No. 20-748

IN THE

Supreme Court of the United States

PHI AIR MEDICAL, LLC,

Petitioner,

v.

TEXAS MUTUAL INSURANCE COMPANY, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF TEXAS MUTUAL INSURANCE COMPANY AND OTHER INSURER RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Texas correctly held that the Airline Deregulation Act does not preempt Texas law requiring workers' compensation insurers to pay air-ambulance providers a "fair and reasonable" amount for transport of injured workers, when the fair-and-reasonable requirement is considered—as PHI expressly requested—independently from Texas law's prohibition on "balance billing" workers for amounts unpaid by insurers.

2. Whether the "fair and reasonable" requirement is saved from preemption by the McCarran-Ferguson Act because the requirement regulates the business of insurance (a question the Supreme Court of Texas did not reach).

PARTIES TO THE PROCEEDING

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

Respondents 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 were petitioners below.

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

CORPORATE DISCLOSURE STATEMENT

Respondent Texas Mutual Insurance Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents Hartford Underwriters Insurance Company and Twin City Fire Insurance Company are each wholly owned by The Hartford Financial Services Group, Inc., a publicly held company.

Respondent TASB Risk Management Fund has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents Transportation Insurance Company and Valley Forge Insurance Company are each wholly owned by CNA Financial Corporation, a publicly held company. Approximately 90% of CNA Financial Corporation's stock is owned by Loews Corporation, a publicly held company.

Respondent Truck Insurance Exchange has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Zenith Insurance Company is wholly owned by Fairfax Financial Holdings Limited, a publicly held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

JURISDICTION 5

STATEMENT 5

A. The Texas Workers' Compensation Act 5

B. Factual And Procedural Background 6

REASONS FOR DENYING THE PETITION 12

I. THIS COURT LACKS JURISDICTION 12

A. The Decision Below Is Not Final 12

B. The Preemption Issue PHI Seeks To Litigate In This Court Was Neither Pressed Nor Passed Upon Below 16

C. The Case Is Not Justiciable Because This Court Cannot Redress PHI's Asserted Injury 19

II. THE TEXAS SUPREME COURT'S PREEMPTION RULING DOES NOT WARRANT CERTIORARI 21

A. The Purported Split Of Authority Is Illusory 21

TABLE OF CONTENTS—Continued

Page

B. The Decision Below Correctly Applied This Court's Precedent To The Facts Before It ... 27

III. THE MCCARRAN-FERGUSON ACT QUESTION DOES NOT WARRANT CERTIORARI ... 30

A. The Texas Supreme Court Did Not Pass On McCarran-Ferguson ... 30

B. The Concurrence's Analysis Is Correct And Implicates No Split Of Authority ... 31

CONCLUSION ... 34

TABLE OF AUTHORITIES

CASES

Page(s)

Adams v. *Robertson*,
520 U.S. 83 (1997) 16, 17, 31

Air Evac EMS, Inc. v. *Cheatham*,
910 F.3d 751 (4th Cir. 2018) 24, 25, 28

Bailey v. *Rocky Mountain Holdings, LLC*,
889 F.3d 1259 (11th Cir. 2018) 26, 28, 33

Belknap, Inc. v. *Hale*,
463 U.S. 491 (1983) 15

Black v. *Cutter Laboratories*,
351 U.S. 292 (1956) 32

Buck v. *American Airlines, Inc.*,
476 F.3d 29 (1st Cir. 2007) 28

Byrd v. *United States*,
138 S. Ct. 1518 (2018) 30

Camreta v. *Greene*,
563 U.S. 692 (2011) 19

Cardinale v. *Louisiana*,
394 U.S. 437 (1969) 16

Cox Broadcasting Corp. v. *Cohn*,
420 U.S. 469 (1975) 13, 14, 15

Dan's City Used Cars, Inc. v. *Pelkey*,
569 U.S. 251 (2013) 20

EagleMed LLC v. *Cox*,
868 F.3d 893 (10th Cir. 2017) 22, 23, 24, 28, 33

Florida v. *Thomas*,
532 U.S. 774 (2001) 13, 14, 15, 16

TABLE OF AUTHORITIES—Continued

Page(s)

Flynt v. *Ohio*,
451 U.S. 619 (1981) 15, 16

Food Marketing Institute v. *Argus Leader Media*, 139 S. Ct. 2356 (2019) 19, 21

Genord v. *Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006) 33

Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) 32

Guardian Flight LLC v. *Godfread*,
2021 WL 983084 (8th Cir. Mar. 17, 2021) 27, 33

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 20, 30

Jefferson v. *City of Tarrant*,
522 U.S. 75 (1997) 12, 13, 14, 15

Johnson v. *California*,
541 U.S. 428 (2004) 13, 14, 15

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 4, 10, 27, 28, 29

Southland Corp. v. *Keating*,
465 U.S. 1 (1984) 15

Travel All Over the World, Inc. v. *Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996) 28

Union Labor Life Insurance Co. v. *Pireno*,
458 U.S. 119 (1982) 32

United States v. *Holness*,
706 F.3d 579 (4th Cir. 2013) 26

TABLE OF AUTHORITIES—Continued

Page(s)

United States Department of Treasury v. *Fabe*,
508 U.S. 491 (1993) 32

Virginia v. *Hicks*,
539 U.S. 113 (2003) 20

Zivotofsky ex rel. Zivotofsky v. *Clinton*,
566 U.S. 189 (2012) 31

ADMINISTRATIVE DECISIONS

In re: Reimbursement of Air Ambulance Services Provided by PHI Air Medical, No. 454-15-0681.M4 (Tex. State Office of Admin. Hearings Sept. 8, 2015) 7

DOCKETED CASES AND BRIEFS

Air Evac EMS, Inc. v. *Sullivan*,
No. 18-50722 (5th Cir.) 11

Brief of Appellant, *PHI Air Medical, LLC* v. *Texas Mutual Insurance Co.*, No. 03-17-00081-CV, 2017 WL 2619788 (Tex. App. June 5, 2017) 8

Brief of Plaintiff-Appellee, *Air Evac EMS, Inc.* v. *Cheatham*, No. 17-2349, 2018 WL 1350944 (4th Cir. Mar. 7, 2018) 25

Joint Response Brief on the Merits, *Texas Mutual Insurance Co.* v. *PHI Air Medical, LLC*, No. 18-0216, 2019 WL 7819910 (Tex. Sept. 10, 2019) 9, 18

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

15 U.S.C. §1012 31

28 U.S.C. §1257 .... 3, 5, 12, 20

49 U.S.C. §41713 7

28 Tex. Admin. Code §134.1 6

Tex. Ins. Code §2052.002 .... 5, 32

Tex. Lab. Code
§406.003 5
§408.021 6
§408.027 6
§413.031 6
§413.042 6

Supreme Court Rule 14.1 .... 17, 20

OTHER AUTHORITIES

Shapiro, Stephen M., et al., *Supreme Court Practice* (11th ed. 2019) 13

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Vemuri, Chitra, *KKR to Acquire Air Medical from Bain*, Wall Street Journal (Mar. 11, 2015) 7

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BRIEF IN OPPOSITION OF TEXAS MUTUAL INSURANCE COMPANY AND OTHER INSURER RESPONDENTS

INTRODUCTION

Texas law prescribes the terms of workers' compensation insurance policies, which employers purchase from private insurance companies like respondent Insurers. As relevant here, Texas law requires insurers to pay a "fair and reasonable" amount on claims by medical providers for services to injured workers. It also bars medical providers from "balance-billing" injured workers for amounts not covered by insurance.

