No. 20-748

In the
Supreme Court of the United States

PHI AIR MEDICAL, LLC,
Petitioner,

v.

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

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

REPLY BRIEF

The appellate courts are divided in a pattern that is familiar in preemption cases: Every federal appellate court has found preemption, while a state high court has upheld state-law rate regulation. And the decision below is plainly incorrect: While this Court has repeatedly found even indirect state efforts to influence the rates charged by federally licensed air carriers preempted, the Texas Supreme Court upheld an effort to dictate those rates directly, in clear contravention of this Court's precedents and the text of the Airline Deregulation Act.

Unable to seriously contest any of that, Respondents focus their efforts on suggesting that this case is a poor vehicle for resolving the split. They are wrong. The decision here definitively holds that Texas' effort to set a fair-and-reasonable rate for Petitioner PHI's service comports with the ADA. This Court has jurisdiction to review that definitive federal-law holding. Moreover, PHI's decision to focus its challenge on the most practically significant and legally deficient aspect of Texas law—its effort to dictate fair-and-reasonable rates—is neither problematic nor unusual. Texas' effort to set a fair-and-reasonable rate is preempted without regard to whether other provisions of Texas law are also preempted or would fall under a severability analysis. By focusing on the most obviously problematic and preempted aspect of state law, PHI followed the lead of the successful challengers in the Fourth and Tenth Circuits. That the same tactics produced opposite outcomes only underscores the split.

In the end, both the split of authority and the errors in the decision below are clear. Texas' naked effort to dictate fair-and-reasonable rates for the services of a federally licensed air carrier is not just preempted, but far more obviously preempted than the state laws this Court has previously found preempted. And if the Court grants certiorari on the ADA question, Respondents offer no compelling reason not to review the McCarran-Ferguson Act issue as well. The stakes are high (as multiple amici attest), the courts are split, and the errors are clear. This Court should grant plenary review.

I. The Court Should Review The ADA Question.

A. There Are No Barriers To Review.

1. The Insurers—but not Texas—insist that PHI is asking this Court to review not just whether the ADA preempts the TWCA's fair-and-reasonable provision but also whether it preempts the separate balance-billing provision. Ins.16-18. Not so. The question presented here is whether the ADA preempts Texas' fair-and-reasonable standard for setting air-ambulance rates—or, "[w]hether the ADA preempts a state workers' compensation system that limits the prices an air-ambulance company can charge and collect for its air-transport services." Pet.i. Nobody disputes that this question was pressed and passed on below. *See, e.g.*, App.10 (Texas Supreme Court describing question presented as "[w]hether the ADA preempts the TWCA's reimbursement guidelines"); Tex.12 (conceding that "the fairness standard was … presented to the Texas Supreme Court").

In insisting that PHI *is* challenging the balance-billing prohibition here, the Insurers complain that the petition adverts to the "combined effect" of the fair-and-reasonable provision and the balance-billing prohibition. *See, e.g.*, Ins.2-3, 17-18 & n.4, 21-23. But nothing in law or logic prevents a party from focusing its challenge on the statutory provision that most obviously vexes it, while noting that other provisions reinforce the challenged provision's invalidity. That is what PHI did, and the challengers in the Fourth and Tenth Circuit made the exact same choice. The only thing different in those federal cases and here is the outcome.

Texas fares no better with its suggestion that this Court should "allow the Texas courts to first address the combined impact of" the fair-and-reasonable provision and the balance-billing prohibition. Tex.11-13. The Texas Supreme Court has already held that the fair-and-reasonable provision is valid. In doing so, it employed deeply flawed reasoning that suggests it would also uphold the balance-billing prohibition. There is no reason for this Court to defer review of that flawed reasoning until the court below strikes again. Federal courts considering the same challenge in the same posture reached the opposite conclusion, while having no difficulty adverting to other provisions that reinforced the preemption problem with the challenged rate restriction. The Texas Supreme Court's preference for viewing the fair-and-reasonable provision in isolation may explain why it reached a contrary conclusion, but it neither creates a vehicle problem nor prevents this Court from considering how other aspects of the Texas regime underscore that the fair-and-reasonable provision is preempted. *See, e.g.*,

Maryland v. Louisiana, 451 U.S. 725, 728 (1981) (explaining that challenged state-law provision "must be assessed … in conjunction with other provisions" of state-law scheme).

