No. 14-1225

IN THE

Supreme Court of the United States

FALCON EXPRESS INTERNATIONAL, INC.,

Petitioner,

v.

DHL EXPRESS (USA), INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713, and the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501, prohibit 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 or motor carrier]." 49 U.S.C. § 41713(b)(1); 49 U.S.C. § 14501(c)(1). It is undisputed that respondent is both an air and motor carrier and that petitioner's state law tort claim for fraud by non-disclosure is a "law, regulation, or other provision having the force and effect of law."

The Texas Court of Appeals held that given the broad scope of the ADA and FAAAA, as construed by this Court, the federal courts of appeals, and the Supreme Court of Texas, petitioner's state law claim for fraud by non-disclosure is preempted. Pet. App. 24a. The Supreme Court of Texas declined review of the appeals court decision, Pet. App. 42a, and denied petitioner's subsequent petition for rehearing, Pet. App. 43a.

The question presented is whether petitioner's claim for fraud by non-disclosure based on allegations that respondent failed to disclose its intent to cease domestic shipping services in the United States is "related to"

respondent's prices, routes, or services as an air or motor carrier and therefore falls within the scope of the ADA and FAAAA's preemption provisions.

RULE 29.6 STATEMENT

Respondent DHL Express (USA), Inc. is a wholly owned subsidiary of DPWN Holdings (USA), Inc., a privately held corporation. DPWN Holdings (USA), Inc. is a wholly owned subsidiary of Deutsche Post Beteililgungen Holdings GmbH, a subsidiary of Deutsche Post AG, a company publicly traded in Germany on the Frankfurt Stock Exchange and a member of DAX.

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STATEMENT

A. <u>ADA and FAAAA Preemption.</u>

The Airline Deregulation Act ("ADA") and Federal Aviation Administration Authorization Act ("FAAAA") expressly preempt a State from enacting or enforcing any law that relates to an air or motor carrier's rates, routes, or services. 49 U.S.C. § 41713(b)(1); 49 U.S.C. § 14501(c)(1). The ADA preemption provision provides in full:

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1).[1] The FAAAA preemption provision is borrowed from the ADA

[1] When the ADA was enacted in 1978, it prohibited a State from enacting or enforcing a "law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services." 49 U.S.C. App. § 1305(a)(1). In 1994, Congress revised the statute to prohibit a State from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service." 49 U.S.C. § 41713(b)(1). With respect to changing the reference to "rates" to a reference to "price," this Court has noted that "Congress intended the revision to make no substantive change," *American Airlines v. Wolens*, 513 U.S.

provision and applies to state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1775 (2013) (citing 49 U.S.C. § 14501(c)(1)).

In enacting the ADA and FAAAA, Congress intended to remove the restrictive and often inconsistent state laws and regulations that had previously governed the operations of carriers. *See Morales v. Trans World Airlines*, 504 U.S. 374, 378-79 (1992). Congress "determin[ed] that 'maximum reliance on competitive forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services.'" *Id.* at 378 (quoting 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9)). As this Court explained, Congress included an express preemption provision in the ADA "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* In passing the FAAAA Congress copied the ADA's preemption language, and this Court has relied upon *Morales* in construing the preemptive reach of the FAAAA. *Rowe v. New Hampshire Motor Trans. Ass'n*, 552 U.S. 364, 370 (2008).

219, 223 n.1 (1995). The courts use the terms "price" and "rates" interchangeably, as does respondent.

B. The Proceedings Below.

Respondent is a federally regulated shipping company that, in 2008, provided both domestic and international express shipping services. Pet. App. 3a. In addition to selling its shipping services directly to large companies, respondent also sold its services to "resellers" that marketed and resold its shipping services to smaller companies. *Id.* One such reseller, Freight Savers Express, Inc., had fallen behind on payments under its Reseller Agreement and was notified that respondent intended to terminate the agreement. Pet. App. 3a-4a. On May 28, 2008, petitioner entered into an agreement (the "Assumption Agreement") whereby petitioner assumed Freight Savers' rights and obligations under its Reseller Agreement with respondent. *Id.* at 4a. In return for payment by petitioner of $1,571,426.21, respondent withdrew its claims for breach of contract against Freight Savers and agreed to assignment of Freight Savers' contract to petitioner. *Id.*