Petitioner PHI Air Medical, LLC, an air-ambulance company, wants to compel Insurers to pay whatever amount PHI decides to charge for transportation of injured workers, whether or not the amount is fair and reasonable. Before the Texas Supreme Court, PHI ar-

gued that the fair-and-reasonable requirement was preempted by the Airline Deregulation Act (ADA) and that PHI was therefore entitled to have Insurers pay its billed charges in full. PHI made a strategic choice not to challenge the balance-billing prohibition, urging that if the Texas Supreme Court rejected PHI's challenge to the fair-and-reasonable requirement, it should remand for the lower courts to address balance billing.

The Texas Supreme Court observed that PHI's litigation tactics created "a critical flaw in PHI's preemption argument," because preemption challenges "should be decided by considering the state statutory and regulatory scheme as a whole." App. 23. Nonetheless, the court considered the fair-and-reasonable requirement "standing alone," as PHI had requested. App 17. It held that on the existing record, PHI had not shown that the fair-and-reasonable requirement had a "significant effect on PHI's prices" supporting preemption. *Id.* In the alternative, the court held that even if the ADA did preempt the fair-and-reasonable requirement, PHI would be entitled to no remedy, because no law would require Insurers to reimburse PHI at all. App. 26. The court remanded to the Texas Court of Appeals to address PHI's challenge to the balance-billing prohibition, along with PHI's arguments that state law requires Insurers to pay its full billed charges. App. 32.

PHI now asks this Court to review the Texas Supreme Court's decision. PHI argues that, taken together, the fair-and-reasonable requirement and the balance-billing prohibition dictate the maximum amount air-ambulance providers can recover and are therefore preempted by the ADA. It claims that the Texas Supreme Court erroneously "upheld the combined effect of the two provisions," and thereby created a split of authority. Pet. 26.

But that is not what the Texas Supreme Court did. The court never addressed the balance-billing prohibition, or "the combined effect of the two provisions"—because PHI asked it not to. Rather, PHI "strategically declin[ed] to challenge" the balance-billing prohibition, preventing the court from considering "the state … scheme as a whole." App. 23. That "choice [had] consequences for [the court's] analysis," App. 15, shaping its reasoning, its holdings as to preemption and remedy, and its ultimate disposition remanding the case for further proceedings. And the choice has consequences for PHI's petition as well. PHI's misdirection cannot obscure the petition's multiple fatal flaws.

To begin (and end), this Court lacks jurisdiction, for three independent reasons. *First*, the Texas Supreme Court's decision below is not a "[f]inal judgment[] or decree[]," as 28 U.S.C. §1257(a) requires. Rather, the Texas Supreme Court remanded for the court of appeals to address PHI's challenge to the balance-billing prohibition, along with the alternative state-law bases for relief that PHI had advanced. The decision is thus interlocutory, and this Court cannot review it.

Second, this Court cannot review the preemption argument PHI now makes, challenging "the combined effect" of the fair-and-reasonable requirement and the balance-billing provision, because that argument was neither pressed nor passed upon below. To the contrary, as the Texas Supreme Court made clear, PHI affirmatively waived that argument below. It cannot now resurrect it before this Court.

Third, any challenge to the preemption ruling the Texas Supreme Court actually made is not justiciable. As noted, the court held in the alternative that if the fair-and-reasonable requirement were preempted, no

law would require Insurers to pay PHI anything, App. 26, making PHI "substantially worse off," App. 3. PHI does not seek this Court's review of that holding. A decision by this Court thus could not redress PHI's alleged injury.

Each of these jurisdictional defects dooms the petition. But even if the Court had jurisdiction, the petition would present no question worthy of review.

The split of authority PHI alleges on ADA preemption is illusory, resting as it does on PHI's misrepresentation of the decision below. The Texas Supreme Court did not apply a different legal standard for preemption than the court of appeals cases PHI cites; it applied the same standard to a different question. PHI made a tactical choice to confine its preemption challenge to the fair-and-reasonable insurance requirement in isolation, and that is all the Texas Supreme Court addressed. By contrast, the other cases on which PHI relies addressed the combined effect of a balance-billing prohibition and fixed caps on fees for medical providers. They do not conflict with the decision below.

On the merits of the preemption question, the Texas Supreme Court applied the correct standard, acknowledging that the ADA preempts state laws of general applicability that have a "forbidden significant effect" on air fares, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992). App. 15-16. And its application of that standard to this case is unexceptional and largely fact-bound. The court simply held that, on the record before it, PHI had not submitted evidence demonstrating that the fair-and-reasonable insurance requirement had a significant effect on the prices PHI charged its customers for its services. App. 21. Nothing in that analysis warrants certiorari.

Finally, PHI argues that if this Court grants review on ADA preemption, it should also decide whether the McCarran-Ferguson Act applies. But the Texas Supreme Court did not address that question—only the concurrence did so—and this Court is one of review, not first view. In any event, the concurrence's analysis was correct and implicates no split of authority.

JURISDICTION

This Court lacks jurisdiction for three reasons. First, the Texas Supreme Court's decision is not "[f]inal." 28 U.S.C. §1257(a). Second, the preemption question PHI now urges this Court to decide was not pressed or passed upon below. Finally, a favorable decision by this Court would not redress PHI's alleged injury. *See infra* Part I.

STATEMENT

A. The Texas Workers' Compensation Act

The Texas Workers' Compensation Act (TWCA) was enacted "to respond 'to the needs of workers, who, despite escalating industrial accidents, were increasingly being denied recovery.'" App. 5. Under the TWCA, if employers purchase workers' compensation insurance, workers receive compensation for work-related injuries under the insurance policy's terms, without regard to employer or worker fault, rather than through the tort system. *Id.* Employers "may obtain workers' compensation insurance coverage through a [private] licensed insurance company." Tex. Lab. Code §406.003. The Texas Department of Insurance mandates "a uniform policy for workers' compensation insurance," Tex. Ins. Code §2052.002(a), which incorporates the terms of and benefits required by the TWCA, App. 42.

