No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A unanimous jury found by clear and convincing evidence that respondent DHL Express (USA), Inc. fraudulently induced petitioner to pay it more than $1.5 million by lying about its intent to remain in the U.S. domestic shipping business. The jury awarded petitioner compensatory and punitive damages, but the court below erased that award solely on the basis that petitioner's fraud claim is preempted by the federal Airline Deregulation Act of 1978 (ADA) and by the Federal Aviation Administration Authorization Act (FAAAA). Following long-standing precedent of the Texas Supreme Court, the court below so ruled without ever considering whether petitioner's fraud claim expressly referenced, or would have a significant economic effect on, respondent's rates, routes, or services.

The question presented is whether common-law fraud claims are preempted by the ADA or by the FAAAA in the absence of a determination that such claims *expressly reference* air or motor carriers' rates, routes, or services, or that entertaining such claims would have a *significant economic effect* on such rates, routes, or services — an issue on which Texas courts diverge from the Fifth Circuit and other federal courts of appeals.

RULE 29.6 STATEMENT

Petitioner Falcon Express International, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Falcon Express International, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First District of Texas in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-39a) is reported at 408 S.W.3d 406. The trial court did not issue an opinion; its judgment (App. 40a-41a) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 14, 2013. App. 1a. Petitioner timely petitioned for discretionary review in the Texas Supreme Court. That court denied the petition on November 21, 2014. App. 42a. The court further denied petitioner's timely petition for rehearing on January 9, 2015. App. 43a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

1. The applicable preemption clause of the Airline Deregulation Act of 1978 (ADA) provides:

> Except as provided in this subsection, 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).

2. The applicable preemption clause of the Federal Aviation Administration Authorization Act (FAAAA) provides:

> Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more 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 any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

STATEMENT

1. Respondent DHL Express (USA), Inc. (DHL) is, in its own words, "the world leader in international shipping." 3 Reporter's Record 33:21-22.[1] Petitioner Falcon Express International, Inc. (Falcon) is a company formed by three individuals in 2008 "to buy and resell DHL package delivery services under a [DHL] reseller agreement." App. 2a.

2. The jury in this action unanimously found that "DHL commit[ted] fraud against Falcon Express by failure to disclose a material fact prior to Falcon

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[1] Citations to the "Reporter's Record" and the "Clerk's Record" are to documents in the official record of Court of Appeals for the First District of Texas.

Express entering into the Assumption Agreement" between the parties. 7 Clerk's Record 01835.[2] Under that Agreement, Falcon "assumed" another company's multi-million dollar debt to DHL in exchange for the right to act as a reseller of DHL's services in the U.S. domestic shipping market. App. 3a-4a.

Because the right to resell DHL's U.S. domestic services would become worthless if DHL ceased selling those services, and because Falcon "had heard rumors that DHL was contemplating exiting the domestic shipping market due to huge financial losses," Falcon sought assurances from DHL prior to entering into the Assumption Agreement. App. 4a. DHL in response "assured [Falcon] that the plan for reducing [its] domestic footprint involved no more than a four percent reduction in services and that the reduction would affect only rural areas in the U.S." *Id.* In reliance on DHL's assurance, Falcon executed the Assumption Agreement and paid DHL more than $1.5 million of the assumed debt. *Id.*

The parties' relationship lasted only five months. Just four months after taking Falcon's money, DHL informed Falcon that it was discontinuing all domestic shipping. 3 Reporter's Record 126, 133-37. A few weeks later, DHL terminated the reseller agreement

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[2] On appeal from a judgment entered after a jury verdict, Texas courts "must view the evidence in the light most favorable to the verdict." *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014). This Court views the facts through the same lens. *See, e.g., Wharf (Holdings) Ltd. v. United International Holdings, Inc.*, 532 U.S. 588, 590 (2001) (recounting the "relevant facts, viewed in the light most favorable to the verdict winner").

with Falcon based on a purported billing dispute and then "announced publicly that it would cease domestic package delivery services." App. 5a.

3. This action ensued. As relevant here, "Falcon sued DHL for fraudulent inducement and fraud, and . . . [a]fter a seven-day trial, the jury found DHL committed 'fraud by failure to disclose a material fact prior to [Falcon] entering into the [assumption agreement]' and awarded out-of-pocket damages in the amount of $1.7 million and punitive damages in the amount of $3.2 million." App. 5a-6a (alterations in original; footnote omitted). The trial court "entered judgment on the jury's verdict, awarding Falcon the sum of $4.9 million." App. 6a; *see also* App. 41a (trial court's judgment).

4. A divided three-judge panel of the Texas Court of Appeals reversed.

a. On the sole issue presented by this petition, the majority accepted DHL's argument that Falcon's "fraud claim is preempted by the Airline Deregulation Act of 1978 (ADA) and the Federal Aviation Administration Authorization Act (FAAAA)." App. 6a. The majority recognized that this is a federal question arising under the Supremacy Clause, and the majority treated the question as "an issue of law we review de novo." App. 7a.

The majority correctly observed that the ADA applies to air carriers, the FAAAA applies analogously to motor carriers, and DHL is both an air carrier and a motor carrier within the meaning of these statutes. App. 7a-8a. The majority then sought to apply the

preemption provisions of the two statutes, which are identical in relevant part: a state "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" a covered carrier. 49 U.S.C. §§ 41713(b)(1), 14501(c)(1), *reproduced in full supra* pp. 1-2.

The majority began by surveying this Court's decisions construing the ADA and FAAAA in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); and *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008). App. 8a-12a. The majority then turned to "[t]wo decisions of the Texas Supreme Court [that] reflect the breadth of ADA preemption and the narrowness of the *Wolens* exception for certain breach of contract claims," App. 12a-13a, namely, *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274 (Tex. 1996) (*Kiefer*), and *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745 (Tex. 2003) (*Black*).

The majority found in *Kiefer* (as supplemented by *Black*) "a two-step inquiry to determine whether the ADA preempted the passengers' [state-law tort] claims": the court "asked, first, whether the claims 'related to' airline rates, routes, or services and, second, whether the claims constituted the enactment or enforcement of a state law, rule, regulation, standard, or other provision." App. 13a (citing *Kiefer*, 920 S.W.2d at 281).

Applying "the two-part *Kiefer* analysis" to Falcon's fraud claim, the majority sought to "determine, first, whether Falcon's claim is 'related to' . . . DHL's

rates, routes, or services." App. 16a (quoting *Kiefer*, 920 S.W.2d at 281). The majority thus "consider[ed] the nature of Falcon's fraud claim," *id.*, about which it made several important observations:

- "[That claim] is not 'service-determining' in the sense that the Supreme Court used that term in *Rowe*. This is because Falcon does not seek, by its fraud claim, to compel DHL either to perform a particular service or to perform a service in a particular way . . . ." *Id.* (citation omitted).

- "Nor is Falcon's claim premised on a complaint about the manner in which DHL performed or failed to perform its package delivery services. It is not, for example, a claim seeking damages for a lost or untimely delivered package. In this sense, it is not as directly 'related to' the air and motor carrier's services as were the [flight over-booking] claims in *Black*." App. 16a-17a.

- "Falcon's claim, in essence, is about what DHL said or, more precisely, failed to say to Falcon *about DHL's package delivery services* before Falcon entered into the assumption agreement." App. 17a (emphasis in original).

- "Falcon summarized its liability theory as follows: 'By making false and misleading disclosures intending to influence those doing business with DHL, and failing to disclose the whole truth, DHL fraudulently induced Falcon to enter into a contractual relationship as a reseller and pay off another's debt to DHL.'" *Id.*

- "In short, Falcon contends [that] Texas common law imposed a duty on DHL to disclose fuller information to Falcon, its customer and an intermediary between DHL and DHL's end users, about DHL's future plans for its domestic package delivery service operations." *Id.*

On these facts, the majority concluded that "Falcon's fraud claim 'relates to' DHL's prices, routes or services within the meaning of the ADA and FAAAA." App. 17a. The majority did not consider — as federal courts routinely do, *see infra* pp. 11-13 — whether Falcon's fraud claim *expressly referenced*, or would have a *significant economic effect* on, DHL's prices, routes or services.

Applying *Kiefer*'s second step, the majority also concluded that "Falcon's recovery on its fraud claim, if permitted, would constitute the enactment or enforcement of a state law, rule, regulation, standard, or other provision." App. 18a. (That ruling was correct, and Falcon does not challenge it in this Court.) Therefore, ruled the majority, "Falcon's fraud claim is preempted" by the ADA and the FAAAA. App. 19a.

b. Justice Jennings dissented from the majority's "erroneous conclusion that Falcon's lawsuit, in which it seeks rescission of the [parties'] agreement and asks for punitive damages, is preempted by" the ADA and the FAAAA. App. 31a.

The dissent viewed the essence of Falcon's fraud claim as a complaint that "DHL had a duty to disclose the fact that it was not going to continue small package delivery services in the United States and failed

to disclose this fact with the intent to get Falcon to assume [another company's] reseller relationship by paying [that company's] debt to DHL." App. 35a. In the dissent's view, this was "clearly not the type of conduct or activity that Congress meant to regulate in crafting the ADA or the FAAAA. The fact that the subject matter of the underlying contract concerned DHL's delivery services is only remotely connected to Falcon's claim." App. 35a-36a; *accord* App. 34a (observing that this Court "has emphasized that some state actions that may affect airline rates, routes, or services do so 'in too tenuous, remote, or peripheral a manner to have preemptive effect'" (quoting *Morales*, 504 U.S. at 390)).