Over the next several months, petitioner repeatedly failed to make payments to respondent under the Reseller Agreement. Pet. App. 4a-5a. Respondent terminated the Reseller Agreement for non-payment on November 7, 2008. *Id.* at 5a. Three days after the agreement with petitioner was terminated, respondent

announced publicly that it would cease its U.S. domestic shipping services. *Id.*

Petitioner sued respondent in Texas state court, alleging that respondent fraudulently induced petitioner to enter into the Assumption Agreement by affirmatively stating that respondent would continue to "service[] the U.S. market in the same manner as it had in the past." CR 55, ¶ 18. Petitioner also claimed that respondent committed fraud by non-disclosure by failing to disclose its confidential business plans, among them that DHL was considering the discontinuance of domestic shipping services in the United States. CR 510, ¶ 25. Respondent counterclaimed for breach of contract for amounts due as a result of petitioner's non-payment for shipping services rendered. Pet. App. 5a.

At trial, the jury found that petitioner breached the Reseller Agreement but awarded no damages to respondent. CR 1173. The jury rejected petitioner's fraudulent inducement claim but concluded that respondent committed fraud by non-disclosure. CR 1165-66. The jury awarded petitioner $1,704,228.79 in damages, representing petitioner's initial $1,571,426.31 payment of Freight Savers' debt, plus $132,802.48 in net operating losses for 2008. CR 1167; 3 RR 102:17-103:3; 5 RR 50:3-6; 8 RR 73:4-74:1. The jury also awarded punitive damages to

petitioner in the amount of $3,214,724.62. CR 1179.

The Texas Court of Appeals reversed the trial court's judgment and held that petitioner's fraud by non-disclosure claim and the award of punitive damages are preempted by the ADA and the FAAAA. Pet. App. 24a. Together, the ADA and FAAAA prohibit 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 or motor carrier]." 49 U.S.C. § 41713(b)(1); 49 U.S.C. § 14501(c)(1). Petitioner did not dispute that respondent is both an air and a motor carrier, and therefore preemption turned on whether petitioner's fraud claim was "a law, regulation, or other provision having the force and effect of law related to [respondent's] price, route, or service." Pet. App. 8a.

First, the Court of Appeals considered whether petitioner's fraud claim is "related to" respondent's rates, routes, or services. *Id.* at 16a. In doing so, the court focused on the substance of petitioner's claim: "[Petitioner] contends Texas common law imposed a duty on [respondent] to disclose fuller information to [petitioner], its customer and an intermediary between [respondent] and [respondent's] end users, about [respondent's] future plans for its domestic package delivery service operations." *Id.* at 17a. The court concluded that this claim

"has 'a definite connection with, or reference to'—and is not peripheral to—[respondent's] package delivery services." *Id.* (quoting *Morales*, 504 U.S. at 384).

Second, the court concluded that petitioner's recovery on its fraud claim "would constitute the enactment or enforcement of a state law rule, regulation, standard, or other provision." Pet. App. 18a. In this regard, the court emphasized:

> [Petitioner] d[id] not seek to enforce its contracts with [respondent], nor did it seek merely to rescind them. What [petitioner] sought, instead, was to deploy Texas common law to undo its bargain and punish [respondent] through a punitive damages award. We conclude permitting [petitioner's] recovery in this circumstance 'would impose state policies on the operation of [respondent] that are external to the parties' agreement' in a way that would have too great a regulatory effect on [respondent's] marketing mechanisms, which Congress intended to leave largely to the air and motor carriers themselves, and not at all to the states.

Id. (citing *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 757 (Tex. 2003) (citing *Wolens*, 513 U.S. at 229 n.5)). Thus, because both parts of the two-prong test were met, the court of appeals

held that petitioner's fraud claim and punitive damages award were preempted. *Id.*

Petitioner petitioned for review by the Texas Supreme Court. That court denied review on November 21, 2014, Pet. App. 42a, and denied petitioner's subsequent petition for rehearing on January 9, 2015, Pet. App. 43a.