A covered worker who sustains a compensable injury "is entitled to all health care reasonably required by the nature of the injury." Tex. Lab. Code. §408.021(a). Medical providers generally "may not pursue a private claim against a workers' compensation claimant for all or part of the cost of a health care service provided to the claimant." *Id.* §413.042(a). Instead, providers must "submit a claim for payment to the insurance carrier." *Id.* §408.027(a). Providers and insurers may agree in advance by contract on the covered amount for particular types of services. 28 Tex. Admin. Code §134.1(e). Absent a contract, insurers must cover providers' charges "in accordance with the … fee guidelines" promulgated by the Department of Insurance's Division of Workers' Compensation (the Division) through notice-and-comment rulemaking. *Id.* §134.1(e)(1). Where the Division has not promulgated a guideline for a particular service, the provider receives "a fair and reasonable reimbursement amount." *Id.* §134.1(e)(3).

A provider that disputes the amount an insurer pays may seek review by the Division. Tex. Lab. Code §413.031(a), (c). The Division's decision may be appealed to an ALJ in the State Office of Administrative Hearings, and a party aggrieved by the ALJ's decision may seek judicial review. *Id.* §413.031(k), (k-1).

B. Factual And Procedural Background

1. This case originated as a dispute over claims PHI submitted to Insurers for 33 air-ambulance transports. App. 7. Insurers had no contracts with PHI "set[ting] a predetermined reimbursement amount." *Id.* Until 2012, Insurers had covered air-ambulance services at 125% of the Medicare rate, pursuant to a specific Division fee guideline, without objection from

PHI. *Id.* Around that time, however, air-ambulance companies began aggressively attempting to increase their profit margins. Air-ambulance charges soared, doubling in a few short years.[1] Providers started to argue that state workers' compensation laws providing for less than full payment of their billed charges were preempted by the ADA, which bars States from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. §41713(b)(4)(A).

In 2012, PHI and other air-ambulance providers began to file fee disputes with the Division raising the ADA preemption argument. App. 7. With respect to the claims at issue here, the Division initially agreed that the Texas scheme was preempted. *In re: Reimbursement of Air Ambulance Servs.* 17, No. 454-15-0681.M4 (Tex. State Office of Admin. Hearings Sept. 8, 2015). On appeal, an ALJ reversed and remanded for a determination of the fair and reasonable amount under Texas law. *Id.* at 2. The Division awarded PHI its full charges, finding them "fair and reasonable." *Id.* at 18. Insurers again appealed, and after a three-day evidentiary hearing, the ALJ reversed, determining that a fair and reasonable rate was "149% of the Medicare rate for air ambulances." App. 9.

[1] In 2010, one of the largest air-ambulance companies, Air Medical Group Holdings, was acquired by a private-equity firm. Vemuri, *KKR to Acquire Air Medical from Bain*, Wall. St. J. (Mar. 11, 2015). "Between 2010 and 2014, the median prices charged for helicopter air-ambulance service[s] by providers approximately doubled." U.S. Gov't Accountability Office, GAO-17-637, *Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight* 11 (2017). Two of the three largest air-ambulance providers are now owned by private-equity firms, while the third, PHI, is a subsidiary of a publicly traded company. *Id.* at 19 & n.37.

2. Insurers and PHI filed petitions for review of the ALJ's order in Texas District Court. The court granted Insurers' petition, concluding that "no additional payments greater than the 125% of Medicare amounts already paid are due." App. 105-106.

Insurers and PHI also each sought a declaratory judgment on ADA preemption. PHI contended that the ADA preempted the TWCA's fair-and-reasonable requirement, its balance-billing prohibition, and certain associated regulations; Insurers, supported by the Division as an intervenor, contended that the provisions were not preempted. App. 105. The district court held the ADA did not preempt any of the provisions. *Id.*

3. PHI appealed to the Texas Court of Appeals for the Third District. App. 87. PHI's opening brief argued that (1) the district court improperly rejected its preemption argument; (2) the Division's order finding PHI's full charges "fair and reasonable" should be reinstated because Insurers failed to exhaust administrative remedies before appealing that order; and (3) PHI's full charges were "fair and reasonable" under Texas law. Br. of Appellant 14-16, *PHI Air Med., LLC* v. *Texas Mutual Ins. Co.*, No. 03-17-00081-CV, 2017 WL 2619788 (Tex. App. June 5, 2017). In its reply brief, PHI explained that its preemption argument "only attacks the balance-billing provision in the alternative and that [PHI] would prefer to see that provision left intact while the provisions related to the reimbursement schedule [for insurers] are struck." App. 86 n.2.

The court of appeals reversed the district court, holding that the ADA preempted "the rules and statutes related to reimbursement rates" paid by insurers, and that the McCarran-Ferguson Act did not save the scheme from preemption. App. 102; *see* App. 83-103. It

stated: "We limit our decision to the rules and statutes related to reimbursement rates and explicitly do not address the balance-billing provision, as PHI has explained that it only attacks that provision in the alternative and that it would prefer to leave the balance-billing provision intact." App. 102. Noting that in light of the preemption ruling, "we need not address the other issues raised by the parties," it remanded to the district court for further proceedings. App. 102 & n.14.

4. The Supreme Court of Texas granted petitions for review from Insurers and the Division and reversed the court of appeals. App. 4; *see* App. 1-32.

The court identified the "questions presented" as (1) "whether Texas's [requirement] that private insurance companies reimburse the fair and reasonable medical expenses of injured workers is preempted by" the ADA; and (2) if so, whether "Texas [must] mandate reimbursement" of PHI's full billed charges. App. 2. It "answer[ed] both questions no." *Id.*

The court began its preemption analysis by noting that "it is important to be clear about what PHI is challenging and what it is not." App. 14. "In this Court, PHI only briefs a challenge to Texas's general 'fair and reasonable' standard." *Id.* "PHI is not presently challenging Texas's prohibition on PHI balance billing its customer directly." *Id.*[2] While the court thought it

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[2] PHI's brief urged the Texas Supreme Court "not [to] address whether the … balance-billing ban is preempted by the ADA"; instead, if the court held "that the … rate-setting provisions are not preempted," PHI asked it to "remand so that the court of appeals can address the status of the balance-billing prohibition 'in the first instance.'" Joint Response Br. on the Merits 61, *Texas Mutual Ins. Co.* v. *PHI Air Med., LLC*, No. 18-0216, 2019 WL 7819910 (Tex. Sept. 10, 2019) (PHI Tex. Br.).

"understandable" that PHI preferred to be paid by Insurers, it observed that "the choice does have consequences for our preemption analysis." App. 14-15.