The dissent warned that if "Falcon's fraud claim is 'related to' DHL's rates, routes, and services and is preempted, as asserted by the majority, then virtually any claim regarding a business contract with an air or motor carrier will be preempted. Congress simply did not intend to so immunize air and motor carriers." App. 36a. The dissent believed that "the fallacy of the majority's reasoning" was revealed in its unjust result: "it destroys Falcon's remedy of contract rescission and remands the case to the trial court for proceedings to enforce a contract that a jury has found is based upon fraud." *Id.*; *see also* App. 28a (remanding DHL's counterclaim for breach of contract).

5. Falcon timely sought discretionary review in the Texas Supreme Court. Although it requested and received "briefs on the merits," Order of Apr. 25, 2014, that court ultimately denied review. App. 42a.

The court subsequently denied Falcon's timely petition for rehearing. App. 43a.

REASONS FOR GRANTING THE PETITION

More than two decades ago, this Court observed that determining whether state law is preempted by the ADA is a "line-drawing exercise," and it acknowledged soon thereafter that the governing principles required a "closer working out." The federal courts of appeals took up that task and have since 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.

Texas courts, by contrast, have crafted a divergent standard that exhibits the "uncritical literalism" that this Court has long criticized in the preemption arena. The resulting split is outcome-determinative in Texas: whether a plaintiff can pursue tort claims against an air or motor carrier depends on whether the plaintiff sues in state court or in federal court.

As detailed below, the Court should resolve the split on this recurring issue of federal law, and this case presents an excellent vehicle to do so.

I. Courts are split regarding the standard for preemption of tort claims by the ADA and the FAAAA.

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 379 (1992), the Court confronted the "Air Travel Industry Enforcement Guidelines" adopted by the National Association of Attorneys General (NAAG).

Those Guidelines set out "detailed standards governing [inter alia] the content and format of airline advertising." *Id.* In particular, the Court considered "whether enforcement of the NAAG guidelines on fare advertising through a State's general consumer protection laws is pre-empted by the ADA." *Id.* at 383. Although the Court answered that specific question in the affirmative, *see id.* at 391, it declined to craft a once-and-for-all solution to ADA preemption issues. The Court acknowledged that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 390 (alterations in *Morales*) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

Having recognized ADA preemption as a line-drawing exercise, the Court in *Morales* "'express[ed] no views about where it would be appropriate to draw the line.'" *Id.* (quoting same). And in its next ADA preemption case just a few years later, the Court observed that "in our system of adjudication, principles seldom can be settled on the basis of one or two cases, but require a closer working out." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 234-35 (1995).

The lower courts have spent two decades drawing that line as it relates to preemption of tort claims. As documented below, the federal courts of appeals have converged on a workable standard that finds ADA/FAAAA preemption of common-law tort claims only if they expressly reference, or have a significant economic effect on, carriers' rates, routes, or services. But Texas courts disregard the federal courts' "closer working out" of the related-to standard, embracing

an analysis that assumes that *all* tort claims against carriers "relate to" their rates, routes, or services.

A. The Fifth Circuit and other federal courts of appeals find preemption of common-law tort claims only if such claims *expressly reference* or have a *significant economic effect* on carriers' rates, routes, or services.

The first court of appeals to confront the preemption of tort claims after *Morales* was the Fifth Circuit. Sitting en banc, the court considered whether a "state law tort claim for physical injury based on alleged negligent operation of the aircraft is preempted by [the ADA]." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995). The Fifth Circuit answered that question in the negative, relying on two factors adumbrated in *Morales*. One, "unlike the NAAG Guidelines in *Morales*, enforcement of tort remedies for personal physical injury ordinarily has no 'express reference' to [airline] services." *Id.* at 339. And two, "[e]nforcement of such tort duties normally will not have 'the forbidden significant effect' on airlines' services." *Id.*; *accord id.* at 340 (finding no preemption because the disputed "tort claim for personal injury has no specific 'reference to' airline services," nor "would enforcement of [such] claim significantly affect Delta's services").

The Seventh Circuit followed *Hodges* in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), which held that the tort claims at issue were not preempted by the ADA. As with the personal injury claims at issue in *Hodges*,

"the slander and defamation claims do not expressly refer to airline rates, routes, or services." *Id.* at 1433. Moreover, "these claims do not have the 'forbidden significant [economic] effect' on airline rates, routes, or services, as contemplated by *Morales*." *Id.* (alteration in *Travel All Over*). In general, the court held, a law "'relates to' airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them." *Id.* at 1432. The Seventh Circuit adheres to this test: "a claim is preempted if *either* the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have 'a significant economic effect upon them.'" *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000).

The Eleventh Circuit, in turn, followed *Travel All Over* in holding that a state-law claim for employment discrimination was not preempted: "For a law to be expressly preempted by the ADA, a state must 'enact or enforce a law that relates to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them.'" *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465-66 (11th Cir. 1998) (quoting *Travel All Over*, 73 F.3d at 1431). The Eleventh Circuit applied this emerging federal standard a few years later in concluding that a tort-like "whistleblower" claim afforded by Florida law was not preempted either. *See Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1259 (11th Cir. 2003). ADA preemption, the court explained, is "established by showing that the state law in question either directly regulates such services or . . . has a significant

economic impact on them." *Id.* (relying on *Parise* and *Travel All Over*).

Branche relied in part on a First Circuit decision that applied the same basic test. *See United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323, 335 (1st Cir. 2003) (finding a sufficient nexus for preemption "if the law expressly references the air carrier's prices, routes or services, or has a 'forbidden significant effect' upon the same"), *quoted in Branche*, 342 F.3d at 1255. The Third Circuit likewise relied on the First Circuit's decision in ruling (like the Eleventh Circuit) that another state-law "whistleblower" claim was not preempted by the ADA: "The requisite connection exists either where 'the law expressly references the air carrier's prices, routes or services, or has a forbidden significant effect upon the same.'" *Gary v. Air Group, Inc.*, 397 F.3d 183, 186 (3d Cir. 2005) (quoting *Flores-Galarza*, 318 F.3d at 335).

B. Texas courts, by contrast, routinely find preemption of tort claims without considering either express reference or significant economic effect.

As documented below, Texas courts have crafted a different test for determining whether a particular common-law tort claim is preempted under the ADA or the FAAAA.

In *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 281 (Tex. 1996), the Supreme Court of Texas essentially ruled that *every* tort claim "is 'related to' an airline's prices or services within the meaning of [the ADA]." The court reasoned: "Tort liability cannot but

have, in *Morales*' words, 'a significant impact upon the fares [airlines] charge,' just as the advertising guidelines in that case." *Id.* (quoting 504 U.S. at 390). And in so ruling, the Texas Supreme Court expressly rejected the federal appellate decisions — illustrated vividly by the decisions catalogued above — "that particular tort claims did not relate to airline services." *Id.* The court wrote at some length, moreover, to express its disagreement with the en banc decision of the Fifth Circuit in *Hodges*. *See id.* at 283-84.

The Texas Supreme Court reaffirmed *Kiefer* in *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 747 (Tex. 2003), which considered "whether the ADA preempts a passenger's state law claims for an airline's alleged failure to honor a confirmed first-class seat." In answering that question in the affirmative, the Texas Supreme Court finished creating what has become the controlling "two-part analysis" employed by the Texas courts to determine preemption under the ADA and the FAAAA.

The first part of the *Kiefer*/*Black* analysis asks simply "whether the claim is *related to* an airline's prices or services within the meaning of the [statute's] preemption provision." *Id.* at 752 (emphasis added). Observing that various courts "have fashioned inconsistent tests for determining whether a state law is related to an airline's services," *id.*, the court did little to clarify the prevailing test in Texas. Certainly, the court said nothing to qualify *Kiefer*'s indication that *all* tort claims against air carriers are "related to" carrier prices or services. Accordingly, *Black* made no mention of either (1) a claim's *expressly referencing*

an airline's rates, routes, or services, or (2) a claim's having a *significant economic effect* on those matters.

The second part of the *Kiefer/Black* analysis asks "whether [the] claims, if allowed, would constitute enactment or enforcement of a state law within the meaning of the ADA's preemption clause." *Id.* at 753. After this Court's recent decision in *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014), that question will always yield an affirmative answer for state-law tort claims like Falcon's here. *See id.* at 1429 ("The first question we address is whether . . . the ADA's preemption provision applies only to legislation enacted by a state legislature and [to] regulations issued by a state administrative agency but not to a common-law rule like the implied covenant of good faith and fair dealing. We have little difficulty rejecting this argument."). As discussed in the Statement (*supra* p. 7), the lower court correctly concluded that a recovery on Falcon's fraud claim would constitute enactment or enforcement of a state law.

The Texas courts have adhered to *Black*'s divergence from the federal courts of appeals. In *Henson v. Southwest Airlines Co.*, 180 S.W.3d 841, 846 (Tex. App. 2005), the court found ADA preemption of claims for malicious prosecution and negligence on the basis that those claims did "relate to airline prices or service." The court gave no consideration to whether the claims expressly referenced prices or services or had a significant economic effect on prices or services. Similarly, the court in *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 372 (Tex. App. 2007), found ADA preemption of a common-law claim for wrongful discharge

because the claim "related to [an air carrier's] prices, routes, or services." Like *Henson*, *Miller* did not consider whether the claim expressly referenced prices or services or had a significant economic effect on them. And consistent with these decisions, the court below found preemption of Falcon's fraud claim without considering whether that claim expressly references or has a significant economic effect on DHL's prices, routes, or services. App. 17a-18a.