REASONS FOR DENYING THE PETITION

Petitioner does not challenge the Texas court's conclusions that respondent is both an air carrier and a motor carrier within the meaning of the ADA and FAAAA or that petitioner's fraud claim, if allowed to proceed, would constitute the enactment of a state law, rule, regulation or other provision. Pet. 4, 7. Petitioner's core contention is that the Texas court applied a standard to determine whether petitioner's fraud claim is "related to" respondent's services that differs from the standard applied by the Fifth Circuit—as well as other federal courts of appeals—such that whether a plaintiff may pursue a tort claim against an air or motor carrier in Texas depends entirely on whether the tort claim is brought in state or federal court. Pet. 9.

In direct contradiction to petitioner's insistence that the outcome below "would have been just the opposite" had the case been pursued in federal court, Pet. 17, the Texas

court's decision was entirely faithful to, and is on all fours with, the Fifth Circuit's decision in *Lyn-Lea Travel Corp. v. American Airlines*, 283 F.3d 282 (5th Cir. 2002) (Jones, J.). The decision below is also fully consistent with other decisions from the Fifth Circuit, as well as with the decisions of other federal courts of appeals and of this Court. This case does not present any conflict that merits review by this Court. Certiorari should be denied.

I. The Texas Court of Appeals' Decision Is Fully Consistent with Relevant Fifth Circuit Precedent.

The Petition is remarkable for its omission of even a single citation, let alone any substantive discussion, of the Fifth Circuit's highly relevant decision in *Lyn-Lea*. Petitioner ignores *Lyn-Lea* and cites only one earlier decision from the Fifth Circuit in its attempt to suggest that the decision below raises a conflict. Pet. 11.

The failure to reference *Lyn-Lea* cannot be ascribed to mere oversight. In concluding that petitioner's fraud claim was preempted, the Texas court below was guided by and placed central reliance on the Fifth Circuit's reasoning in *Lyn-Lea*. Indeed, the Texas court expressly pointed out that the facts and outcome in *Lyn-Lea* are "strikingly similar" to those in this case. Pet. App. 19a. Furthermore, the parties' briefs

before the Supreme Court of Texas, which declined review of the Court of Appeals' decision, discussed *Lyn-Lea* in great detail. *See* Petitioner's Brief on the Merits at 30-32; Respondent's Brief on the Merits at 39-41.

Lyn-Lea, a travel agency, entered into an agreement whereby it earned commissions for booking client flights on American Airlines through American's computer reservation system. *Lyn-Lea*, 283 F.3d at 284. Two months after entering into the agreement, American announced modifications to its domestic commission schedule that "dramatically reduced" the commissions it would pay Lyn-Lea. *Id.* Just like petitioner in the present case, Lyn-Lea sued the carrier, American, alleging that American committed fraud by failing to disclose its plans to change its domestic commission schedule prior to signing the contract with Lyn-Lea. *Id.* at 284-85. Noting that "the phrase 'relating to rates, routes, or services' in the ADA was 'deliberately expansive' and preempted any '[s]tate enforcement action having a connection with or reference to airline rates, routes, or services,'" *id.* at 286 (quoting *Morales*, 504 U.S. at 384), the Fifth Circuit concluded that the ADA preempted Lyn-Lea's fraud claim and other tort claims, *id.* at 289. The court explained that "the ADA's purpose [is] 'to leave largely to airlines themselves, *and not at all to States,* the selection and design of market mechanisms appropriate to the furnishing of airline transportation

services,'" *id.* at 288 (quoting *Wolens*, 513 U.S. at 227), and that "the carrier's relations with travel agents, as intermediaries between carriers and passengers, plainly fall within the ADA's deregulatory concerns" because they related to American's prices and services, *id.*