The court explained that the ADA preempts both "state provisions that 'express[ly] reference' air carrier prices" and "state provisions of general applicability" that have a '"forbidden significant effect upon fares."' App. 15-16 (brackets in original) (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992)). The court treated the fair-and-reasonable requirement as "generally applicable," because "it does not reference air carrier prices." App. 17. Turning to the "forbidden significant effect" question, the court noted that the fair-and-reasonable requirement does not govern the relationship between the parties to the air-ambulance transaction (PHI and the injured worker), but only third-party insurers' subsequent coverage of claims. App. 19. It also observed that the fair-and-reasonable requirement set no fixed cap on insurer payments, and that PHI could still argue on remand that its full billed charges were fair and reasonable. App. 21. While acknowledging that it might be possible the fair-and-reasonable requirement could have a significant effect on PHI's prices, App. 19, the court found that, "[o]n this record, PHI has not shown" such "a significant effect on its prices," App. 17.

The court considered at length, and distinguished, all three of the decisions with which PHI now contends it split, *see infra* Part II.A, noting that the balance-billing prohibition was critical to the preemption analysis in each case. App. 23-24. It commented that those decisions "expose[] a critical flaw in PHI's preemption argument"—its "strategic[]" choice to "declin[e] to challenge" the balance-billing prohibition, thus preventing the court from "considering the state statutory and

regulatory scheme as a whole, not just the particular provision that [PHI] prefers to challenge." App. 23.

The court also articulated an independent, alternative basis for reversing the court of appeals' judgment: Even "if ADA preemption applies, neither state nor federal law provides for full reimbursement of air carrier bills—or for any reimbursement at all." App. 26. The court explained that if the ADA preempted the fair-and-reasonable standard for insurance reimbursement, it would also necessarily preempt the requirement that Insurers reimburse PHI in the first place. It rejected the court of appeals' conclusion that those provisions could be severed. App. 29-30. In sum, "PHI would be substantially worse off if it succeeded on its preemption claim, as insurers would no longer have any obligation to reimburse it at all." App. 3.

The Texas Supreme Court thus "reverse[d] the court of appeals' judgment … and remand[ed] for the court of appeals to address other issues it did not reach." App. 32.

Four Justices concurred on the ground that the McCarran-Ferguson Act shielded the TWCA's provisions from preemption. App. 33-54. Two Justices dissented and would have held that the TWCA's provisions are preempted by the ADA and not saved by McCarran-Ferguson. App. 55-82.[3]

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[3] A similar challenge to Texas's workers' compensation scheme is pending before the Fifth Circuit. *Air Evac EMS, Inc.* v. *Sullivan*, No. 18-50722 (5th Cir.) (oral argument held Nov. 5, 2019).

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION

PHI's petition contains three distinct jurisdictional defects. First, the decision below is not final and thus outside this Court's jurisdiction under 28 U.S.C. §1257(a). Second, the preemption question PHI now asks this Court to decide was neither pressed nor passed upon below. Finally, because PHI has not sought review of the Texas court's alternative holding on remedy, this Court cannot redress PHI's injury.

A. The Decision Below Is Not Final

1. This Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State" on federal issues. 28 U.S.C. §1257(a). "This provision establishes a firm final judgment rule," which "'is not one of those technicalities to be easily scorned,'" but "'an important factor in the smooth working of our federal system.'" *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be … 'final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Id.* "'It must be the final word of a final court.'" *Id.*

That is not the case here. Rather, the Texas Supreme Court's decision was "avowedly interlocutory." *Jefferson*, 522 U.S. at 81. The court ruled on only two issues: (1) whether the ADA preempted the fair-and-reasonable standard for insurance benefits as applied to air-ambulance claims and (2) if so, whether to require Insurers to pay PHI's full billed charges. App. 2. Having answered those questions no, the Texas Supreme Court "remand[ed] for the court of appeals to address other issues it did not reach." App. 32.

Those outstanding issues include PHI's preemption challenge to the balance-billing prohibition, which the court of appeals "explicitly d[id] not address" in its earlier decision. App. 102. They also include PHI's state-law arguments that its full charges were "fair and reasonable" and that the Division's determination to that effect should be reinstated because Insurers failed to exhaust their administrative remedies before appealing it. App. 102 n.14; *see supra* pp. 8-9. Insurers contested all those arguments below and continue to believe they are meritless. Nonetheless, those issues are outstanding and render the Texas Supreme Court's judgment interlocutory. *See 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).

"A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment." *Johnson*, 541 U.S. at 431. And "because finality of a state court judgment is of jurisdictional dimensions, the Supreme Court rules require both the petitioner and the respondent to discuss such a finality problem in the certiorari petition and in the brief in opposition." Shapiro et al., *Supreme Court Practice* §3.4 (11th ed. 2019). PHI has made no attempt to explain why the Texas Supreme Court's "avowedly interlocutory" ruling, *Jefferson*, 522 U.S. at 81, satisfies the final judgment rule. This Court should deny the petition on that ground alone.

2. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court identified "four exceptional categories of cases [that may] be regarded as 'final' … despite the ordering of further proceedings in the lower

state courts." *Johnson*, 541 U.S. at 429-430. By failing to address the finality issue in its petition, PHI has forfeited any argument that any *Cox* exception supplies jurisdiction here. In any event, none does.

The first *Cox* exception applies when "there are further proceedings … to occur in the state courts but … the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. That is not true here. The Texas Supreme Court's ruling did not decide either PHI's preemption challenge to the balance-billing prohibition or its arguments that state law requires Insurers to pay its full billed charges, which remain pending on remand.

The second exception applies when "the federal issue … will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Again, that is not true here. If PHI were to prevail on remand on its state-law arguments, it would be entitled to its full billed charges, "effectively moot[ing] the federal-law question raised." *Jefferson*, 522 U.S. at 82. Likewise, if PHI prevailed on its preemption challenge to the balance-billing prohibition, it "would no longer be necessary" for this Court to review the Texas Supreme Court's ruling addressing the fair-and-reasonable requirement standing alone. *Thomas*, 532 U.S. at 779.

The third exception applies when "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. The typical example is a criminal case where an acquittal would bar the state from seeking review of a suppression ruling, while a conviction would moot the issue. *See Thomas*, 532 U.S. at 779. Here, later review of the federal issue can still occur. If PHI ultimately loses in the Texas

courts, it can seek this Court's review of federal issues finally decided by those courts—including the preemption ruling below—at that time. *See, e.g.*, *Jefferson*, 522 U.S. at 83 ("If a state court judgment is not final for purposes of Supreme Court review, the federal questions it determines will (if not mooted) be open in the Supreme Court on later review of the final judgment."); *Johnson*, 541 U.S. at 430-431 (similar); *Thomas*, 532 U.S. at 780 (similar).