C. The resulting split can be resolved only by this Court.

The Texas Supreme Court's decisions in *Kiefer* and *Black* cannot be reconciled with the ADA/FAAAA preemption standards applied by the Fifth Circuit and other federal courts of appeals. The divergence between the state and federal courts in Texas has existed for at least a decade, and there are no signs of any rapprochement.

As DHL observed in its merits brief in the Texas Supreme Court, the Texas "court of appeals was not only correct to rely on *Black*, the court was obligated to follow *Black*'s reasoning." Respondent's Brief on the Merits 33 (Aug. 15, 2014) (citing *Weeks Marine, Inc. v. Garza*, 371 S.W.3d 157, 165 n.10 (Tex. 2012)). DHL is correct, as the Texas Supreme Court has long held that the Texas courts are "not obligated to follow Fifth Circuit precedent" or any federal-court decisions *other than* the decisions of this Court. *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17, 18 (Tex. 1996) (citing *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993)).

II. This case is an ideal vehicle by which to resolve the split.

The court below correctly viewed the preemption issue as "an issue of law we review de novo." App. 7a. That pure legal issue comes to this Court after the unanimous verdict of a jury that "DHL commit[ted] fraud against Falcon Express by failure to disclose a material fact prior to Falcon Express entering into the Assumption Agreement" between those two parties. *Supra* pp. 2-3. Indeed, though the court below ruled against Falcon, the court nonetheless correctly characterized Falcon's common-law fraud claim against DHL. *See supra* pp. 6-7.

The correct legal standard for ADA/FAAAA preemption is determinative here. Under the expansive and ill-defined "related to" test that is mandated in Texas state courts by the Texas Supreme Court's decisions in *Kiefer* and *Black*, it is not unreasonable to conclude that Falcon's fraud claim has *some* relation to DHL's services. It was as easy as merely pointing out that "Falcon's claim, in essence, is about what DHL said or, more precisely, failed to say to Falcon *about DHL's package delivery services* before Falcon entered into the assumption agreement." App. 17a (emphasis in original).

But the result would have been just the opposite under the two-part test employed in the Fifth Circuit and other federal courts of appeals. Falcon's common-law fraud claim did not *expressly reference* DHL's services in asking the jury to find that "DHL commit[ted] fraud against Falcon Express by failure to disclose a

material fact prior to Falcon Express entering into the Assumption Agreement" between the parties.

DHL will doubtless argue that the undisclosed "material fact" was a fact "about" DHL's services. As the court below put it, Falcon's claim concerns "what DHL said or, more precisely, failed to say to Falcon *about DHL's package delivery services*" before Falcon entered into that agreement. App. 17a (emphasis in original). This phrasing suggests that the claim concerns DHL's failure to disclose facts about a particular service to a potential customer, i.e., DHL was "falsely advertising" its services (as in *Morales*). But as the court correctly recognized a few lines later, Falcon's claim is nothing of that sort; instead, it is that Texas common law imposed a duty on DHL "to disclose fuller information to [its *non*-customer] Falcon . . . *about DHL's future plans for its domestic package delivery service operations*." *Id.* (emphasis added). This claim simply does not *expressly* reference "*a* . . . service of [an air or motor] carrier" within the meaning of the ADA or FAAAA, 49 U.S.C. §§ 41713(b)(1), 14501(c)(1) (emphasis added).

The Fifth Circuit has recognized that "enforcement of tort remedies for personal physical injury ordinarily has no 'express reference' to [an air carrier's] services." *Hodges*, 44 F.3d at 339. This holds *even though* one "could suggest that 'services' includes all aspects of the air carrier's 'utility' to its customers," *id.* at 337, so that personal injury claims necessarily reference services; e.g., personal injury claims against air carriers are necessarily "about" the (negligent) provision of services by those carriers.

Nor could Falcon's claim be said to have a *significant economic effect* on DHL's services. In *Travel All Over*, for example, the Seventh Circuit concluded that slander and defamation claims were not preempted by the ADA; the court could not "envision how allowing tort claims based on an airline's knowingly false statements about a travel agency would have even a 'tenuous, remote or peripheral' economic effect on the rates, routes, or services that the airline offers." 73 F.3d at 1433. Here, allowing tort claims based on a carrier's "fraudulently induc[ing] Falcon to enter into a contractual relationship as a reseller and pay off another's debt to DHL," App. 17a, similarly would not have a significant economic effect on DHL's services.

DHL's mantra in the Texas courts was that Falcon is using the law to "punish" DHL for changing its services by leaving the U.S. domestic shipping market. Not so. At the start of its opening statement to the jury, Falcon made absolutely clear that "[n]o one is faulting DHL . . . for having left the United States." 3 Reporter's Record 9:19-20. Falcon immediately reiterated this point: "We are not here to criticize that decision. That's DHL's choice to make and [it] can make that choice." *Id.* at 9:24-10:1. But the law of Texas — like the law of every state in this regard — did not permit DHL to *lie* about its choice: "The complaint that Falcon has and the complaint [that] you will hear evidence about during the trial is that DHL chose to lie about what it said, what it decided." *Id.* at 10:5-8. Any effect of preventing air carriers from lying to potential business partners (*not* consumers of transportation services) regarding general business

plans (*not* any one particular service) is the kind of "tenuous, remote or peripheral" economic effect that the federal courts of appeals routinely discount, as in *Travel All Over*, 73 F.3d at 1433.

In sum, Falcon would prevail under the standard employed by the federal courts of appeals. For this reason, and because the petition presents a pure question of law on facts already decided by a unanimous jury, this case is an ideal vehicle for the Court to resolve the long-standing split between the state and federal courts in Texas on an important and recurring issue of federal law.

III. The preemption standard prevailing in the Texas courts exemplifies the "uncritical literalism" condemned by this Court, and it frustrates the intent of Congress in the ADA and the FAAAA.

In *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013), the Court opined that "the breadth of the words 'related to' does not mean the sky is the limit." Consequently, the Court has refused to read ERISA's preemption clause, which "supersedes state laws 'relate[d] to any employee benefit plan,' with an 'uncritical literalism,' else 'for all practical purposes pre-emption would never run its course.'" *Id.* (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655-56 (1995)). And the Court has reiterated that the term "related to" in the ADA and FAAAA "does not preempt state laws affecting carrier prices, routes, and services 'in only a "tenuous, remote, or peripheral . . . manner."'" *Id.* (quoting *Rowe v. New Hampshire*

Motor Transport Association, 552 U.S. 364, 371 (2008), in turn quoting *Morales*, 504 U.S. at 390).

The Texas courts have fallen into the pit of "uncritical literalism," such that for tort claims, it is true that for all practical purposes, preemption never runs its course. Indeed, the Texas Supreme Court in *Kiefer* essentially ruled that *every* tort claim "is 'related to' an airline's prices or services within the meaning of [49 U.S.C. §] 41713(b)(1)." 920 S.W.2d at 281. Moreover, finding preemption of a claim concerning fraud "about DHL's future plans for its domestic package delivery service operations," App. 17a, is a textbook example of preempting state laws that affect carrier services in, at most, a *tenuous, remote, or peripheral* manner.

This uncritical literalism does not merely effect private injustice; it frustrates the intent of Congress. As this Court has explained, Congress first "largely deregulated the domestic airline industry," and then subsequently "extended deregulation to the trucking industry." *Dan's City*, 133 S. Ct. at 1775. In keeping with Congress's aim to achieve "maximum reliance on competitive market forces," the preemption clauses of the ADA and FAAAA seek to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* (quoting *Morales*, 504 U.S. at 378).

Permitting state-law claims for fraud regarding how air or motor carriers bargain with prospective business partners (*not* consumers of transportation services) about their "future plans" poses no threat to "undo" federal deregulation of the airline and trucking industries. On the other hand, "[f]ederal law does

not speak to [the] issues" raised by a carrier's fraud in connection with executing an assumption agreement like that between DHL and Falcon. *Id.* at 1780-81.[3] Therefore, "if such state-law claims are preempted, *no law* would govern the resolution of a non-contract-based dispute arising from" such fraud. *Id.* at 1780 (emphasis added). No such anomalous result "can be attributed to a rational Congress." *Id.* at 1781.

More than a decade ago, a commentator observed that lower courts' "interpretive inconsistencies" in this arena "are especially troubling because they have led to much confusion in the airline industry on a high-stakes topic"; until those inconsistencies are ironed out, "contradictory legal obligations can be imposed on airlines depending on their location or the location of their services." Eric E. Murphy, *Comment: Federal Preemption of State Law Relating to an Air Carrier's Services*, 71 U. Chi. L. Rev. 1197, 1198 (2004). This case provides a good opportunity for the Court to end the interpretive inconsistencies in the lower courts — and the consequent contradictory legal obligations on air and motor carriers — with respect to common-law tort claims.

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[3] The court below pointed to 49 U.S.C. § 41712(a) and 14 C.F.R. §§ 302.403, 302.404(a) as authorizing the U.S. Department of Transportation "to investigate allegations of 'unfair or deceptive practice or an unfair method of competition' and providing that any person may file a formal or informal complaint concerning a violation of statute or DOT regulations." App. 23a. But the cited statute refers to "an unfair or deceptive practice or an unfair method of competition *in air transportation or the sale of air transportation*" (emphasis added). The DHL conduct that the jury found fraudulent is outside that limited category.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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April 2015

APPENDIX

APPENDIX A

Opinion issued February 14, 2013.

[SEAL]

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01080-CV

DHL EXPRESS (USA), INC., Appellant

V.