As the Texas Court of Appeals observed, petitioner's fraud claim is precisely analogous to Lyn-Lea's claim, and the decision below is in complete accord with the reasoning and analysis applied by the Fifth Circuit. Just like Lyn-Lea, petitioner served as an "intermediary" between respondent and shipping customers, and it marketed and sold respondent's services to its customers. Pet. App. 3a-4a. Also like Lyn-Lea, petitioner alleges it was defrauded because its carrier discontinued services shortly after entering into a contract with petitioner. Pet. App. 5a-6a. Like the Fifth Circuit, the Texas court adhered to this Court's statements that the preemption provisions in the ADA and FAAAA have a "broad preemptive purpose" and apply "when State enforcement actions have 'a connection with or reference to' airline rates, routes, or services," Pet. App. 8a (quoting *Morales*, 504 U.S. at 384), and concluded that respondent's commercial relations with intermediaries between it and its shipping customers, such as petitioner, fall squarely within the ADA's regulatory concerns because those relations plainly relate to respondent's prices, routes, or services. Pet. App. 17a.

The key principles espoused by *Lyn-Lea* and by the court below—*i.e.*, that the phrase "relating to price, routes, or services" has a "broad" and "expansive" reach and preempts any state law or enforcement action that has "a connection with or reference to" a carrier's prices, routes, or services—have been applied consistently in other Fifth Circuit decisions. *See, e.g., Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596, 599-600 (5th Cir. 2010) (emotional distress claim arising from airline's refusal to allow passenger to board flight preempted by ADA); *Malik v. Continental Airlines Inc.*, 305 F. App'x 165, 168 (5th Cir. 2008) (state law claims related to loss of luggage are "connected to" baggage handling services and preempted by ADA).

Not only does the Petition conspicuously omit any reference to the Fifth Circuit's "strikingly similar" decision in *Lyn-Lea*, petitioner cites only one earlier Fifth Circuit decision, *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995), in support of the purported outcome-determinative split between the Texas court and the federal courts of appeals. Petitioner claims that because *Hodges* differs from *another* decision by the Texas Supreme Court, *Continental Airlines v. Kiefer*, 920 S.W.2d 274 (Tex. 1996), this Court should review the decision below. Pet. at 13-14. However, neither *Hodges* nor *Kiefer* involved a fraud claim like the one pursued by petitioner. Rather, both cases involved personal injury claims arising from

alleged negligence by the defendant airlines. To the extent there may be any arguable divergence in the reasoning of *Hodges* and *Kiefer*, any such divergence relates to issues specific to personal injury claims that are not presented in the Petition and that were not before the court below.

Plaintiffs in both *Hodges* and *Kiefer* brought personal injury claims against airlines, alleging that they were injured when heavy packages fell from an overhead compartment. *Hodges*, 44 F.3d at 335; *Kiefer*, 920 S.W.2d at 275. Like the *Lyn-Lea* court and the Texas court below, the Fifth Circuit in *Hodges* and the Texas Supreme Court in *Kiefer* both relied upon this Court's declaration in *Morales* that the phrase "relating to" in the ADA should be given a broad construction and encompasses any state law or enforcement action "having a connection with or reference to" airline rates, routes, or services. *Hodges*, 44 F.3d at 336; *Kiefer*, 920 S.W.2d at 278-79.

The Fifth Circuit in *Hodges* ultimately held that the negligence claim was not preempted, but not because of an insufficient connection between the claim and the airline's services. Rather, the court held that the "service" in question—proper overhead storage—was not "a bargained-for or anticipated provision of labor from one party to another," and was therefore not an economic aspect of air or motor

carrier service covered by the ADA. *Id.* at 336 ("[F]ederal preemption of state laws, even certain common law actions 'related to services' of an air carrier, does not displace state tort actions for personal physical injuries or property damage caused by the operation and maintenance of aircraft."). The court reasoned that, because air carriers were required by statute to "maintain insurance . . . that covers 'amounts for which . . . air carriers may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the operation or maintenance of aircraft,'" Congress had not intended to preempt personal physical injury tort claims. *Id.* at 338 (quoting 49 U.S.C. App. § 1371(q)).