2. Respondents wrongly contend that this Court lacks jurisdiction because the decision below is "not final." Ins.12-16; Tex.8-11. The decision readily qualifies as final under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[1]

The second *Cox* circumstance plainly applies here, because "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. The Texas Supreme Court has "finally decided" the "federal issue" of whether the ADA preempts the fair-and-reasonable restriction. That question "will survive and require decision regardless of" the outcome of the two questions on remand that Respondents identify: (1) whether the ADA also preempts the TWCA's balance-billing prohibition; and (2) what air-ambulance rates are "fair and reasonable" under Texas law. Tex.7; Ins.13.

As to the first, even if the Texas Supreme Court ultimately found the balance-billing prohibition

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[1] The Insurers suggest that PHI "forfeited" any *Cox* argument. Ins.13-14. That is meritless. Nothing requires a petition asserting §1257 jurisdiction to affirmatively anticipate a finality objection and pre-refute it by invoking a *Cox* factor. If a Respondent raises a finality issue, the reply brief is time enough to refute it. *See e.g.*, *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013) (exercising §1257 jurisdiction although *Cox* only discussed in certiorari-stage reply brief).

preempted (an unlikely prospect given the reasoning employed below), the fair-and-reasonable restriction would still limit the amount that air-ambulance providers could bill insurers. The fair-and-reasonable restriction would thus remain the principal thorn in PHI's side because, in most cases, the option of billing anyone else is only theoretical. That readily distinguishes this case from the Insurers' lone case, *Florida v. Thomas*, 532 U.S. 774 (2001), where a remand decision upholding a search would obviate the need to evaluate that search under a different doctrine.

Likewise, whether the ADA preempts the fair-and-reasonable standard will "survive and require decision regardless of" the precise fair-and-reasonable rates that Texas ultimately dictates. The question here is whether Texas may limit insurer rate payments *at all*; whether the limit is 125% or 149% of Medicare or some other level is just a detail. Any level of state-dictated rates is equally preempted. Respondents suggest that the question presented would become "effectively moot" if Texas decides that fair-and-reasonable rates are exactly the same as PHI's market-based charges. Ins.14; Tex.15. There is little chance of that happening, but it would not matter even if it did: the ADA preempts state laws related to rates even if they purport to be "consistent with" federal law. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386-87 (1992).[2]

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[2] Alternatively, this case would satisfy the fourth *Cox* circumstance. The Insurers dispute only the last precondition, arguing that "no federal policy would be harmed" by delaying review. Ins.15-16. But this Court has already held that federal

3. Finally, Respondents argue that PHI's injury cannot be redressed by a favorable decision. Ins.19-21; Tex.13-15. This argument rests on a faulty premise. Contrary to Respondents' assertions, PHI is not asking this Court (or any court) for "an order requiring the Insurers to reimburse its billed charges fully under state law," Tex.13, or a state-law (or federal-law) "full-reimbursement standard," App.26. Instead, PHI seeks a declaratory judgment that the TWCA's fair-and-reasonable restriction—the provision that vexes PHI and that PHI has challenged—is preempted. That is more than enough for redressability, as the Tenth Circuit has recognized. *See EagleMed LLC v. Cox*, 868 F.3d 893, 905-06 (10th Cir. 2017) ("[E]njoining Defendants from enforcing the preempted statute and rate schedule … [is] sufficient to remedy this federal violation.").

Respondents' (and the Texas Supreme Court's) reliance on *Dan's City Used Cars* is misplaced. That case concerned not redressability but the preemptive scope of the FAAAA, and it is inapposite regardless. The Court explained that reading the FAAAA's preemption provision expansively would preempt all state law in an area of traditional state authority (vehicle towing)—a result that could not be attributed to a Congress that had deregulated only the interstate trucking industry. 569 U.S. at 265. Here, in contrast, reading the ADA to preempt state-dictated fair-and-reasonable rates for federally licensed air carriers

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policy is harmed when a state-court decision authorizes "direct state regulation" in an exclusively federal sphere. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988).

would simply vindicate the basic judgment at the heart of the ADA's preemption provision.[3]

B. The Decision Below Creates a Conflict Among the Lower Courts.

Respondents' efforts to disclaim the clear conflict among the lower courts are unavailing. Texas merely repeats the "distinction[s]" on which the decision below relied, *see* Tex.16-18, and those distinctions remain unsound. As the petition explained, *Morales* rejected any distinction between air-carrier-specific laws and generally applicable laws as "utterly irrational," Pet.19, and any differences in *how* states set rates—whether through a "fixed-fee schedule" or "fair and reasonable" determinations, Tex.17—are immaterial because the ADA prohibits states from dictating rates *at all*, Pet.25.

