 U.S. at 390 (alterations in original). This Court has never held that payment for medical services provided within a workers'-compensation system falls within the ADA simply because certain of those services involved aviation.

2. The court below correctly recognized that the ADA "did not deregulate reimbursement for air-related medical care generally." Pet. App. 15. To the contrary, this Court's precedent suggests that a history of Medicare regulation should be taken into account when interpreting general preemption language in other statutes. *See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 667 n.6 (1995). The Social Security Act regulated air-ambulance reimbursement rates for Medicare and Medicaid, and prohibited balance-billing, before the ADA was enacted. *See Keefe*

ex rel. Keefe v. Shalala, 71 F.3d 1060, 1062-63 (2d Cir. 1995). This was left unchanged by the ADA *See* Soc. Sec. Amendments of 1965 Act, Pub. L. No. 89-97, § 102(a), 79 Stat. 286, 322 (codified at 42 U.S.C. § 1395x(s)(7)); 42 U.S.C. § 1395m(l); 67 Fed. Reg. 9100, 9112 (Feb. 27, 2002).

3. The Texas Supreme Court also correctly stated and applied this Court's framework for determining whether a state law is "related to a price." Pet. App. 15. State laws of general applicability, which neither "express[ly] reference" air-carrier prices nor establish "binding requirements," are preempted only if they "have the forbidden significant effect upon fares." *Morales*, 504 U.S. at 388; *see Rowe*, 552 U.S. at 371-72. A forbidden significant effect, "prices" under the challenged state law would have to "differ significantly from those that, in the absence of the regulation, the market might dictate." 552 U.S. at 371-72.

Petitioner argues that this Court did not state a "test" in *Morales*. Pet. 18. Circuits addressing the question have consistently held otherwise. *See Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc); *see also, e.g., Cheatham*, 910 F.3d at 767; *Bailey*, 889 F.3d at 1271; *EagleMed*, 868 F.3d at 902; *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34-35 (1st Cir. 2007); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996). Petitioner further insists (at 19) this consistently applied interpretation creates some "irrational" loophole in the ADA. But this Court has explained that a "particularized application of a general statute" *may* still be preempted but *only* if it has a "significant effect" on price. *Morales*, 504 U.S. at 386, 388.

Texas's workers'-compensation laws are rules of general effect for medical-service providers and do not mention air-carrier prices. Pet. App. 17 (citing *Morales*, 504 U.S. at 388). The TWCA also does not have the forbidden significant effect on price for at least four reasons.

First, because air-ambulance charges are not set in a traditional market, the TWCA does not interfere with the setting of a market price. Petitioner acknowledges that the ADA "sought to avoid" substitution of a State's commands for "competitive market forces." Pet. 18 (quoting *Rowe*, 552 U.S. at 372). The Texas Supreme Court correctly recognized that air-ambulance rates are "not the product of a transactional relationship, as PHI's injured customer has not agreed to pay it." Pet. App. 20.

Indeed, in the healthcare context, a "two-tiered structure has evolved: 'list' or 'full' rates sometimes charged to uninsured patients, but frequently uncollected, and reimbursement rates for patients covered by government and private insurance." *Haygood v. De Escabedo*, 356 S.W.3d 390, 393 (Tex. 2011) (footnotes omitted). As in the hospital/medical provider context more generally, PHI's billed charges for air-ambulance services do not reflect bargained-for or market prices as contemplated by the ADA. There is no choice of providers or opportunity for price negotiation.

Second, to the extent a hypothetical market price exists for emergency air-ambulance services, that price would resemble the "fair and reasonable" payment provided for in the TWCA. As the Texas Supreme Court concluded, "[a]bsent an agreement on price, the law implies a fair or reasonable price: exactly the same standard Texas has adopted for determining reimbursement." Pet. App. 20-21; *see also Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966). This rule has been

frequently applied by courts across the country. *Ferrell v. Air Evac EMS, Inc.*, 900 F.3d 602, 609 (8th Cir. 2018); *see Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1065 (10th Cir. 2019).