Kiefer, on the other hand, held that the plaintiff's negligence claim was "related to" the airline's services within the meaning of the ADA. 920 S.W.2d at 281. The court did, as the Petition points out, "express its disagreement with the en banc decision" in *Hodges*. Pet. 14. However, this disagreement was specific to the Fifth Circuit's distinctions between: (1) "airline services and aircraft operations," which the *Kiefer* court held was a difficult line to draw and unsupported by this Court's precedent; and (2) the economic aspects of airline service, which *Hodges* held were preempted, and the safety aspects, which were not. 920 S.W.2d at 283-284.

Neither of the distinctions drawn by the Texas Supreme Court in *Kiefer* was at issue in the case below. Certainly, no such distinction or purported disagreement with any decision of the Fifth Circuit is even remotely presented to this Court by the Petition. The purported split in authority that petitioner conjures by reference to *Kiefer* and *Hodges* is therefore irrelevant to whether the decision below merits certiorari review. It does not.

II. The Texas Court's Decision Is in Line with this Court's Precedents and with the Decisions of Federal Courts of Appeals Beyond the Fifth Circuit.

Petitioner insists that the federal courts have "converged on a workable standard that finds ADA/FAAAA preemption of common law torts *only* if those claims *expressly reference*, or have a *significant economic effect* on, carriers' rates, routes or services." Pet. 10 (emphasis added). According to petitioner, because the court below did not specifically address whether petitioner's claim satisfied either of these two, allegedly critical, factors, that decision is in conflict with those of the federal courts. *Id.* at 16.

Petitioner's narrow construction not only has never been endorsed by this Court, it cannot be squared with this Court's well-established view that preemption should be applied broadly.

Moreover, petitioner's novel preemption standard is not supported by the decisions from the federal courts of appeals on which petitioner relies. While the federal courts of appeals may find that an express reference to or significant economic impact on a carrier's rates, routes, or services is *sufficient* to warrant preemption, they do not hold that this level of relation is a minimum threshold that must be met before a state law or cause of action will be preempted.

A. The Decision Below Properly Follows this Court's Preemption Decisions.

This Court's existing authority on the scope of ADA and FAAAA preemption establishes several core principles for determining whether a state law or enforcement action may proceed, and the Texas court's decision conforms with this authority. As relevant to whether petitioner's fraud claim is "related to" respondent's rates, routes, or services, this Court has consistently held that the ADA and FAAAA preemption provisions express a "broad preemptive purpose." *Morales*, 504 U.S. at 383. The Court has emphasized that these provisions are "deliberately expansive" and "conspicuous for [their] breadth." *Id.* at 384 (internal quotation marks omitted); *accord Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428 (2014). Only state actions that are "too tenuous, remote, or peripheral" to the carrier's

rates, routes, or services are not preempted. *Rowe*, 552 U.S. at 371; *accord Wolens*, 513 U.S. at 224.

Furthermore, the meaning of the phrase "related to" is well-settled. As this Court explained in *Morales*, "[t]he ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" 504 U.S. at 383 (quoting Black's Law Dictionary 1158 (5th ed. 1979)). The Court has never strayed from that expansive definition, consistently holding that the ADA and FAAAA preempt state laws "having a connection with, or reference to, airline 'rates, routes, or services.'" *Wolens*, 513 U.S. at 223 (quoting *Morales*, 504 U.S. at 384); *accord Ginsberg*, 134 S. Ct. at 1428; *Dan's City Used Cars*, 133 S. Ct. at 1778; *Rowe*, 552 U.S. at 370. The Court has expressly established that preemption is appropriate "even if a state's law's effect on rates, routes, or services is only indirect," *Rowe*, 552 U.S. at 370 (internal quotation marks omitted), and has rejected the assertion that the ADA preempts only express regulation of routes, rates, or services or state laws that "specifically address . . . the airline industry." *Morales*, 504 U.S. at 385-86. Recognizing that determining preemption under the ADA and FAAAA requires a degree of line-drawing, *see id.* at 390, the Court has refrained from defining minimum requirements for preemption but has established

that preemption is appropriate "*at least* where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives," *Rowe*, 552 U.S. at 371 (emphasis added) (quoting *Morales*, 504 U.S. at 390).