Nor does this case fall within the fourth *Cox* exception. That exception applies when, among other things, "a refusal immediately to review the state-court decision might seriously erode federal policy," making it "intolerable to leave [the federal question] unanswered" until the state-court proceedings are completed. *Cox*, 420 U.S. at 483, 485-486. State litigation seeking to penalize speech, for example, could chill "'the operation of a free press,'" warranting immediate review to protect First Amendment interests. *Id.* at 485. Similarly, in some cases, immediate review may be necessary to vindicate an asserted right not to be haled into state court in the first place. *See, e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 7-8 (1984) (deciding motion to compel arbitration); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983) (deciding whether state-court suit stemming from labor strike was within National Labor Relations Board's exclusive jurisdiction).

Such cases "involve[] identifiable federal statutory or constitutional policies which would … be[] undermined by the continuation of the litigation in the state courts." *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Here, by contrast, no federal policy would be harmed by allowing the Texas courts to decide the issues before them. No one disputes that this case is within the Texas courts' jurisdiction, and there is no plausible argu-

ment that allowing the Texas courts to decide it infringes any constitutional or statutory right. In short, there is no erosion of federal policy not "common to all run-of-the-mine decisions" involving preemption. *Thomas*, 532 U.S. at 780. "A contrary conclusion would permit the fourth exception to swallow the rule." *Flynt*, 451 U.S. at 622. The finality rule accordingly applies here and bars this Court's review.

B. The Preemption Issue PHI Seeks To Litigate In This Court Was Neither Pressed Nor Passed Upon Below

When reviewing state-court judgments, this Court has, "with 'very rare exceptions,' … adhered to the rule … that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997). Although the Court has sometimes treated this rule as jurisdictional, and sometimes as prudential, *see id.*, the principle that "the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions" is long "established," *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). And it "serves an important interest of comity." *Adams*, 520 U.S. at 90. It would be, at the very least, "'unseemly' … to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.*

This Court has thus repeatedly held that a petitioner seeking review of a federal issue on certiorari to a state court has the "burden of showing that the issue was properly presented to that court" "with 'fair precision and in due time'" to give "the state court 'a fair opportunity to address the federal question that is sought to be presented.'" *Adams*, 520 U.S. at 87 (citing cases).

And the Court has codified that holding in its rules. *See* Rule 14.1(g)(i); *Adams*, 520 U.S. at 91 n.5. PHI has not met its burden—or even attempted to do so.

Before this Court, PHI argues that the Texas workers' compensation scheme as a whole—including the fair-and-reasonable requirement and the balance-billing prohibition—dictates the maximum amount air-ambulance providers can recover and is therefore preempted. "[I]t is the combined effect" of those two provisions "that creates the undeniable preemption problem," PHI argues, because "together," they "dictate rates by specifying how much the only party that can be charged for a service provided by an air carrier must pay." Pet. 26. PHI thus asks this Court to intervene to correct the alleged error made, and to resolve the alleged "conflict" created, "when the Texas Supreme Court … *upheld the combined effect of the two provisions*." *Id.* (emphasis added).[4]

But the Texas Supreme Court did no such thing. And it explained exactly why: Because PHI had made a deliberate choice to challenge "only … Texas's gen-

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[4] PHI's reliance on the balance-billing prohibition to support its preemption argument permeates its entire petition. For just a few examples, *see* Pet. 2 (TWCA sets rates "directly by dictating what the one and only party that can be charged for the services must pay"); Pet. 15 ("Texas prevents the air carrier from charging patients or employers anything. Texas thus dictates what the one and only party [the carrier] can charge for a service must pay."); Pet. 17 ("Texas law forbids the air ambulance from recovering the difference between that state-determined amount [paid by insurers] and its actual billed rate. … [B]ecause air ambulances are prohibited from seeking payment from anyone else, the state-determined amount is the *only* rate that an air ambulance can collect."); Pet. 19 ("[S]tate officials dictate the maximum amount that an air carrier can recover from the only party it can charge.").

eral 'fair and reasonable' standard" for insurers. App. 14. PHI expressly asked the court "not [to] address whether the … balance-billing ban is preempted." PHI Tex. Br. 61; *see supra* p. 9 n.2. The court did what PHI asked, but explained that PHI's tactical decision to bifurcate its challenge created "a critical flaw in [its] preemption argument." App. 23. The court suggested that if any part of the Texas scheme significantly affected air-ambulance prices, it was the balance-billing prohibition, not the fair-and-reasonable standard, and that "PHI cannot obtain preemption of the latter by strategically declining to challenge the former in this Court." *Id.* "Whether the Supremacy Clause displaces state law … 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.* (emphasis added).

The Texas Supreme Court thus made perfectly clear that it did *not* "uph[o]ld the combined effect of the two provisions," as PHI claims (Pet. 26). To the contrary, the court explained that PHI had asked it not to consider "the combined effect of the two provisions"—or, as the court put it, "the state statutory and regulatory scheme as a whole"—and the court therefore did not do so. App. 23. In short, the preemption argument PHI now asks this Court to decide was not only neither pressed nor passed upon below, PHI *affirmatively waived it* below. It would be wholly improper for this Court to grant certiorari to review an issue that the state court below did not address because of petitioner's tactical decision not to raise it.

C. The Case Is Not Justiciable Because This Court Cannot Redress PHI's Asserted Injury

Even if this Court were to construe the petition as raising only the preemption question actually presented to and decided by the Texas Supreme Court—that is, whether the fair-and-reasonable requirement, standing alone, is preempted—jurisdiction is still lacking. That is so not only because the Texas court's decision is not final, *see supra* Part I.A, but also because even if this Court were to reverse the Texas court's preemption ruling, it could not redress PHI's claimed injury, making the petition nonjusticiable.

"To show standing under Article III" to pursue a case in this Court, a petitioner "must demonstrate that it has suffered an actual or imminent injury that is 'fairly traceable' to the judgment below and that could be 'redress[ed] by a favorable ruling.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019); *see also, e.g.*, *Camreta* v. *Greene*, 563 U.S. 692, 701 (2011). Absent such a redressable injury, there is no case or controversy for this Court to adjudicate.

That is the situation here. In addition to reversing the court of appeals' preemption holding, the Texas Supreme Court also reversed the court of appeals on the independent, alternative ground that even "if ADA preemption applies," the result "would not be full reimbursement—it would be no reimbursement." App. 26. In reaching that holding, the court "disagree[d]" with the court of appeals' conclusion "that 'the specific rate-setting provisions at issue' could be severed from the overall Texas reimbursement scheme." App. 25-26. It explained that the "workers' compensation insurance policies do not independently require reimbursement, as they rely on the state statutory and regulatory re-

quirements PHI claims are preempted to define the insurers' contractual reimbursement obligations." App. 28 n.19. The court also reasoned that "PHI cannot have it both ways: it cannot rely on state law requiring reimbursement of air carriers while arguing that a particular state standard for measuring that reimbursement is preempted." App. 27 (citing *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 265 (2013)). The court thus held that "PHI would be substantially worse off if it succeeded on its preemption claim, as insurers would no longer have any obligation to reimburse it at all." App. 3.