Petitioner argues that any state-court determination of an implied-in-fact contract price would be preempted *too*, Pet. 21. But this Court has already held that the ADA does not preempt contract claims. *Wolens*, 513 U.S. at 228.

Third, PHI cannot establish that the TWCA significantly affects rates by comparing the amount received to "the actual amounts that PHI billed for its services." Pet. 19. "Legally, the full amount billed for air ambulance services is not the starting point for measuring significant effect." Pet. App. 20; *Cheatham*, 910 F.3d at 769. Moreover, the one suggestion in the record regarding a market price is entirely consistent with the lower court's conclusion: PHI agreed to 125% of Medicare when it contracted with the University of Texas Medical Branch for inmate transport. Pet. App. 7 n.4. And the billed rates charged here are far more than what PHI receives for the vast majority its services. *See* Pet. 35; Pet. App. 4-5.

Fourth, petitioner errs by focusing (at 2, 19) on the trial court's determination of fair and reasonable reimbursement for these transports (125% of Medicare). As the Texas Supreme Court pointed out, "under the fair and reasonable standard, it is possible that the amount of PHI's reimbursement for carrying covered workers could be either (1) the full amount PHI billed, (2) the average price PHI is paid for air ambulance services, or (3) a price PHI bargained for in the market." Pet. App. 21. As a result, the TWCA does not have any consistent effect on price—let alone one that the ADA prohibits.

4. The Texas Supreme Court was correct in interpreting the ADA in light of the significant federalism concerns it implicates. *Id.* at 2. This Court has repeatedly recognized that when a challenged state law is an exercise of the "historic police powers of the States," it is presumed *not* to be preempted unless the federal statute expresses a "clear and manifest" preemptive intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *see Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Travelers*, 514 U.S. at 655, 661.

This Court has recognized that workers' compensation is just such an area of historic state power. *See DeCanas v. Bica*, 424 U.S. 351, 356 (1976). Indeed, each time Congress has legislated in a field that intersects with state workers'-compensation systems, it has carefully excluded those systems. It did so by refusing removal of any state-court action arising under state workers' compensation laws. 28 U.S.C. § 1445(c). Workers'-compensation plans are also excepted from ERISA, 29 U.S.C. § 1003(b)(3)), HIPAA, 42 U.S.C. § 300gg-91(c)(1)(D), and GINA, 42 U.S.C. § 2000ff-8(a)(4). Indeed, the Department of Labor has recognized that "[s]tate-based workers' compensation" is the "only major component of the social safety net with no federal oversight or minimum national standards." U.S. Dep't of Labor, *Report: Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers?* at 1 (2016), https://www.dol.gov/sites/dolgov/files/OASP/files/WorkersCompensationSystemReport.pdf.

Given this clear policy of non-intervention, this Court should not lightly infer an intent by Congress to interfere with this traditional state power. And nothing about the ADA leads to the inference that Congress intended to address workers' compensation or expected that it

would be applied to private air-ambulance reimbursement in Texas's workers'-compensation system. Moreover, for thirty years, States have regulated air-ambulance reimbursement rates without objection from the industry. Without further instruction from Congress, the Court should not change course now.

5. Finally, the Texas Supreme Court correctly refused to construe the preemption provision in a way that would "disserve the central purpose of the ADA." *Northwest*, 572 U.S. at 283. This Court considers the federal Act's objectives "as a guide to the scope of the state law that Congress understood would survive." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480-81 (2020). Rather than discouraging conditions that would allow airlines "unreasonably to increase prices" as Congress intended in passing the ADA, 49 U.S.C. § 40101(a)(10), petitioner's approach would allow air-ambulance companies to exploit monopoly power because injured workers who need to be transported by air ambulance cannot shop around for substitutes. This interpretation does not further Congress's intent, is not dictated by the statutory language, and should not be adopted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2021