The Insurers take a different approach, reprising their obsession with the balance-billing provision. They admit that the air-carriers in *Cheatham* and *EagleMed* challenged only state-dictated payment caps in the Fourth and Tenth Circuits, respectively, and preserved their challenges to the balance-billing prohibitions in the alternative—just like PHI in the Texas Supreme Court. Ins.23-25. Despite those

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[3] The Insurers—but not Texas—assert that the Texas Supreme Court's "remedy holding" rested "at least in significant part on" a view that the fair-and-reasonable standard was inseverable from the rest of the TWCA. Ins.19-20 & n.5, 24. That grossly misstates the decision below, which provided no remedy and barely mentions severability. But if this Court grants and reverses and the Texas courts on remand ultimately invalidate more of the law, the fair-and-reasonable restriction will still fall, which is the relief PHI seeks.

identical postures, the Insurers insist that the Fourth and Tenth Circuits analyzed the respective state laws "as a comprehensive scheme," finding preemption based on "the combined effect" of that law and "the balance-billing prohibition," while the Texas Supreme Court did not, because of PHI's "tactical choice not to challenge the balance-billing provision." *Id.* at 23, 25-26. But as the Insurers concede, the challengers in the Fourth and Tenth Circuits made the identical "tactical choice." The fact that the Texas Supreme Court responded to the same tactics with a different outcome (non-preemption versus preemption) and different reasoning (a focus on the fair-and-reasonable standard in isolation versus in context) is the very definition of a split in authority. Put differently, the Texas Supreme Court's refusal to even consider aspects of the statutory scheme that were not separately challenged may explain why it reached the wrong result, but it does not explain away the conflict with federal decisions that found preemption in the exact same posture.[4]

Respondents likewise fail to distinguish *Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259 (11th Cir. 2018), and the Eighth Circuit's recently-issued decision in *Guardian Flight LLC v. Godfread*, ___ F.3d ___, 2021 WL 983084 (8th Cir. Mar. 17, 2021). They note that the companies there only challenged a

[4] The Insurers state that "the Texas Supreme Court distinguished" *Cheatham* and *EagleMed* "on the ground that those courts were considering balance-billing prohibitions." Ins.21. But those courts only "consider[ed]" balance-billing prohibitions in the context of evaluating whether the challenged rate-setting provisions were preempted; neither court opined on the legality of balance-billing provisions.

balance-billing prohibition, Ins.25-27; Tex.16-17, but PHI has already explained why that distinction is immaterial, Pet.23-24, 26. Moreover, preemption of state-dictated rates follows *a fortiori* from preemption of a balance-billing prohibition; the latter "*effectively* caps" rates at whatever the insurer pays, *Guardian Flight*, 2021 WL 983084, at *3 (emphasis added), while the former *directly* caps rates. At most, these cases illustrate that some challenges to invalid state-rate regimes primarily focus on being able to charge insurers more, while others primarily focus on being able to charge non-insurers something. For obvious reasons, insurers would prefer it if PHI were doing the latter, but PHI's choice to pursue the former neither creates a vehicle problem nor makes a clear split of authority disappear.

C. The Decision Below is Incorrect.

Respondents' defense of the decision below is even less persuasive. They endorse its use of a cramped two-part test as "consistent with *Morales*," Ins.27-28; Tex.25, but neither *Morales* nor this Court's other ADA cases have adopted such a narrow approach. Rather, given the ADA's "broad pre-emptive purpose," this Court holistically assesses whether a challenged state law has "a connection with or reference to airline 'rates, routes, or services.'" *Morales*, 504 U.S. at 383-84; *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 280-81 (2014). Here, it is clear as day that Texas' determination of the "fair and reasonable" rate that an air carrier can collect has "a connection with or reference to" the carrier's rates.