FALCON EXPRESS INTERNATIONAL, INC., Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2008-66394

OPINION

In May 2008, Falcon Express International obtained the rights to buy and resell DHL package delivery services under a DHL Express (USA) Inc. reseller agreement. To obtain those rights, which previously belonged to Freight Savers Express, Inc., Falcon entered into an Assignment and Assumption Agreement with Freight Savers and DHL, in which Falcon agreed to assume Freight Savers's obligations under the reseller agreement, including Freight Savers's significant outstanding debt to DHL.

Over the next few months, DHL sold its package delivery services to Falcon, which, in turn, resold them to its customers, pursuant to the terms of the reseller agreement. But Falcon fell behind in its payments to DHL and, on that basis, DHL terminated the reseller agreement effective November 7, 2008. Three days later, DHL announced it was discontinuing domestic package delivery services, a large part of Falcon's business.

Falcon sued DHL, seeking rescission of the assumption agreement on the theory that Falcon was induced to enter into the assumption agreement by DHL's deliberately misleading statements that it had "ruled out" a cessation of its U.S. domestic shipping services. DHL countersued for breach of contract, to recover amounts it claimed were due from Falcon under the reselling and assumption agreements. The trial court's judgment awarded Falcon $1.7 million under a rescission theory and $3.2 million in punitive damages based on the jury's

finding that DHL committed fraud by failing to disclose to Falcon a material fact—that DHL still was contemplating exiting the domestic package delivery services market—before Falcon entered into the assumption agreement. The trial court's judgment also recited that DHL shall take nothing on its counterclaim for breach of contract.

DHL appeals, contending, among other things, that Falcon's fraud claim is preempted by the Airline Deregulation Act of 1978 (49 U.S.C. § 41713(b)(1)) and the Federal Aviation Administration Authorization Act (*id.* § 14501(c)(1)), and that factually insufficient evidence supports the jury's finding that $0 would compensate DHL for Falcon's breach of contract. Finding both contentions meritorious, we reverse the trial court's judgment, dismiss Falcon's fraud claim, and remand DHL's counterclaim for breach of contract.

Background

DHL Express (USA), Inc. is a federally regulated express package delivery company that, in 2008, provided domestic and international package delivery services. While DHL sold its services to larger customers directly, it also sold to resellers, which, in turn, marketed and sold DHL's services to smaller customers. Freight Savers Express, Inc. was one such reseller. It bought and resold DHL's services under the terms of a reseller agreement between Freight Savers and DHL.

In early 2008, DHL had sent Freight Savers notice that it intended to terminate the reseller

agreement because Freight Savers had fallen behind in its payments. Three Freight Savers employees, James Fisher, Rick Bouse and David Shavlan, decided to form a new entity, Falcon, and have Falcon take over Freight Savers's business. The men had heard rumors that DHL was contemplating exiting the domestic shipping market due to huge financial losses. But there was also evidence the men knew, before they took over Freight Savers's business, that high- level DHL executives had been quoted as saying that DHL had "ruled out the option of withdrawal," and that DHL "expects to present a plan for the division there in May." Bouse testified that, the day before Falcon entered into the assumption agreement, Bouse contacted Beth Taylor, his main contact at DHL, to ask about the rumors. According to Bouse, Taylor assured Bouse that the plan for reducing the domestic footprint involved no more than a four percent reduction in services and that the reduction would affect only rural areas in the U.S. The next day, May 28, Fisher signed the assumption agreement on behalf of Falcon, assuming Freight Savers's rights and obligations under Freight Savers's reseller agreement with DHL. The assumption agreement reflects that DHL consented to the assignment and agreed to withdraw its notice of material breach and contract termination on the condition that Falcon pay $1,571,426.31 against Freight Savers's past due debt by May 29.

Falcon met that condition and began doing business under the reseller agreement, but soon fell behind on payments due to DHL. Over the next

several months, Falcon repeatedly promised to catch up, but it never did. On September 29, 2008, four months after entering into the assumption agreement, Falcon sent the last payment it would make to DHL. On that same day, DHL informed Falcon that DHL would cease domestic shipping "fairly soon." Despite this news, Falcon and DHL continued doing business and discussing Falcon's unpaid invoices. In an October meeting, Falcon disputed some of DHL's charges. Shortly thereafter, Bouse sent DHL an email explaining that Falcon felt it had been defrauded because it paid "an awful lot of money . . . based on [the] belief that DHL would be in business in the United States."

On October 24, 2008, DHL sent Falcon a Default Notice demanding payment of approximately $1.6 million. The following week, DHL sent another notice offering to waive $562,000 of the past due debt in exchange for Falcon's agreement to pay $966,348.49, and enter into "a mutual full release of any existing claims." Falcon did not agree, and DHL terminated the reseller agreement on November 7, 2008. Three days later, DHL announced publicly that it would cease domestic package delivery services.

Falcon sued DHL for fraudulent inducement and fraud, and DHL countersued for breach of contract. After a seven-day trial, the jury found DHL committed "fraud by failure to disclose a material fact prior to [Falcon] entering into the [assumption

agreement]"[1] and awarded out-of-pocket damages in the amount of $1.7 million and punitive damages in the amount of $3.2 million. With respect to DHL's counterclaim for breach of contract, the jury found Falcon breached both the assumption and the reseller agreements, and that $0 would fairly and reasonably compensate DHL for its damages. The trial court entered judgment on the jury's verdict, awarding Falcon the sum of $4.9 million[2] and denying DHL relief on its counterclaim for breach of contract. DHL appeals.

Preemption under the ADA and FAAAA

In its first issue, DHL contends Falcon's claim fraud claim [sic] is preempted by the Airline Deregulation Act of 1978 (ADA) and the Federal Aviation Administration Authorization Act (FAAAA).

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[1] The jury answered "yes" to Question 2, which asked whether DHL committed fraud by non-disclosure, but it answered "no" to Question 1, which asked whether DHL fraudulently induced Falcon to enter into the assumption agreement by making a material misrepresentation. Thus, although we refer throughout this opinion to the claim on which Falcon prevailed as a "fraud" claim, it is, more specifically, a claim of fraud by nondisclosure.

[2] The exact amount of the judgment, $4,918,953.41, is the sum of $1,704,228.79, which is the amount of out-of-pocket damages found by the jury in response to Question 3, and the punitive damages award of $3,214,724.62. In a post-trial motion, Falcon elected the remedy of rescission, and the judgment accordingly refers to the $1,704,228.79 award as a "rescission component." The amount of the punitive damage award corresponds exactly to the amount DHL asked the jury, in closing argument, to award DHL on its counterclaim for breach of contract.

Under the Supremacy Clause, if a state law conflicts with federal law, the state law is preempted and without effect. *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128–29 (1981). Preemption may be either express or implied. *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 748 (Tex. 2003), *cert. denied*, 540 U.S. 1181, 124 S. Ct. 1418 (2004). Whether a claim is preempted is an issue of law we review de novo. *See Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 404 (5th Cir. 2000); *Skilled Craftsmen of Tex., Inc. v. Tex. Workers' Comp. Comm'n*, 158 S.W.3d 89, 93 (Tex. App.—Austin 2005, pet. dism'd).

Both the ADA and FAAAA have express preemption provisions. The ADA's provides:

> A State, political subdivision of a State, or political authority of 2 or more 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 . . . .

49 U.S.C. § 41713(b)(4)(A). Through this provision, Congress expressly preempted state law as applied to the price, route, or service of an air carrier. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S. Ct. 2031, 2036 (1992). The FAAAA's preemption provision is similar, but it forbids enactment or enforcement of laws, regulations, or other provisions having the force and effect of law related to a price, route, or service of any *motor*

carrier. 49 U.S.C. § 14501(a)(1). Both provisions have the same breadth and express a "broad pre-emptive purpose." *See Morales*, 504 U.S. at 384, 112 S. Ct. at 2037 (adopting standards in other preemption contexts to conclude that ADA preemption occurs when State enforcement actions have "a connection with or a reference to" airline rates, routes, or services); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 3709, 128 S. Ct. 989, 994 (2008) (adopting *Morales*'s analysis of ADA provisions in analyzing preemption provisions of FAAAA).

It is undisputed that DHL is both an air carrier and a motor carrier within the statutes' meaning. The question before us, then, is whether enforcement of Falcon's state law fraud claim qualifies as "a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of DHL. Several decisions of the United States Supreme Court and the Texas Supreme Court provide the framework for our analysis.

1. U.S. Supreme Court trio: *Morales*, *Wolens*, *Rowe*

In *Morales v. Trans World Airlines, Inc.*, the Supreme Court construed the ADA's preemption provision as having a broad scope. 504 U.S. at 383, 112 S. Ct. at 2037. The National Association of Attorneys General had promulgated Air Travel Industry Enforcement Guidelines to address allegedly deceptive airline fare advertisements. *Id*. at 379. The guidelines contained detailed standards

governing the content and format of airline advertising, the awarding of premiums to frequent fliers, and the payment of compensation to passengers who voluntarily give up seats on overbooked flights. *Id*. Noting that Congress included an express preemption provision in the ADA "to ensure that the States would not undo federal deregulation with regulation of their own," the Court held that the ADA preempted all state enforcement actions that have "a connection with or reference to airline 'rates, routes, or services.'" *Id*. at 378, 384, 112 S. Ct. at 2034, 2037. The Court rejected a reading of the statute that would preempt only state laws prescribing rates, routes, or services; it likewise rejected the notion that only laws specifically addressed to the airline industry were preempted. *Id*. at 385–86, 112 S. Ct. at 2037–38. It reasoned that because the guidelines would impact airlines' fares and airlines' ability to market their product, the guidelines clearly "related to" fares and, accordingly, were preempted. *Id*. at 384, 112 S. Ct. at 2037. The Court also rejected the contention that a finding of preemption would give air carriers "*carte blanche* to lie to and deceive consumers" by noting that the Department of Transportation had regulatory authority to prohibit deceptive or unfair business practices that hinder competition in the industry. *Id*. at 390–91, 112 S. Ct. at 2040.