The Texas court's decision that petitioner's fraud claim is "related to" respondent's services as a carrier and therefore preempted is squarely in line with this Court's case law. The Texas court held that "[petitioner's] claim, in essence, is about what [respondent] said or, more precisely, failed to say, to [petitioner] *about* [*respondent's*] *package delivery services* before [petitioner] entered into the assumption agreement" and therefore "has a 'definite connection with, or reference to'—and is not peripheral to—[respondent's] package delivery services." Pet. App. 17a (citing *Morales*, 504 U.S. at 384). Because petitioner's fraud claim sought to impose liability on respondent for not disclosing to petitioner its confidential business plans regarding potential future changes to its domestic shipping services and for deciding to discontinue its domestic shipping services, the claim both makes "reference to" and has a "connection with" respondent's services.

This decision below complies not only with the language used by this Court, but also with the Court's reasoning. In *Morales*, for example, the Court considered whether the ADA preempted several States' efforts to enforce,

under state consumer protection statutes, guidelines promulgated by the National Association of Attorneys General. 504 U.S. at 383. Specifically, the guidelines required airlines to ensure that "an advertised fare be available in sufficient quantities to 'meet reasonably foreseeable demand' on every flight on every day in every market in which the fare is advertised" and to tell customers "if the fare will not be available." *Morales*, 504 U.S. at 387. The petitioner in *Morales* argued that these restrictions "merely prevent[ed] the market distortion caused by 'false' advertising." *Id.* at 389. The Court rejected this argument on the ground that the restrictions "curtail[ed] the airlines' ability to communicate fares to their customers." *Id.*

If not preempted, petitioner's state-law fraud claim in the present case would have a similar effect. Petitioner's claim seeks to hold respondent liable for allegedly failing to disclose to petitioner that its U.S. domestic shipping services would no longer be available. It also seeks to punish respondent for failing to continue to provide shipping services to and from locations within the United States. As the Texas court held, there is "no meaningful distinction" between the petitioner's effort in *Morales* to impose liability on airlines for false advertising of fares and petitioner's attempt here to impose liability on respondent for allegedly false

statements about its plans for routes and services. Pet. App. 18a.

The Court's most recent decision in *Ginsberg* also supports the decision below and is particularly instructive. In *Ginsberg*, the plaintiff alleged that Northwest Airlines breached the implied covenant of good faith and fair dealing by failing to exercise its discretion reasonably in revoking the plaintiff's frequent flyer membership. *Ginsberg*, 134 S. Ct. at 1427. The Court unanimously reversed the Ninth Circuit's holding that the claim was "too tenuously connected to airline regulation to trigger preemption" because it did not have any "direct effect" on either prices or services. *Id.* at 1427-28 (internal quotation marks omitted). Based on *Morales*' broad preemptive standard, the Court held that the plaintiff's implied covenant claim "related to" rates, routes, and services even though the claim did not expressly reference or challenge the airline's rates, routes, or services. *Id.* at 1430-31. The Court rejected the plaintiff's assertion that his claim was not "related to" rates, routes, and services because he did not challenge the manner in which the airline performed its frequent flyer program services, concluding that this argument ignored the reason for plaintiff's lawsuit, which was to force Northwest, through the vehicle of state law, to provide the plaintiff with reduced rates and enhanced services. *Id.* at 1431. Petitioner's

fraud claim here does not challenge the "manner in which [respondent] performed or failed to perform its package delivery services," Pet. App. 16a, but under *Ginsberg* that does not matter. Like the plaintiff's lawsuit in *Ginsberg*, petitioner's lawsuit seeks to impose a common-law duty on respondent to do something—*i.e.*, "to disclose fuller information to [petitioner]" about respondent's services – or to pay petitioner for its failure to do so. *Id.* at 17a.