Regardless, the fair-and-reasonable provision is preempted even under the Texas Supreme Court's

restrictive methodology. Like the decision below, Respondents disclaim that the provision "expressly references" rates because it is a law of general applicability. Ins.28-29; Tex.25; *see* App.17. But every one of this Court's cases finding ADA preemption involved a law of general applicability, *see* Pet.18-19, so that clearly does not suffice to remove a law from the ADA's preemptive scope.

The fair-and-reasonable standard also plainly has a significant effect on rates. In contending otherwise, Respondents largely rehash the Texas Supreme Court's reasoning, including that "air-ambulance charges are not set in a traditional market," Tex.26, the TWCA's effect on rates should be measured by comparison to a "fair or reasonable" rate implied by state contract law, *id.*, the "full amount billed for air ambulance services is not the starting point for measuring significant effect," *id.* at 27; Ins.29, and specific "fair and reasonable" rates have not yet been determined, Tex.27; Ins.29-30. PHI has explained why this reasoning is unpersuasive, *see* Pet.19-21 & nn.2-3, and Respondents offer little response except to claim that "the ADA does not preempt contract claims." Tex.27. But this is not a contract action, and a state-law regime that seeks to impose a state-dictated rate on parties as an implied term of their contract no matter what they would otherwise agree upon in a free market is at the very heartland of what the ADA preempts. *See* Pet.20-21.

II. The Court Should Also Review The MFA Question.

Respondents do not suggest that there is any jurisdictional hurdle to granting review on whether the MFA saves the TWCA's fair-and-reasonable standard from preemption, as that question was pressed below and thoroughly addressed in the concurring and dissenting opinions. *See* Pet.27. Respondents likewise do not dispute that the MFA question would logically arise from reversal on the ADA question, nor that "judicial economy favors granting both questions." *Id.* at 27, 34. Accordingly, if this Court grants the ADA question, it should also grant the MFA question.

In trying to reconcile the concurrence below with the contrary circuit cases, Respondents misrepresent the Tenth Circuit's reasoning in *EagleMed*, claiming that it "held McCarran-Ferguson inapplicable *because*" Wyoming's workers' compensation system is operated by the state, not insurance companies. Ins.33 (emphasis added); *see* Tex.22. In truth, *EagleMed* denied the relevance of that distinction, holding that the MFA would not apply "even if … Wyoming's state-run workers' compensation system establishes a type of insurance." 868 F.3d at 904. The Insurers, true to form, argue that *Bailey* and *Guardian Flight* are inapposite because they addressed balance-billing provisions. Ins.33. But both rate caps and billing prohibitions regulate the relationship between providers and insurers—not insurers and insureds—making the distinction irrelevant for MFA purposes. Pet.33.

On the merits, Respondents merely describe the ways that *other* provisions of the TWCA regulate the insurer-insured relationship. Tex.19. But PHI is not challenging those provisions; it is challenging the fair-and-reasonable standard that determines the state-dictated rates. That standard and those rates are directed to the relationship between insurers and third-party providers, just like the provisions at issue in *Royal Drug*, *Cox*, *Bailey*, *Guardian Flight*, and *Genord*. Pet.28-32.

III. The Questions Presented Are Exceptionally Important.

The Insurers do not dispute that this case presents an important and recurring national issue. Nor could they, given the critical nature of the air-ambulance industry, the proliferation of state laws seeking to regulate it, and the extraordinary impact of those laws on the viability of air-ambulance carriers (with more than $75 million at stake in just the 1,800 disputes awaiting this case's outcome). Pet.34-36; *see* Airbus.9-11; AirMethods.12; AMOA.5-6. Texas downplays the prospect that other states will follow its lead in regulating the air-ambulance market, Tex.18, but multiple states have *already* passed such laws, and while those states have been thwarted in the federal courts, *see* Pet.24 & n.4, the decision below will provide encouragement to other states absent this Court's review. Finally, Texas insists that allowing states to "take different approaches" to air-ambulance regulation should be encouraged. Tex.18-19, 28-29. But such appeals to experimental federalism are anathema when it comes to the ADA and its preemption provision. The *raison d'être* of that

provision is that Congress did not want a failed regime of intrusive federal regulation replaced with 50 different flavors of re-regulation. Instead, it wanted to clear the field of state regulation and place "maximum reliance on competitive market forces." 49 U.S.C. §40101(a)(6). The Texas Supreme Court's disregard of that congressional imperative is just one more reason to grant review of its erroneous, anomalous, and far-reaching decision.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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