In *American Airlines, Inc. v. Wolens*, the Court again found ADA preemption of claims based on state statutes designed to protect consumers from fraud in the airline industry. 513 U.S. 219, 115 S.

Ct. 817 (1995). Importantly, *Wolens* also created an exception to the ADA's broad preemption provision: it held that the ADA's preemption provision does *not* extend to contract claims "alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings," provided the parties did not rely on state laws or policies external to the agreement to enlarge contractual obligations or enhance their bargain. 513 U.S. at 228, 115 S. Ct. at 824. In *Wolens*, members of a frequent flyer program sued an air carrier for alleged violations of Illinois consumer fraud statutes and for breach of contract based on retroactive changes to the frequent flyer program. *Id*. at 224–25, 115 S. Ct. at 822. Noting the inherent potential in state consumer protection laws for intrusive regulation of airline marketing practices, the Court reiterated that the ADA's purpose was to leave largely to the airlines themselves, and not at all to the states, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services. *Id*. at 228, 115 S. Ct. at 823. Because the Illinois state consumer fraud statutes at issue, like the guidelines at issue in Morales, "serve[d] as a means to guide and police the marketing practices of the airlines," the ADA preempted the plaintiffs' consumer fraud claims. *Id*., 115 S. Ct. at 823.

Not so for the breach of contract claims. *Id*., 115 S. Ct. at 824. The Court reasoned that Congress did not intend the ADA to shield airlines from "suits alleging no violation of state-imposed obligations, but

seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id*. at 227, 115 S. Ct. at 824. Rather, "the ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" *See id*. at 229 n.5, 115 S. Ct. at 824 n.5 (quoting brief of United States as *amicus curiae*). The Court explained that the parties' contract was a privately ordered obligation, and, provided the parties did not rely on state laws or policies external to the agreement to enlarge the carrier's contractual obligations or enhance the parties' bargain, contract enforcement did not amount to a state's attempt to "enact or enforce any law, rule, regulation, standard, or other provision" as prohibited by the ADA. *Id*. at 228–29, 115 S. Ct. at 824; *see also* 49 U.S.C. § 41713(b)(1). The DOT's lack of authority to investigate or resolve breaches of contract, the court reasoned, supported the conclusion that the ADA did not preempt claims for breach of an airline's self-imposed obligations. *Wolens*, 513 U.S. at 232, 115 S. Ct. at 825 (noting "the DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime"); *cf. Morales*, 504 U.S. at 390–91, 112 S. Ct. at 2040 (noting the DOT's authority to investigate unfair business practices).

Most recently, the Court held a Maine statute that imposed "service-determining" obligations on

carriers shipping tobacco was preempted by the FAAAA. *Rowe*, 552 U.S. at 373, 128 S. Ct. at 996. Among other things, the statute required retail recipients of tobacco shipments to use an elaborate recipient-verification service, and provided that a person is deemed to know that the package contains a tobacco product if it is marked in a certain way or if the sender's name appears on a list compiled by the Maine Attorney General. *Rowe*, 552 U.S. at 368–69; 128 S. Ct. at 993–94. A group of air carrier associations challenged the "recipient-verification" and "deemed-to-know" provisions of the law, arguing the provisions were preempted by the FAAAA. *Id*. at 369; 128 S. Ct. at 994. The Court concluded that allowing Maine to *require specific actions and services* by carriers "could easily lead to a patchwork of state service-determining laws, rules, and regulations . . . inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Id*. at 373, 128 S. Ct. at 996. Accordingly, it found these provisions had a significant impact on air carriers that interfered with Congress's objectives: it would produce "the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces.'" *Id*. at 372, 128 S. Ct. at 995.

2. Texas Supreme Court duo: *Kiefer* and *Black*

Two decisions of the Texas Supreme Court reflect the breadth of ADA preemption and the

narrowness of the *Wolens* exception for certain breach of contract claims. *Continental Airlines, Inc. v. Kiefer*, involved two consolidated personal injury cases. In one, a passenger claimed she was injured when a briefcase fell from an overhead storage bin and struck her head. 920 S.W.2d 274, 275 (Tex. 1996). In the second, a passenger claimed he fell and was injured while trying to make his connecting flight because the airline negligently failed to provide meet and assist services. *Id*. at 275–76. Following *Morales* and *Wolens*, the court conducted a two-step inquiry to determine whether the ADA preempted the passengers' negligence claims. *Id*. at 281. The court asked, first, whether the claims "related to" airline rates, routes, or services and, second, whether the claims constituted the enactment or enforcement of a state law, rule, regulation, standard, or other provision. *Id*. The court concluded that, although the plaintiffs' negligence claims did not relate to airline rates and services as directly as the claims in *Wolens* did, "the impact of tort liability on an airline's services [wa]s no less real" and was certainly not as "tenuous, remote, or peripheral" as a prohibition against obscenity in advertising—the example *Morales* gives of a state law that likely would lie outside the scope of the ADA's preemption clause. *Id*. The court continued: "Tort liability cannot but have, in *Morales*' words, 'a significant impact upon the fares [airlines] charge,' just as the advertising guidelines in that case." *Id*. (citation omitted). The court thus concluded the negligence claims "related to" the airline's rates, routes, or services. *Id*.

But, the court concluded, the plaintiffs' negligence actions did not satisfy the second prong of the preemption analysis. Because negligence actions do not "carry the same 'potential for intrusive regulation of airline business practices inherent in state consumer protection legislation,'" they did not amount to the enforcement of a state law. *Id*. at 282 (quoting *Wolens*, 513 U.S. at 227, 115 S. Ct. at 823). The court explained: "Simple negligence law . . . is far more policy–neutral than specific–purpose legislation, like consumer protection laws." *Id*. While the court concluded the negligence claims were not preempted, it stopped short of declaring that personal injury claims are always saved from preemption. *Id.* Rather, it hinted other tort claims—and even some negligence claims—may be preempted because they carry with them a greater risk that state policies will be too involved, especially when a claimant seeks punitive or mental anguish damages. *Id*. at 282. Observing that neither plaintiff sought such damages, the court held that "the ADA does not preempt common-law personal-injury negligence claims against air carriers, subject to the reservations we have expressed as to damages." *Id*. at 283.

By contrast, in *Delta Air Lines, Inc. v. Black*, the court held the ADA preempted Black's fraud, negligent misrepresentation, and breach of contract claims. 116 S.W.3d at 747. Black and his wife bought round-trip, first-class tickets on a flight that Delta had overbooked. Delta denied Black's wife a first-class seat for the flight out, but offered several

alternatives, each of which included vouchers for use on a later flight. *Id*. The Blacks refused these alternatives and sued. *Id*. at 748. The court applied the two-part analysis it used in *Kiefer*. First, it concluded the claims involving boarding and seating procedures "related to" Delta's services, noting that "seating policies and boarding procedures are not peripheral to the operation of an airline, but are inextricably linked to the contract of carriage between a passenger and the airline and have a definite 'connection with, or reference to' airline services." *Id*. at 753 (quoting *Morales*, 504 U.S. at 384, 112 S. Ct. at 2037).

Second, the court rejected the court of appeals's conclusion that federal law did not preempt Black's misrepresentation claims. The lower court's reasoning—that Black's claims were not premised on a law imposed by a Texas legislative body—could not withstand scrutiny, because state common law actions "can be state enforcement." *Id*. at 756. The court reasoned that both *Wolens* and *Kiefer* "suggest that state misrepresentation and fraud claims are preempted by the ADA," and that Black's misrepresentation claim was "comparable" to a claim under a consumer fraud statute because both "would impose state policies on the operation of air carriers that are external to the parties' agreement." *Id*. at 757. For these reasons, the court concluded Black's

misrepresentation and fraud claims were preempted.[3] *Id*.

3. Falcon's fraud claim

We now apply these principles, and the two-part *Kiefer* analysis, to Falcon's fraud claim. We determine, first, whether Falcon's claim is "related to," or, in the words of *Morales*, has "a definite 'connection with, or reference to'" DHL's rates, routes, or services. *Morales*, 504 U.S. at 384, 112 S. Ct. at 2037; *Kiefer*, 920 S.W.2d at 281. To do so, we must consider the nature of Falcon's fraud claim. It is not "service-determining" in the sense that the Supreme Court used that term in *Rowe*. 552 U.S. at 373, 128 S. Ct. at 996. This is because Falcon does not seek, by its fraud claim, to compel DHL either to perform a particular service or to perform a service in a particular way, as the Maine legislature did when it passed the statute at issue in *Rowe*. *Id*., 128 S. Ct. at 996. Nor is Falcon's claim premised on a complaint about the manner in which DHL performed or failed to perform its package delivery services. It is not, for example, a claim seeking damages for a lost or untimely delivered package. In this sense, it is not as directly "related to" the air and

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[3] The court also concluded Black's breach of contract claim was preempted. Delta and Black's contract expressly incorporated federal regulations providing a uniform system of compensation to passengers who, like Black, had been denied boarding. But Black sought to ignore the parties' bargain in that respect and instead use state law to enlarge Delta's obligations to him. Accordingly, it did not fit within the *Wolens* exception and was preempted. *Black*, 116 S.W.3d at 756.

