No. 14-1225

In the Supreme Court of the United States

FALCON EXPRESS INTERNATIONAL, INC.,

Petitioner,

v.

DHL EXPRESS (USA), INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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As a carrier, respondent DHL would doubtless be content to leave the law of ADA/FAAAA preemption hazily broad. In DHL's view, to be preempted by those statutes, a claim need only have a "connection with" a carrier's rates, routes, or services. *See* Opp. at 6, 9, 10, 11, 12, 16, 17, 20, 21, 22, 24, 25 (repeatedly invoking phrase). But this Court recently reiterated that the "phrase 'in connection with' is essentially 'indeterminat[e]' because connections, like relations, '"stop nowhere."'" *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). Accordingly, "the phrase 'in connection with' provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions." *Id.*

As described in the petition, the federal courts of appeals have formulated and adhered to just such a limiting principle, but the Texas courts have not. The brief in opposition tries to deflect this evident point on three broad grounds. As elaborated below, however, nothing in that brief overcomes the split in the courts below on this important question of federal law.

ARGUMENT

I. This case is not controlled by the Fifth Circuit's decision in *Lyn-Lea*.

DHL's principal argument is that the decision below "is fully consistent with relevant Fifth Circuit precedent." Opp. at 8 (section heading; capitalization altered). In particular, DHL (parroting the decision

below) posits that this case is "strikingly similar" to *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282 (5th Cir.), *cert. denied*, 537 U.S. 1044 (2002). Opp. at 8 (quoting Pet. App. 19a). In fact, the similarities to *Lyn-Lea* are superficial, and the conflict with controlling Fifth Circuit precedent is evident.

DHL chides petitioner Falcon for "cit[ing] only one earlier decision from the Fifth Circuit" in showing the split between the federal courts of appeals and the court below. Opp. at 8. That "one" decision, however, was the Fifth Circuit's *en banc* consideration of "the breadth of [the ADA's] express preemption of state law." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995). DHL dismisses *Hodges* as irrelevant because the case did not "involve[] a fraud claim like the one pursued by petitioner"; rather, the case "involved personal injury claims arising from alleged negligence by the defendant airline[]." Opp. at 11-12.

True enough. But in concluding that those tort claims were not preempted, the en banc Fifth Circuit relied on precisely the two factors discussed at length in the petition: (1) "enforcement of tort remedies for personal physical injury ordinarily has no '*express reference*' to [airline] services"; and (2) "[e]nforcement of such tort duties normally will not have 'the forbidden *significant effect*' on airlines' services." *Hodges*, 44 F.3d at 339 (emphasis added). *Hodges*, of course, remains controlling law in the Fifth Circuit. *See, e.g., Racal Survey U.S.A., Inc. v. M/V COUNT FLEET*, 231 F.3d 183, 190 n.7 (5th Cir. 2000) ("[G]iven any conflict between those two cases and *Equilease*, the

latter controls as an en banc decision."), *cert. denied*, 532 U.S. 1051 (2001).

DHL's principal point about the Fifth Circuit, however, is its assertion that the decision below "was entirely faithful to, and is on all fours with, the Fifth Circuit's decision" in *Lyn-Lea*. Opp. at 8. To be sure, both this case and *Lyn-Lea* involved a plaintiff who served as an "intermediary" between a carrier and its customers, which plaintiff alleged that the carrier acted "fraudulently" in negotiating with the plaintiff. *See* Opp. at 9-10.

But the crucial and essential difference between the cases is the subject of the plaintiff's fraud claim. In *Lyn-Lea*, the plaintiff alleged fraud with respect to "commissions for booking flights," i.e., the amount of money that the plaintiff would be paid "to sell airline tickets for American." 283 F.3d at 284. Accordingly, the fraud claim had "a significant relationship to the *economic* aspects of the airline industry." *Id.* at 287 (emphasis added); *cf. id.* (reiterating *Hodges*' conclusion that "ADA preemption is 'concerned solely with economic deregulation, not with displacing state tort law'" (quoting 44 F.3d at 337)). In the terms used by *Hodges*, the plaintiff's fraud claim could be said both to *expressly reference* prices for air travel and to have a *significant effect* on those prices.

The fraud claim in the present case, by contrast, does not concern any particular interaction between the carrier and its customers, even through an intermediary. That is to say, the claim does not concern the price for any particular service, as with the commissions in *Lyn-Lea*. Indeed, Falcon's claim does not

concern any particular service at all. As the court below acknowledged, "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." Pet. App. 16a (emphasis added).

Therefore, as elaborated in the petition, Falcon's generalized fraud claim does not expressly reference DHL's services, nor could that claim be said to have a significant economic effect on DHL's services. *See* Pet. 17-20. For all its lengthy opposition, DHL does not even attempt to show otherwise. *See, e.g.*, Opp. at 17 (contending merely that Falcon's fraud claim "both makes 'reference to' and has a 'connection with' [DHL's] services"). Putting aside the distinguishable decision in *Lyn-Lea*, Falcon's fraud claim would survive preemption under *Hodges* and the other federal courts of appeals that have adopted the preemption standard advocated by the petition.