PHI's petition does not even mention, let alone challenge, that alternative holding on remedy. Nor is a challenge to that holding "fairly included," Rule 14.1(a), in the questions presented. *See* Pet. i (asking "[w]hether the ADA preempts [Texas's] workers' compensation system"). By holding that even "if [PHI] succeeded on its preemption claim," PHI would have no right to payment from Insurers, the Texas Supreme Court made clear that the preemption and remedy questions are distinct. App. 3; *see, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) ("A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'").[5]

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[5] PHI's failure to challenge the Texas Supreme Court's remedy holding in this Court is perhaps unsurprising, since that holding rested at least in significant part on the court's conclusion that the fair-and-reasonable standard was not severable from Texas's broader workers' compensation scheme. The severability of a state statute is "a matter of state law," *Virginia* v. *Hicks*, 539 U.S. 113, 121 (2003), and this Court lacks jurisdiction to review a state court's decision on a state-law question, *see* 28 U.S.C. §1257(a).

Accordingly, even if this Court were to grant review of the Texas Supreme Court's preemption holding and reverse, PHI would not benefit. In fact, it "would be substantially worse off." App. 3. Because PHI cannot demonstrate that any injury it suffered from the "judgment below … could be 'redress[ed] by a favorable ruling,'" *Food Mktg. Inst.*, 139 S. Ct. at 2362, the questions it presents to this Court are not justiciable.

II. THE TEXAS SUPREME COURT'S PREEMPTION RULING DOES NOT WARRANT CERTIORARI

Even if this Court had jurisdiction—and, as explained above, it does not—the Texas Supreme Court's preemption ruling would not warrant review.

A. The Purported Split Of Authority Is Illusory

PHI claims that the Texas Supreme Court's decision conflicts with court of appeals decisions finding ADA preemption of state schemes that "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." Pet. 24. According to PHI, "[t]he Texas Supreme Court … found no preemption problem with Texas' materially indistinguishable scheme." *Id.* PHI is wrong.

PHI admits—as it must—that the Texas Supreme Court distinguished the purportedly contrary decisions on which PHI relies on the ground that those courts were considering balance-billing prohibitions as well as regulations governing insurers. Pet. 25. But, PHI says, "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." Pet. 26. PHI insists that a "conflict" exists because "the Texas Supreme Court alone *upheld*

the combined effect of the two provisions," while the other courts "reached the opposite conclusion." *Id.* (emphasis added).

As explained, however, the Texas Supreme Court did not "uph[o]ld the combined effect of the two provisions." *See supra* pp. 17-18. To the contrary. The court explained that PHI had challenged "*only* … Texas's general 'fair and reasonable' standard" for insurers, not the balance-billing prohibition. App. 14 (emphasis added). That created "a critical flaw in PHI's preemption argument": "Whether the Supremacy Clause displaces state law … 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." App. 23. But because PHI had asked it to consider only a "particular provision"—the fair-and-reasonable requirement—that is what the court did. Unsurprisingly, PHI's "choice … ha[d] consequences for [the court's] preemption analysis." App. 15. That is one key reason that there is no conflict with the decisions on which PHI relies: In each of them, a balance-billing prohibition was central to the preemption analysis.

1. *EagleMed LLC* v. *Cox*, 868 F.3d 893 (10th Cir. 2017), for example, involved a challenge to Wyoming's workers' compensation scheme. Wyoming law establishes a state workers' compensation fund; medical providers submit claims to the fund, and they are paid in accordance with the State's rate schedules. *Id.* at 897-898. The State has adopted maximum rates for air-ambulance services, capping payment for those services at a fixed amount. *Id.* at 898. The district court held that the ADA preempted the scheme. *Id.*

On appeal, Wyoming argued that the district court erred because air-ambulance providers could either obtain payment from the State at the specified rates or bill injured workers directly, meaning that the rate schedule was not actually binding on providers. *EagleMed*, 868 F.3d at 899. The Tenth Circuit rejected that argument, concluding that providers were "prohibit[ed] … from billing the injured employee for the expenses incurred" whether or not they had made a claim for payment from the State. *Id.* at 900-901. Having held that balance-billing was banned, the court emphasized that it "d[id] not … reach" the question whether a system without a balance-billing prohibition would be preempted by the ADA. *Id.* at 901.

PHI acknowledges that the Wyoming scheme considered in *EagleMed* "prohibited [providers] from billing injured workers," Pet. 22, and that the Texas Supreme Court distinguished it on that ground, Pet. 25-26. As the Texas Supreme Court explained, the balance-billing prohibition "was critical to [the Tenth Circuit's] analysis," which "reserved judgment on whether preemption would apply if Wyoming gave air ambulance companies an option to … pursue a claim against its customer directly." App. 23. Because PHI had "strategically declin[ed] to challenge" Texas's balance-billing prohibition, the Texas court was not faced with the question *EagleMed* addressed. *Id.* PHI's assertion (Pet. 26) that the decision below conflicts with *EagleMed* because it "upheld the combined effect" of the fair-and-reasonable standard and the balance billing-prohibition is simply not true.

PHI argues that *EagleMed* was in the "same procedural posture" as this case, because the air-ambulance provider there likewise challenged the balance-billing prohibition "in the alternative." Pet. 25.

That is irrelevant. However the plaintiff in that case framed its complaint, the defendant relied on the purported absence of a balance-billing prohibition to argue against preemption, and the Tenth Circuit relied on its presence to determine that Wyoming's workers' compensation scheme was preempted. By contrast, the Texas Supreme Court found that PHI had strategically waived any reliance on the balance-billing prohibition. App. 23. That is not a conflict.

Moreover, while the Tenth Circuit affirmed the district court's preemption ruling, it struck down the district court's remedy ordering Wyoming "to reimburse all air-ambulance claims in full." *EagleMed*, 868 F.3d at 905. The Tenth Circuit explained that no federal statute required Wyoming "to make any payment of air-ambulance claims whatsoever, much less payment at whatever rates Plaintiffs choose to charge." *Id.* at 906. "The question of how [Wyoming] should administer the state Worker's Compensation Act without enforcing the preempted rate schedule against air-ambulance carriers is a question of state law, and any duty to pay the claims remains a state duty" that—if it exists—cannot be enforced by a federal court. *Id.* In this important respect, *EagleMed* fully aligns with the Texas Supreme Court's decision below; the only difference is that the Texas court had the power to answer the state-law question and held that without the preempted provisions, state law imposed no duty of payment whatsoever on Insurers. App. 3, 26-30.