motor carrier's services as were the claims in *Black*. Falcon's claim, in essence, is about what DHL said or, more precisely, failed to say to Falcon *about DHL's package delivery services* before Falcon entered into the assumption agreement. Falcon summarized its liability theory as follows: "By making false and misleading disclosures intending to influence those doing business with DHL, and failing to disclose the whole truth, DHL fraudulently induced Falcon to enter into a contractual relationship as a reseller and pay off another's debt to DHL." In short, Falcon contends Texas common law imposed a duty on DHL to disclose fuller information to Falcon, its customer and an intermediary between DHL and DHL's end users, about DHL's future plans for its domestic package delivery service operations. While the relationship between Falcon's claim and DHL's services is not as direct as *Rowe* or *Black*, we nevertheless conclude Falcon's claim has "a definite connection with, or reference to"—and is not peripheral to—DHL's package delivery services. *Morales*, 504 U.S. at 384, 112 S. Ct. at 2037 (a claim relates to rates, routes or services if it has "a definite 'connection with, or reference to'" them). Accordingly, Falcon's fraud claim "relates to" DHL's prices, routes or services within the meaning of the ADA and FAAAA. *Morales*, 504 U.S. at 384, 112 S. Ct. at 2037 (construing "relate to" broadly and holding guidelines governing airfare advertisements relate to rates, routes or services); *Wolens*, 513 U.S. at 224–25, 115 S. Ct. at 822 (claims arising from changes to airline's frequent flier program relate to rates,

routes, or services); *Black*, 116 S.W.3d at 749–50 (complaint about procedures used for compensating passengers denied boarding due to overbooking relates to rates, routes, or services).

We also conclude that Falcon's recovery on its fraud claim, if permitted, would constitute the enactment or enforcement of a state law, rule, regulation, standard, or other provision. Falcon and DHL are parties to two contracts, the assumption and reseller agreements, which reflect voluntary, self-imposed obligations of DHL. But Falcon does not seek to enforce its contracts with DHL, nor did it seek merely to rescind them. What Falcon sought, instead, was to deploy Texas common law to undo its bargain and punish DHL through a punitive damages award. We conclude permitting Falcon's recovery in this circumstance "would impose state policies on the operation of [DHL] that are external to the parties' agreement" in a way that would have too great a regulatory effect on DHL's marketing mechanisms, which Congress intended to leave largely to the air and motor carriers themselves, and not at all to the states. *See Black*, 116 S.W.3d at 757 (citing *Wolens*, 513 U.S. at 229 n.5, 115 S. Ct. at 824 n.5). Indeed, we see no meaningful distinction between the consumer protection guidelines found preempted in *Morales*, on the one hand, and Falcon's fraud claim, on the other. Falcon, through its fraud claim, seeks to have our state's law dictate the content of Falcon's disclosures in its arm's length contract negotiations with a reseller, just as the guidelines in *Morales* sought to govern the content of

airlines' fare advertisements. We believe *Morales* thus compels the conclusion that Falcon's fraud claim is preempted.

Authorities of the Texas Supreme Court also weigh in favor of this conclusion. *Kiefer* recognizes that tort law has a greater regulatory effect than contract law and thus creates a "greater risk that state policies will be too much involved." 920 S.W.2d at 282. Albeit in dicta, *Kiefer* also recognizes that the presence of a punitive damages claim exacerbates this risk. *Id*. And *Black*, decided seven years after *Kiefer*, likewise observes that "both *Wolens* and *Kiefer* suggest that state misrepresentation claims are preempted by the ADA." 116 S.W.3d at 756. *Black* also supports our reliance on *Morales* by noting that claims under a consumer fraud statute are comparable to common law claims for misrepresentation, because both would impose state policies on the operation of air carriers that are external to the parties' agreement. *Id*.

Decisions of the federal circuit courts likewise favor preemption of Falcon's fraud claim. In a case we find strikingly similar to this one, the Fifth Circuit concluded the ADA preempted a travel agency's fraud and other tort claims against American Airlines. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 284 (5th Cir.), *cert. denied*, 537 U.S. 1044, 123 S. Ct. 659 (2002). Lyn-Lea Travel, a travel agency, entered into a contract providing for Lyn-Lea's lease of terminals that would allow it to book its clients' flights on American. *Id*.

Two months later, American announced modifications to its domestic commission schedule that "drastically reduced" the commissions it would pay Lyn-Lea. *Id*. Lyn-Lea sued American, asserting fraud and other claims, contending American knew about and should have disclosed the impending changes when it negotiated the agreement with Lynn-Lea [sic]. *Id*. at 284–85. American countersued for Lyn-Lea's failure to pay amounts due under the agreement and terminated the agreement. *Id*. at 285. In response to American's counterclaim for breach of contract, Lyn-Lea raised fraudulent inducement as an affirmative defense. *Id*.

The Fifth Circuit concluded that Lyn-Lea's fraud and other tort claims were preempted. *Id*. at 289. It noted that American's relations with travel agents, as intermediaries between carriers and passengers, plainly fell within the ADA's deregulatory concerns. *Id*. at 288. And pointing to the Supreme Court's observation in *Wolens* that the ADA's purpose was to leave largely to the airlines themselves, and not at all to the states, the selection and design of market mechanisms appropriate to the furnishing of airline services, the Fifth Circuit concluded that Lyn-Lea's claims had the requisite "connection with" American's prices and services to be preempted.[4] *Id*.

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[4] The Fifth Circuit, however, reached the opposite conclusion regarding Lyn-Lea's fraudulent inducement defense. *Lyn-Lea*, 283 F.3d at 290. The court explained that in *Wolens*, the Supreme Court held breach of contract claims were not

Two Seventh Circuit cases have also found analogous fraud claims preempted. In *United Airlines, Inc. v. Mesa Airlines, Inc.*, Mesa had a code-share agreement with United under which it flew commuter routes for United. 219 F.3d 605, 606 (7th Cir. 2000). In 1995, the parties added new Mesa routes and extended the agreement for ten years. *Id*. As part of this agreement, Mesa was required to and did purchase a number of planes from United. *Id*. Two years later, United replaced Mesa with a rival for several routes, costing Mesa significant revenues. *Id*. at 607. Mesa ceased service to some markets, and United terminated the agreement and sought damages for Mesa's breach. *Id*. Mesa countersued, asserting United fraudulently induced Mesa to enter into the ten-year extension agreement and purchase additional planes. *Id*. The Seventh Circuit noted that *Wolens* permits suits against an air carrier to enforce voluntarily undertaken obligations so long as the state action is limited to enforcing "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id*. at 609 (quoting *Wolens*, 513 U.S. at 233, 115 S.

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preempted insofar as they sought only to enforce "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id*. at 289 (quoting *Wolens*, 513 U.S. at 233, 115 S. Ct. at 826). The court reasoned that fraudulent inducement, when asserted as a defense to a breach of contract claim, does not reflect a state policy seeking to expand or enlarge the parties' agreement; rather, it concerns the issue of whether mutual assent existed in the first instance. Therefore, Lyn-Lea's fraudulent inducement defense was not preempted. *Id*. at 290.

Ct. at 826). But, the court explained, Mesa's suit was "not by any stretch of the imagination a request to enforce the parties' bargains; it [wa]s a plea to replace those bargains with something else." *Id*. Accordingly, the court held Mesa's fraud claim preempted. *Id*. at 610.

A recent Seventh Circuit case is similar. In *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, S.C. Johnson, a customer of air carriers, was injured in a scheme in which its employee took kickbacks from the carriers in exchange for contracting with them (on S.C. Johnson's behalf) so as to require S.C. Johnson to pay the carriers above-market rates. 697 F.3d 544, 546 (7th Cir. 2012). The court held S.C. Johnson's fraud and fraud by omission claims preempted because each sought to "substitute a state policy (embodied in law) for the agreements that the parties had reached." *Id*. at 557. The court noted that, in the air sector, the DOT remains available to address any problems of this ilk that may exist, and that one problem with permitting claims such as S.C. Johnson's is that "one state's deceptive practice might be another state's hard bargain." *Id*. It reasoned that state laws governing deceptive business practices, while well-meaning, are designed to protect consumers from the rigors of the market, but Congress decided "in both the ADA and FAAAA that it did not want (nor did it want the states) to displace the market in this way." *Id*.

Finally, the fact that the DOT is authorized to investigate claims of unfair or deceptive practices by

air and motor carriers supports our conclusion. *See* 49 U.S.C. § 41712; 14 C.F.R §§ 302.403–.404. Falcon contends DOT's regulations are inadequate, mostly because the regulations do not provide Falcon a remedy. *See* 49 U.S.C. § 41712(a); 14 C.F.R §§ 302.403, 301.404(a) (authorizing DOT to investigate allegations of "unfair or deceptive practice or an unfair method of competition" and providing that any person may file a formal or informal complaint concerning a violation of statute or DOT regulations). Even if the relief available to Falcon under the DOT's regulatory authority is not akin to the remedy Falcon could obtain in a state court, were its claims not preempted, we note that *Morales* and *Wolens* pointed to the DOT's regulatory authority as a factor that weighed in favor of preemption in those cases. *See Morales*, 504 U.S. at 391, 112 S. Ct. at 2040 (noting "DOT retains the power to prohibit advertisements which in its opinion do not further competitive pricing"); *Wolens*, 513 U.S. at 228 n.4, 115 S. Ct. at 823 n.4 ("DOT retains authority to investigate unfair and deceptive practices and unfair methods of competition by airlines, and may order an airline to cease and desist from such practices or methods of competition.").