B. The Federal Courts of Appeals Do Not Apply the Preemption Standard Petitioner Advocates.

Petitioner contends that the federal courts of appeals have synthesized this Court's preemption case law and have "crafted a workable standard that finds ADA/FAAAA preemption of common-law tort claims only if those claims *expressly reference*, or have a *significant economic effect on*, carriers' rates, routes, or services." Pet. 9 (emphasis in original). In fact, the federal courts of appeals, including in the decisions cited in the Petition, routinely follow this Court's broad application of preemption under the ADA and FAAAA and confirm that tort claims are preempted where they have "a connection with" or make "reference to" a carrier's rates, routes, or services. *Gary v. Air Group, Inc.*, 397 F.3d 183, 186 (3d Cir. 2005); *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323, 335 (1st Cir. 2003); *Travel All Over*

The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1430-31 (7th Cir. 1996); *Hodges*, 44 F.3d at 336.[2]

The standard petitioner articulates derives from language used in this Court's decision in *Morales*. In support of its holding that the NAAG guidelines "related to" airline rates, the Court noted that each guideline bore an "express reference" to and had a "significant effect upon fares." 504 U.S. at 388. However, as discussed above, *Morales* also established that the term "related to" has a "broad preemptive purpose" and requires only "a connection with" or "reference to" a carrier's rates, routes, or services. *Id.* at 383-84. This Court later confirmed that its decision in *Morales* "determined . . . that pre-emption occurs *at least* where state laws have a 'significant impact' related to Congress' deregulatory and pre-

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[2] Notably, several of the cases petitioner cites in support of the "workable standard" for determining ADA/FAAAA preemption of common law tort claims do not involve common law tort claims. *See Gary*, 397 F.3d at 186 (New Jersey Conscientious Employee Protection Act); *Flores-Galarza*, 318 F.3d at 325 (Puerto Rico statute regulating deliveries by interstate carriers); *Branche v. American Airlines, Inc.*, 342 F.3d 1248, 1250 (11th Cir. 2003) (Florida Whistleblower Act); *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1464 (11th Cir. 1998) (Florida age discrimination statute).

emption-related objective." *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390) (emphasis added). Contrary to petitioner's contention, nothing in *Morales* or *Rowe* suggests that either an express reference or a significant economic effect is a necessary requirement for preemption. To the contrary, those cases indicate only that the ADA and FAAAA "might not" preempt a state law or enforcement action that has "only a 'tenuous, remote, or peripheral'" effect on a carrier's rates, routes, or services. *Id.* at 371 (quoting *Morales*, 504 U.S. at 390). By way of example, the Court remarked that state laws prohibiting gambling, prostitution, or obscenity, as applied to airlines, would be too remotely related to rates, routes, or services to warrant preemption. *Morales*, 504 U.S. at 390.

The federal appeals court cases follow suit. For example, in *Branche*, the Eleventh Circuit confirmed that a state law is "related to" a carrier's rates, routes, or services if it "has a connection with or reference to such" services, but added that the requisite connection "clearly" exists if "the law expressly references the air carrier's prices, routes or services or has a forbidden significant effect upon the same." 342 F.3d at 1254-55; *see also Flores-Galarza*, 318 F.3d at 335 (noting that a "sufficient nexus exists if the law expressly references the air carrier's prices, routes, or services, or has a 'forbidden significant effect' upon the same"). Moreover, to the extent any of these decisions suggests that

preemption requires an express reference to, or significant economic effect on, carriers' rates, routes, or services, those cases pre-date decisions by this Court to the contrary. *See, e.g. Ginsberg*, 134 S. Ct. at 1431 (rejecting plaintiff's contention that his breach of implied covenant of good faith claim was not "related to" airline's services merely because it only contested the termination of his frequent flyer membership and did not expressly reference the airline's services).

Petitioner's assertion that Texas courts have "crafted a divergent standard" from the one applied by the federal courts of appeals, and that this supposed divergence was "outcome determinative" in the present case, Pet. 9, is belied by the fact that the Texas court's reasoning below is in complete harmony with decisions of the federal courts of appeals considering similar claims. As discussed above, the Fifth Circuit in *Lyn-Lea* held that a travel agency's fraud claim against an airline based on the airline's failure to disclose its plans to change its domestic commission schedule prior to signing the contract with the agency was preempted by the ADA. 283 F.3d at 284-85.[3]