2. *Air Evac EMS, Inc.* v. *Cheatham*, 910 F.3d 751 (4th Cir. 2018), is similar. There, the Fourth Circuit addressed West Virginia's systems for workers' compensation and state employees' medical expenses. *Id.* at 758. The State had adopted fee schedules providing maximum rates it would pay for air-ambulance ser-

vices, "backed up by a ban on balance-billing" employees. *Id.* Analyzing "West Virginia's laws, taken together as a comprehensive scheme," the court reasoned that they "establish the maximum amounts that the state will pay directly to air ambulance providers," and "limit the ability of those providers to seek recovery from anyone else," ensuring that air-ambulance providers could not recover more than the maximum rates set by the State. *Id.* at 767. The court concluded that the ADA preempted West Virginia's scheme. *Id.* at 766-767.

The Fourth Circuit made clear that it was not addressing whether West Virginia's fee schedules "could be maintained without either the reimbursement caps or balance-billing provisions." *Air Evac*, 910 F.3d at 769 n.3. As the Texas Supreme Court observed, the situation reserved in *Air Evac* is "the situation presented here, as Texas does not have fixed maximum reimbursement limits and PHI is not challenging the balance-billing prohibition." App. 24. As with *EagleMed*, *Air Evac* addressed the "combined effect" of the laws at issue, including the balance-billing prohibition, but—contrary to PHI's claim (Pet. 26)—the Texas Supreme Court did not.

And, as with *EagleMed*, it does not matter that Air Evac challenged the balance-billing prohibition "in the alternative." Pet. 25. Unlike PHI, Air Evac did argue before the Fourth Circuit that West Virginia's fee caps had a "'forbidden significant effect' upon Air Evac's prices because in combination with the applicable bans on balance billing of patients, they reduce Air Evac's rates." Br. of Plaintiff-Appellee 40, *Air Evac EMS, Inc.* v. *Cheatham*, No. 17-2349, 2018 WL 1350944 (4th Cir. Mar. 7, 2018) (internal citation omitted). In any event, courts of appeals are entitled to exercise "discre-

tion … to disregard the parties' inattention to a particular argument or issue," *United States* v. *Holness*, 706 F.3d 579, 592 (4th Cir. 2013)—just as the Texas Supreme Court was entitled to hold PHI to the consequences of its tactical choice not to challenge the balance-billing provision. What matters is that the two courts reached different outcomes because they addressed different issues, not because they disagreed on any point of law.

3. The Eleventh Circuit's decision in *Bailey* v. *Rocky Mountain Holdings, LLC*, 889 F.3d 1259 (11th Cir. 2018), is even further afield. *Bailey* addressed a Florida law that allowed automobile insurers to cap reimbursement of emergency-transport providers at 200% of Medicare rates and barred providers from billing policyholders for charges above that amount. *Id.* at 1262-1263. Bailey, a policyholder, sued an air-ambulance provider that had billed him for fees unpaid by his insurer. *Id.* at 1263-1264. While not contesting that the provider's full charges were reasonable and that ordinary contract principles would entitle the provider to such payment, Bailey sought to enforce the balance-billing prohibition; the provider argued that the prohibition was preempted. *Id.* at 1263, 1269 & n.22.

The Eleventh Circuit explained that the "[t]he balance billing provision is the gravamen of" the case. *Bailey*, 889 F.3d at 1265. The court concluded that the balance-billing prohibition "has a significant effect on air carrier prices," and is thus preempted by the ADA, because it "restricts the medical provider to the fee schedule amount" even where a "reasonable fee" is higher. *Id.* at 1270-1271. As the Texas Supreme Court observed, by contrast, "Texas's fact-driven standard—which requires insurers to pay 100% of fair and reason-

able charges—has no such effect, and PHI is not challenging the balance-billing prohibition." App. 25. Once again, there is no conflict here.[6]

B. The Decision Below Correctly Applied This Court's Precedent To The Facts Before It

Because the Texas Supreme Court's decision does not conflict with that of any other court, certiorari would be unwarranted even if the decision were wrong. Regardless, the Texas Supreme Court correctly applied uncontroversial principles set out in this Court's precedent to the specific facts before it. PHI's contrary argument rests on the same distortion of the proceedings and decision below that infects the rest of its petition.

1. At the outset, PHI claims that the Texas Supreme Court "(mis)read" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), to establish a "test" under which the ADA preempts state law if it either "'expressly references' air-carrier rates" or "has a significant effect on air-carrier rates." Pet. 18. In fact, that articulation is faithful to *Morales* and to other courts' interpretation of that decision. *Morales* held that the ADA preempted state rules for airfare advertising on two grounds. First, the rules made "express reference to fares," setting out detailed requirements for advertisements and "effectively creating an enforceable right

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[6] For the same reasons, the Eighth Circuit's recent decision in *Guardian Flight LLC* v. *Godfread*, 2021 WL 983084 (8th Cir. Mar. 17, 2021), does not split with the Texas Supreme Court. *Guardian Flight* held that the ADA preempts a North Dakota law prohibiting balance-billing, reasoning that the provision "effectively caps certain air ambulance prices … by mandating the acceptance by an out-of-network provider of the insurer's payment and *prohibiting the provider from billing the insured for any remaining balance*." *Id.* at *3 (emphasis added).

to [a] fare when the advertisement fails to include the mandated explanations and disclaimers." 504 U.S. at 388. Second, the rules had a "forbidden significant effect upon fares," given that airlines' business model depended on the ability "to place substantial restrictions on the availability of lower priced seats" and sell the remaining seats at higher prices. *Id.* at 388-389.

The Texas Supreme Court's "test" is thus entirely consistent with *Morales*. Indeed, the purportedly conflicting decisions on which PHI relies apply the very same standard. *See EagleMed*, 868 F.3d at 902 ("[T]he court only needs to decide whether a particular state law … has a 'forbidden significant economic effect on airline rates …' when the state law … does not 'expressly refer to airline rates[.]'"); *Air Evac*, 910 F.3d at 767 ("It is enough that the state law … has a 'forbidden significant effect' on prices, even without referencing them directly."); *Bailey*, 889 F.3d at 1271 (striking down state law for having a "forbidden significant effect" on fares even though it did not expressly reference air-carrier rates). So do decisions by other courts of appeals. *See, e.g., Buck* v. *American Airlines, Inc.*, 476 F.3d 29, 34-35 (1st Cir. 2007) ("[U]nder *Morales*, the ADA preempts both laws that explicitly refer to an airline's prices and those that have a significant effect upon prices."); *Travel All Over the World, Inc.* v. *Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (finding no ADA preemption where challenged rules "do not expressly refer" to rates and "do not have the 'forbidden significant effect' on rates"). PHI identifies no contrary decision.