Falcon relies primarily on another federal circuit case, *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998), to argue against preemption. Taj Mahal held a common law defamation claim and an accompanying punitive damages claim were not preempted. *Taj Mahal Travel, Inc.*, 164 F.3d at 195. The Third Circuit

reasoned that *Morales* and *Wolens* did not apply to preempt common law, as opposed to statutory, claims and that because the underlying tort, defamation, was not preempted, the punitive damages claim was not preempted. *Id.* We find Falcon's reliance on *Taj Mahal* unavailing, both because (1) unlike the Third Circuit, the Texas Supreme Court, in *Black*, noted that common law claims can be preempted, and read *Wolens* to mean they were, and (2) following *Taj Mahal* would require us to ignore *Kiefer*'s strong suggestion that punitive damages are preempted.[5]

We hold Falcon's common law fraud claim and its punitive damage award are preempted by the ADA and FAAAA because permitting the claims would allow our State's law to serve "as a means to guide and police the marketing practices of" an airline or motor carrier. *See Wolens*, 513 U.S. at 228, 115 S. Ct. at 823; *see also Morales*, 504 U.S. at 384, 112 S. Ct. at 2037 (holding ADA preempted state attorney general guidelines governing airfare advertising); *Kiefer*, 920 S.W.2d at 281 (suggesting tort claims accompanied by punitive damages claims are preempted); *Lyn-Lea*, 283 F.3d at 284 (finding

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[5] Falcon dismisses *Kiefer*'s discussion regarding punitive damages as dicta. We agree that it is, but note that many courts have nevertheless relied on and echoed *Kiefer*'s prescient reasoning. *See Henson v. Sw. Airlines Co.*, 180 S.W.3d 841, 844–45 (Tex. App.—Dallas 2005, pet. denied); *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 308–09 (Tex. App.—Dallas 2001, pet. denied); *see also Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996) (holding that plaintiff's punitive damages claim was preempted under *Wolens*).

preemption of fraud clams [sic] of travel agent, an intermediary between airline and passengers, based on airline's failure to disclose plans to reduce travel agent's commissions before airline entered into new lease agreement with travel agent); *Mesa*, 219 F.3d at 606 (finding fraud claim by commuter airline Mesa against airline United preempted because Mesa did not seek to enforce United's self-imposed agreement with Mesa but, instead, sought to change parties' bargain by applying state law to agreement and extract damages from United); *see also State ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278, 282 (N.Y. 2012) (finding preemption under ADA and FAAAA of plaintiffs' fraudulent misrepresentation claims premised on alleged practices relating to improper imposition of fuel surcharges by DHL where plaintiffs did not sue for breach of contract but, instead, brought qui tam action under New York False Claims Act).

We sustain DHL's first issue. Given our resolution of this issue, we do not address DHL's issues two, three, four, and six, or Falcon's contingent cross-issue.

DHL's Counterclaim

In its fifth issue, DHL contends the jury's finding that $0 would compensate DHL for Falcon's breach of the assumption and reseller agreements is against the overwhelming weight of the evidence. Evidence is factually insufficient if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly

wrong and unjust. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In determining whether there is factually sufficient evidence, we must consider and weigh all of the evidence that supports or contradicts the jury's findings. *Plas–Tex., Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

The jury found that Falcon breached both the assumption and reseller agreements, and Falcon does not challenge those findings on appeal. In response to the corollary damages question, the jury awarded no damages.[6]

The jury heard conflicting evidence about the amount Falcon owed DHL. Shortly before suit was filed, in a notice dated October 24, 2008, DHL claimed Falcon owed $1,634,894.18. In a second notice dated a week later, DHL offered to waive a

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[6] Question 9 asked the jury: Did Falcon fail to comply with either of the following agreements? The jury answered "yes" for both the reseller and the assumption agreements. No affirmative defense to the breach question was submitted, and, having answered yes to Question 9, the jury proceeded to answer the damages question, Question 10. It asked: "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate DHL for its damages, if any, that resulted from such failure to comply?" The jury was instructed to consider only "the difference, if any, between the amount due to DHL and the amount paid DHL under the agreement between the parties." It answered "$0."

portion of the amount in dispute if Falcon would stipulate the amount in dispute was $562,000 and pay $966,348.49. It is undisputed that Falcon made no payments to DHL after late September 2008 and that it continued buying DHL's services for several weeks thereafter. As a result, the amount DHL claimed was due increased after September and, by the time of trial, DHL told the jury its damages totaled $3,214,644.62.

Falcon's evidence demonstrated that DHL's invoices and other documentation were not a model of clarity. But, as DHL points out in its brief, there was no evidence that Falcon paid DHL in full. Falcon protested that DHL's claimed damages were inflated, but never testified that Falcon owed nothing. By Bouse's own admission, the spreadsheet he created showed Falcon owed DHL $762,361.78 as of October 27, 2008.

In its response brief, Falcon argues that the jury's damages finding is justified because DHL's damages evidence was internally inconsistent. It asserts that DHL's witnesses themselves disagreed—by about $130,000—about the amount Falcon owed. Falcon also argues the zero damages finding is justified because, due at least in part to software problems, DHL's records were incomplete, and what existed was in such disarray that DHL's damages experts were compelled to rely on Falcon's records to form their opinions of damages. While this may be good reason for the jury to have discounted DHL's damage model somewhat, there is no evidence that supports the jury's finding that Falcon owed nothing.

Accordingly, having reviewed all the evidence, we conclude the jury's finding that $0 would compensate DHL for Falcon's breach of contract is against the great weight and preponderance of the evidence. *See Kitchen v. Frusher*, 181 S.W.3d 467, 476 (Tex. App.—Fort Worth 2005, no pet.) (holding evidence insufficient to support jury's finding of no value of work in quantum meruit claim when uncontroverted evidence showed work did have value); *see also Dow Chem. Co.*, 46 S.W.3d at 242 (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)) (evidence is factually insufficient when "contrary evidence greatly outweighs the evidence in support of the verdict").

We sustain DHL's fifth issue.

Conclusion

We hold that Falcon's fraud claim and punitive damage award are preempted by the ADA and FAAAA. We further hold the evidence is factually insufficient to support the jury's finding that $0 would compensate DHL for Falcon's breach of the assumption and reseller agreements. We reverse that portion of the trial court's judgment awarding Falcon damages and other relief on its fraud claim, we dismiss that claim, and we remand DHL's counterclaim for breach of contract for further proceedings consistent with this opinion.[7]

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[7] Although we hold that Falcon's affirmative fraud claim is preempted, we express no opinion about whether the ADA or FAAAA would preempt Falcon's use of fraudulent inducement

Rebeca Huddle
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

Justice Jennings, dissenting.

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as an affirmative defense to DHL's breach of contract claim, should it assert such a defense on remand. *See Lyn-Lea*, 283 F.3d at 289 (travel agency's fraud claim against airline preempted but fraudulent inducement defense asserted in response to airline's counterclaim for breach of contract not preempted).

Opinion issued February 14, 2013.

[SEAL]

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01080-CV

DHL EXPRESS (USA), INC., Appellant

V.

FALCON EXPRESS INTERNATIONAL, INC., Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2008-66394

DISSENTING OPINION

The majority errs in holding that the trial court erred in entering its judgment in favor of appellee, Falcon Express International, Inc. ("Falcon"), after a jury found that appellant, DHL Express (USA), Inc. ("DHL"), committed fraud against Falcon by failing to disclose a material fact to Falcon prior to it entering into an "Assignment and Assumption Agreement" with DHL. The majority's error follows from its erroneous conclusion that Falcon's lawsuit, in which it seeks rescission of the agreement and asks for punitive damages, is preempted by the Airline Deregulation Act of 1978 (the "ADA")[1] and the Federal Aviation Administration Authorization Act (the "FAAAA").[2] Accordingly, I respectfully dissent.

Falcon alleged and presented evidence to the jury that DHL defrauded it of $1,571,426.31 to enter a contract to become a reseller of DHL's small package delivery services in the United States with written assurances that DHL had ruled out any possibility of withdrawing from the United States market and was "here to stay." Specifically, Falcon asserted that DHL failed to disclose material facts with the intent to induce Falcon to pay DHL to assume a reseller agreement that Freight Savers Express ("FSE") had with DHL. After DHL, only four months later, announced that it would discontinue all domestic shipping operations,

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[1] 49 U.S.C. § 41713(b)(1) (2004).

[2] 49 U.S.C. § 14501(c)(1) (2004).

effectively destroying Falcon's business, Falcon sued DHL to rescind the agreement, get its money back, and punish DHL for its wrongdoing. The jury unanimously found that DHL defrauded Falcon and awarded it $1,704,228.79 in actual damages and $3,214,724.62 in exemplary damages.

In its first issue, DHL argues that the trial court erred in entering its judgment against DHL, rescinding the agreement, and awarding Falcon actual and exemplary damages because "federal law completely preempts Falcon's fraud and punitive damages claims."

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2; *see also MCI Sales and Serv., Inc., v. Hinton*, 329 S.W.3d 475, 481 (Tex. 2010), *cert. denied*, 131 S. Ct. 2903 (2011).

Preemption of state law may be either express or implied. *MCI Sales*, 239 S.W.3d at 482; *Delta Air Lines, Inc. v. Black*, 116 S.W.2d 745, 748 (Tex. 2003). Ascertaining "[t]he purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks Int'l Ass'n. v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 223 (1963); *Delta Air Lines*, 116 S.W.3d at 748. And congressional intent is discerned primarily from a statute's language and structure. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486,

116 S. Ct. 2240, 2250–51 (1996). Also relevant is the purpose of the statute as a whole, which is revealed through "the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id*.