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[3] Although the Petition makes no reference to *Lyn-Lea*, it is worth noting that the Fifth Circuit's decision in *Lyn-Lea* also recognizes that an "action having a 'forbidden significant effect upon [airline] fares'" is sufficiently "related" to rates to be preempted. 283 F.3d at 287. That a "significant

Noting that *Lyn-Lea* was "strikingly similar" to this case, the Texas court agreed with the Fifth Circuit that an air or motor carrier's economic relationship with "intermediaries between carriers and passengers plainly fell within the ADA's deregulatory concerns," and that fraud claims arising from a carrier's alleged failure to disclose information related to the contracts governing those relationships "had the requisite 'connection with' [the carrier's] prices and services to be preempted." Pet. App. 19a-20a.

The Eighth Circuit similarly held that a fraudulent misrepresentation claim was preempted in *Data Manufacturing, Inc. v. United Parcel Service, Inc.*, 557 F.3d 849 (8th Cir. 2009). Data Manufacturing, Inc. ("DMI") manufactured retail gift and debit cards for customers. *Id.* at 851. One of its customers, First Data Corporation, required DMI to use United Parcel Service ("UPS") to ship all cards. *Id.* First Data began to reject UPS billings, and UPS charged DMI's account directly, including a $10 charge for each previously rejected billing. *Id.* DMI sued UPS for fraudulent and negligent

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effect" is not a necessary requirement for preemption, however, is made clear by the court's rejection of Lyn-Lea's argument that its claim was not preempted because it did "not directly involve airline passengers," and only "peripherally" affected American's services. *Id.* at 288.

misrepresentation, alleging that UPS failed to disclose the additional charge. *Id.* The Eighth Circuit rejected DMI's argument that its claim was not preempted by the ADA because it related to UPS's failure to disclose its billing policy, and not to its shipping services, because the "validity of the $10 re-billing charge . . . relates to UPS's price or services." *Id.* at 852.

The *Data Manufacturing* decision is directly in line with the Texas court's reasoning that petitioner's claim "about what [respondent] said or, more precisely, failed to say to [petitioner] *about* [*respondent's*] *package delivery services*. . . has 'a definite connection with or reference to'—and is not peripheral to—[respondent's] package delivery services." Pet. App. 17a (quoting *Morales*, 504 U.S. at 384).

Finally, the Texas court also found support from the federal courts of appeals for its conclusion that petitioner's fraud claim "sought . . . to deploy Texas common law to undo its bargain and punish [respondent] through a punitive damages award" and that "permitting [petitioner's] recovery in this circumstance 'would impose state policies on the operation of [respondent] that are external to the parties' agreement' in a way that would have too great a regulatory effect on [respondent's] marketing mechanisms, which Congress intended to leave largely to the air and motor carriers themselves,

and not at all to the states." Pet. App. 18a (citations omitted).

On this point, the decision below is right in line with federal decisions like *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), *cert. denied*, 531 U.S. 1036 (2000). In that case, United and Mesa were parties to a "code-share agreement" under which Mesa provided local connecting flights for United. *Id.* at 606. When United began replacing some of Mesa's routes with another carrier, Mesa alleged that United fraudulently induced Mesa to enter into an extension of the agreement and to purchase airplanes from United. *Id.* at 606-07. In affirming the district court's ruling that Mesa's fraud claim was preempted, the Seventh Circuit explained that the fraud claim was an attempt by Mesa to use state common law to impose "external norms" beyond the terms of the parties' agreement. *Id.* at 609. Like the Texas court below, the Seventh Circuit concluded that the pursuit of such a state-law claim involved "a process that the national government has reserved to itself in the air transportation business." *Id.* at 609-10; *see also S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 557 (7th Cir. 2012) (fraudulent misrepresentation by omission claims were preempted because the claims sought to "substitute a state policy (embodied in the law) for the agreements that the parties had reached").

The Texas court's decision is entirely in accord with this Court's and the federal courts of appeals' decisions regarding ADA and FAAAA preemption, including several decisions construing fraud claims. This Court should reject petitioner's attempt to invent a new standard for preemption that is not supported by the case law and is in direct conflict with the broad preemptive scope afforded to those statutes by this Court. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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