2. PHI's complaints regarding the Texas Supreme Court's application of *Morales* are similarly unpersuasive. PHI challenges the court's conclusion that the fair-and-reasonable requirement is generally appli-

cable (rather than expressly referring to fares), quoting *Morales'* admonition that "state impairment of the federal scheme" is not "acceptable" simply because "it is effected by the particularized application of a general statute." Pet. 19 (quoting 504 U.S. at 386). But that statement merely recognizes that even a statute of general applicability is preempted if it has a "forbidden significant effect upon fares." 504 U.S. at 388. The Texas Supreme Court held exactly that. App. 15-17.

PHI also objects to the Texas Supreme Court's holding that "PHI has not shown that the fair and reasonable standard for third-party reimbursement has a significant effect on its prices." App. 17. According to PHI, the court erroneously failed to recognize that "state officials dictate the maximum amount that an air carrier can recover from the only party it can charge for a service," Pet. 19, and that "the TWCA forbids PHI from actually *collecting* anything above the maximum rate," Pet. 20. First, Texas law does not set specific amounts that air-ambulance providers may charge—or even specific maximum dollar amounts that they may collect from insurers. It merely requires insurers to pay a "fair and reasonable" rate when their policy obligations are triggered. What constitutes such a rate in this case is still in dispute. *See supra* p. 13. More importantly, PHI asked the Texas Supreme Court not to address the balance-billing prohibition, and thus waived in that court its current argument that "the TWCA forbids PHI from actually collecting anything above" what insurers pay. *See supra* pp. 9-10 & n.2.

Moreover, the Texas Supreme Court did not hold that the fair-and-reasonable requirement, as a matter of law, could never have a significant effect on price. Rather, it merely held that "PHI must come forward

with evidence proving that [the requirement has] a significant effect on price." App. 17. And it concluded that "*[o]n this record*, … PHI has not shown" such a significant effect. *Id.* (emphasis added). PHI pointed to only one thing in the record—the ALJ and trial court's finding that a fair and reasonable amount was less than PHI's full charges. But that issue has not yet been finally resolved in the state courts. *See supra* p. 13. The Supreme Court thus correctly held that PHI had not met its burden. App. 20-22. That "factbound issue" "does not meet the standards that guide the exercise of [this Court's] certiorari jurisdiction." *Izumi Seimitsu*, 510 U.S. at 34.

III. THE MCCARRAN-FERGUSON ACT QUESTION DOES NOT WARRANT CERTIORARI

PHI asks this Court, if it grants review of the ADA preemption question, also to determine whether the McCarran-Ferguson Act applies. The Court should deny review of both questions, but even if it granted the former, it should not review the latter.

A. The Texas Supreme Court Did Not Pass On McCarran-Ferguson

As an initial matter, the Texas Supreme Court never passed on McCarran-Ferguson. Given its preemption ruling, it had no reason to do so. That alone is more than ample reason to deny certiorari. As this Court has admonished many times, it "is 'a court of review, not of first view.'" *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018). As a rule, therefore, this Court will not "consider arguments in the first instance," before they have been addressed by the court below. *Id.*

That prudential principle has special force when, as here, the Court is asked to review a state-court decision. The same federalism concerns that restrict this Court from considering questions neither pressed nor passed upon in state court, *see supra* pp. 16-17, counsel strongly in favor of restraint in considering issues that were pressed but not passed upon because they were not necessary to the state court's judgment. A state court "has an undeniable interest in having the opportunity to determine in the first instance whether its existing rules … satisfy the requirements" of federal law. *Adams*, 520 U.S. at 90. And that is especially true here, where resolution of the federal question ultimately turns on the nature and purpose of state law.

The McCarran-Ferguson Act provides 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 only question here is whether Texas enacted the TWCA "for the purpose of regulating the business of insurance." For comity reasons, the Texas Supreme Court should address that question in the first instance. And for prudential reasons, in the interest of reaching a fully informed and correct decision, this Court would "benefit [from a] thorough [decision by the Texas Supreme Court] to guide [its] analysis." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012).

B. The Concurrence's Analysis Is Correct And Implicates No Split Of Authority

PHI treats the concurrence's discussion of McCarran-Ferguson as if it were a decision by the Texas Supreme Court. Because it is not, it does not warrant this

Court's review. "This Court … reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Regardless, the concurrence rightly concluded that "the specific provisions challenged in this case regulate the business of insurance" and therefore fall within McCarran-Ferguson's scope. App. 42. And while a concurrence—not being an authority—cannot create a split of authority, the concurrence's reasoning is consistent with the cases PHI cites.

This Court has held that McCarran-Ferguson applies if a state law "prescrib[es] the terms of the insurance contract" or governs "the actual performance of an insurance contract." *U.S. Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 502-503 (1993). The fair-and-reasonable requirement does both. Texas law requires workers' compensation policies to conform to the "uniform policy for workers' compensation insurance," Tex. Ins. Code. §2052.002(a), which requires insurers to pay benefits established under Texas workers' compensation law, including "fair and reasonable" amounts for medical services with no specific fee schedule. The fair-and-reasonable requirement thus both constitutes a "term[] of the insurance contract" itself and governs "the actual performance" of that contract—"paying benefits under the policy, which is 'an essential part of the business of insurance.'" App. 45.[7]

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[7] PHI relies (Pet. 29-32) on *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982). Those decisions do not govern here. They addressed a separate clause of §1012(b), providing that federal antitrust laws "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." As *Fabe* recognized, the clause applicable here "is not so narrowly circumscribed." 508 U.S. at 504.

That analysis does not conflict with any of the court of appeals decisions PHI cites. In *EagleMed*, for example, the Tenth Circuit held McCarran-Ferguson inapplicable because, under Wyoming's statute, injured workers recover from "'an industrial-accident fund—financed by industry and underwritten by the State," 868 F.3d at 897, rather than from insurance policies issued by private insurers, as in Texas. *EagleMed* expressly distinguished Texas's scheme, explaining that while "other states have structured their workers' compensation programs to operate through private insurance companies," Wyoming has not, and its statute therefore does not "regulate the business of insurance." *Id.* at 904.

Bailey is likewise distinguishable. It reasoned that "[b]ecause the balance billing provision concerns the relationship between the insured and medical providers—not the relationship between the insurer and insured—[McCarran-Ferguson] does not reverse the ADA's preemptive effect in this case." 889 F.3d at 1274. PHI did not challenge the balance-billing provision here, and the concurrence did not consider it.[8]

Finally, *Genord* v. *Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006), is inapposite. It addressed reimbursement agreements between an insurer and providers, separate from any insurance policies. *Id.* at 803. Here, by contrast, the fair-and-reasonable requirement is part of every workers' compensation insurance policy, App. 45, and insurers' payment of fair and reasonable benefits to a provider is

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[8] *Guardian Flight* is similarly distinguishable because it focused on a balance-billing prohibition, which it reasoned was not "an integral part of the policy relationship between the insurer and the insured." 2021 WL 983084, at *4.

performance of that policy, at the core of the business of insurance. The concurrence's analysis thus implicates no split of authority.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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