The ADA is designed to promote "maximum reliance on competitive market forces" while at the same time "assigning and maintaining safety as the highest priority in air commerce." 49 U.S.C. § 40101(a) (2004); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 230, 115 S. Ct. 817, 824 (1995); *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 369 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The ADA's preemption provision provides:

> Except as provided in this subsection, 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 price, route, or service* of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1) (2004) (emphasis added). The FAAAA uses the same preemption language, but it applies to motor carriers instead of air carriers. *See* 49 U.S.C. § 14501(c)(1) (2004).

The United States Supreme Court, relying on its ERISA line of cases and the ordinary meaning of the

statute's words, has broadly construed the phrase "related to" in the ADA to preempt "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or services.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 2037 (1992); *Delta Air Lines*, 116 S.W.3d at 749–50. However, the Court has emphasized that some state actions that may affect airline rates, routes, or services do so "'in too tenuous, remote, or peripheral a manner' to have preemptive effect." *Morales*, 504 U.S. at 390, 112 S. Ct. at 2040 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21, 103 S. Ct. 2890, 2901 (1983)). The Texas Supreme Court has utilized a two-step inquiry to determine whether claims are preempted by the ADA, asking whether: (1) a claim "relate[s] to" airline rates, routes, or services and (2) the claim constitutes the enactment or enforcement of a state law, rule, regulation, standard, or other provision. *Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.3d 274, 281 (Tex. 1996).

Here, Falcon alleged and presented evidence that DHL committed fraud by nondisclosure in making false and misleading representations about whether DHL "still considered a withdrawal from the United States domestic market an option," which DHL had a duty to disclose because it "created a false impression by making partial disclosures"; "knew that Falcon was ignorant of the undisclosed fact"; and "voluntarily disclosed some information to Falcon." Falcon asserts that DHL made "false and misleading disclosures intending to influence those

doing business with DHL" and "fraudulently induced Falcon to enter into a contractual relationship as a reseller and pay off" FSE's "debt to DHL."[3]

Even assuming that Falcon's common-law fraud claim has "a connection with, or reference to," DHL's rates, routes, and services, such a connection is too "tenuous, remote, or peripheral" to conclude that it is preempted by the ADA and the FAAAA. The gist of Falcon's fraud claim is that DHL failed to disclose a material fact prior to Falcon entering into the Assignment and Assumption Agreement. And, as the trial court properly instructed the jury, Falcon's fraud claim primarily concerns DHL's "duty to disclose" material facts to Falcon and DHL's failure to disclose those material facts with the intent "to induce" Falcon "to take some action by failing to disclose the fact[s]."

In short, Falcon complains that DHL had a duty to disclose the fact that it was not going to continue small package delivery services in the United States and failed to disclose this fact with the intent to get Falcon to assume FSE's reseller relationship by paying FSE's debt to DHL. Simply put, Falcon complains that DHL engaged in wrongdoing in this business transaction. This is clearly not the type of

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[3] Falcon made essentially the same allegations under its claims for both "fraud in the inducement" and fraud by nondisclosure. However, the jury answered, "No," in response to whether DHL had fraudulently induced Falcon to enter the contract. It answered, "Yes," in response to whether DHL had committed fraud by nondisclosure.

conduct or activity that Congress meant to regulate in crafting the ADA or the FAAAA. The fact that the subject matter of the underlying contract concerned DHL's delivery services is only remotely connected to Falcon's claim. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 146, 121 S. Ct. 1322, 1327 (2001) (noting, in ERISA context, that "the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes pre-emption would never run its course'") (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 1677 (1995)). If Falcon's fraud claim is "related to" DHL's rates, routes, and services and is preempted, as asserted by the majority, then virtually any claim regarding a business contract with an air or motor carrier will be preempted. Congress simply did not intend to so immunize air and motor carriers. And the fallacy of the majority's reasoning is made apparent in the result dictated by its holding: it destroys Falcon's remedy of contract rescission and remands the case to the trial court for proceedings to enforce a contract that a jury has found is based upon fraud.

The trial court's judgment on Falcon's fraud claim simply does not amount to a prohibited enforcement of a state law, rule, regulation, standard, or other provision. Falcon's fraud claim arises from general, commonly accepted tort and contract principles. *See Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 289–90 (5th Cir. 2002) (noting that fraudulent inducement is a "core

concept" of contract law and observing that because "contract law is, at its 'core,' uniform and non-diverse, there is little risk of inconsistent state adjudications of contractual obligations"); *see also Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809 (9th Cir. 2009) (stating that airline regulatory acts intend "to prohibit states from regulating the airlines while preserving state tort remedies that already existed at common law") (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998)).

Like the negligence action at issue in *Kiefer*, Falcon's fraud claim, which is centered on DHL's "duty to disclose" material facts and its failure to disclose those material facts with the intent "to induce" Falcon "to take some action by failing to disclose the fact[s]," is not intrusive on the regulation of airline business practices. *See* 920 S.W.2d at 282. Falcon does not seek to require DHL to perform any services or impose any limits on its rates or routes. It merely seeks to rescind a contract entered into based on fraud by nondisclosure. And nothing in the record establishes that Falcon's lawsuit to rescind the Assumption and Assignment Agreement will impact DHL's rates, routes, or services. Simply put, Falcon's claim for fraud by nondisclosure in no way impedes Congress's goal in enacting the ADA to promote "maximum reliance on competitive market forces" while at the same time "assigning and maintaining safety as the highest priority in air commerce." *See* 49 U.S.C. § 40101(a).

Likewise, the trial court's award of punitive damages to Falcon does not impact DHL's rates, routes, or services or impede the purpose of the ADA or the FAAAA. It is true that the Texas Supreme Court has, in dicta, cautioned that tort claims, including a claim for punitive damages, might "undo federal deregulation with regulation of their own." *Kiefer*, 920 S.W.2d at 282–83 (quoting *Morales*, 504 U.S. at 387, 112 S. Ct. at 2034). However, because Falcon's claim for fraud has only, at best, a tenuous connection to DHL's rates, routes, or services, the trial court's award of punitive damages, a customary remedy for a fraud claim, is not preempted by the ADA or the FAAAA. *See Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 195 (3rd Cir. 1998) (holding that punitive damages award on defamation claim was not preempted because "defamation is so foreign to regulations on prices, routes, and services that it is unlikely that an award of traditional damages would offend Congressional intent"); *see also Pac. Mut. Life Ins. Co. v. Haislip*, 499 U.S. 1, 15, 111 S. Ct. 1032, 1041 (1991) ("Punitive damages have long been a part of traditional state tort law.") (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S. Ct. 615, 625 (1984)).

Accordingly, I would hold that Falcon's lawsuit, in which it seeks rescission of the Assumption and Assignment Agreement and actual and punitive damages, is not preempted by the ADA or the FAAAA. The majority's conclusion to the contrary constitutes an error of such importance to the state's jurisprudence that it should be corrected. *See* TEX.

GOV'T CODE ANN. § 22.001(a)(6) (Vernon 2004). Thus, I would further hold that the trial court did not err in entering judgment against DHL, rescinding the Assumption and Assignment Agreement, and awarding Falcon actual and exemplary damages on the ground that "federal law completely preempts" Falcon's lawsuit, and I would address the remaining issues in this appeal.

Terry Jennings
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

Justice Jennings, dissenting.

APPENDIX B

Filed 10 August 23 P2:17
Loren Jackson - District Clerk
Harris County
ED101J015923809
By: Charlie Tezeno

CAUSE NO. 2008-66394

FALCON EXPRESS INTERNATIONAL, INC.	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
DHL EXPRESS (USA) INC., DEUTSCHE POST AG,	§	
	§	
Defendants.	§	**157th JUDICIAL DISTRICT**

FINAL JUDGMENT

The Court called this case to trial on May 25, 2010. Appearing through counsel were Plaintiff Falcon Express International. Inc. ("Falcon") and Defendant DHL Express (USA). Inc. ("DHL"). All parties announced ready for trial. and the Court impaneled and swore the jury, which heard the evidence and arguments of counsel. The Court submitted questions, definitions, and instructions to the jury. In response, the jury made findings that the Court received, filed, and entered of record. The questions submitted to the jury and the jury's

findings as to both Phase I and Phase II of this trial arc attached hereto as **Exhibit A** and **Exhibit B**, respectively, and are incorporated herein by reference. The Court hereby renders judgment as follows:

1. DHL takes nothing from Falcon.

2. Based upon the Jury's finding that DHL committed fraud against Falcon, Falcon shall recover from DHL the sum of $4,918,953.41, which is comprised of a rescission component of $1,704,228.79 and the Jury's punitive damages finding of $3,214,724.62, along with pre-judgment interest on this sum in the amount or $673.83 per day from May 30, 2008 to the date this Judgment was signed, and all taxable court costs. All amounts awarded in this paragraph shall bear simple post-judgment interest at the annual rate of 5% until paid.

3. The Court orders execution and all writs to issue for this judgment.

4. The Court denies all relief not granted in this judgment. This is a Final Judgment and disposes of all parties and causes of action, and is appealable.

SIGNED on this 14th day of Sept , 2010.

/s/ Randy Wilson
THE HONORABLE RANDY WILSON
JUDGE PRESIDING

APPENDIX C

RE: Case No. 13-0873 DATE: 11/21/2014

COA #: 01-10-01080-CV TC#: 2008-66394

STYLE: FALCON EXPRESS INTERNATIONAL, INC.
v. DHL EXPRESS (USA), INC.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX D

RE: Case No. 13-0873 DATE: 1/9/2015

COA #: 01-10-01080-CV TC#: 2008-66394

STYLE: FALCON EXPRESS INTERNATIONAL, INC. v. DHL EXPRESS (USA), INC.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.