II. The petition correctly describes the preemption standard applied in the federal courts of appeals.

Of course, DHL contends that "the federal courts of appeals do not apply the preemption standard [that Falcon] advocates." Opp. at 20 (section heading; capitalization altered). The gravamen of DHL's analysis seems to be that "[w]hile the federal courts of appeals may find that an express reference to or significant economic impact on a carrier's rates, routes, or services is *sufficient* to warrant preemption, they do not hold that this level of relation is a minimum threshold that must be met before a state law or cause of action will be preempted." Opp. at 15. In other words, DHL

appears to argue that an express reference or a significant economic impact is *sufficient* but not *necessary* for preemption under the ADA or FAAAA.

This is a testable hypothesis, and testing shows that DHL is wrong. Consider first *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003). According to DHL, the Eleventh Circuit there "confirmed that a state law is 'related to' a carrier's rates, routes, or services if it 'has a connection with or reference to such' services." Opp. at 22 (quoting 342 F.3d at 1258. To be sure, *Branche* started with that phrase. But *Branche* then explained what this meant: the requisite connection "can be established by showing that the state law in question either directly regulates such services or . . . has a significant economic impact on them." *Id.* at 1259; *see also id.* ("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.' " (quoting *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465-66 (11th Cir. 1998))).

The Eleventh Circuit found that the first of these alternatives was not met: "Florida's Whistleblower Act does not explicitly address [i.e., reference] airline services; accordingly, the *only possible basis* for preemption is if it has a sufficient — i.e., significant — impact on those services." *Id.* at 1255 (emphasis added). The Eleventh Circuit then determined that the second alternative was not satisfied either: at most, claims under the Act may have an "incidental effect" on airline services. *Id.* at 1259. Neither alternative

having been satisfied, the court held "based on the foregoing analysis that [the plaintiff's whistleblower] claim does not relate to the services of an air carrier within the meaning of § 41713, and consequently is not pre-empted under that section." *Id.* at 1261.

As stated above, *Branche* relied on the Eleventh Circuit's prior decision in *Parise v. Delta Airlines*. In that case, the court held: "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.'" 141 F.3d at 1465-66 (emphasis added) (quoting *Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1431 (7th Cir. 1996)). The court's use of *must* here belies DHL's notion that a law *might* (or *might not*) survive preemption even if it neither expressly refers to rates, routes, or services nor has a significant economic effect upon them. Indeed, *Parise* reversed the district finding of ADA preemption. *See id.* at 1467-68.

The Third Circuit's decision in *Gary v. Air Group, Inc.*, 397 F.3d 183 (3d Cir. 2005), is similar to the Eleventh Circuit's in *Branche*. The Third Circuit *began* with the generalization that "[s]tate enforcement actions having a connection with, or reference to airline 'rates, routes, or services' are pre-empted." *Id.* at 186 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992)). The court then *elaborated on* what this meant: "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.'" *Id.* (quoting *United*

Parcel Service, Inc. v. Flores-Galarza, 318 F.3d 323, 335 (1st Cir. 2003)). DHL would read this passage to say that the requisite connection exists where the law either makes express reference or has significant effect *or has some undefined generalized relation known only to DHL*. This is a tendentious and untenable reading. In fact, the Third Circuit determined that neither part of the two-part standard was satisfied because the plaintiff's whistleblower claim was "too remote and too attenuated," such that the claim was "not expressly preempted by the ADA." *Id.* at 189.

In *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000), the Seventh Circuit reiterated that "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.'" Only DHL could interpret this passage to mean that a claim is preempted under the ADA/FAAAA if there is either an express reference or a significant economic effect *or some undefined other thing*. And contrary to DHL, *Mesa Airlines* is not "right in line" with the decision below. Opp. at 26. *Mesa Airlines* did indeed conclude that "Mesa's fraud claim was preempted." *Id.* That was an obvious conclusion — under any test — where Mesa, an air carrier, had a contract to *provide flights* using United's name and logos, and the fraud claim was based on a contract extension by which "United extended Mesa's contractual term for ten years and to additional cities." 219 F.3d at 606. Therefore, the claim did not merely "relate to" the services of an air carrier; that was the claim's very essence.

Having misread the cases cited in the petition, DHL goes on to misread other cases as well. In *S.C. Johnson & Son, Inc. v. Transportation Corp. of America*, 697 F.3d 544 (7th Cir. 2012), *cited in* Opp. at 26. the Seventh Circuit continued "'to discern two distinct requirements for a law to be expressly preempted by the ADA: (1) A state must "enact or enforce" a law that (2) "relates to" airline rates, routes, or services, either [a] by expressly referring to them or [b] by having a significant economic effect upon them.'" *Id.* at 553 (quoting *Travel All Over*, 73 F.3d at 1432). It is no surprise that the plaintiff's fraudulent inducement claim satisfied this test and was preempted, *see id.* at 557, for the claim alleged that defendants' conduct "resulted in plaintiff paying *increased rates* and in addition, for *unnecessary services*." No. 10-C-0681, 2011 WL 4625655, at *3 (E.D. Wis. Sept. 30, 2011) (emphasis added).

Data Manufacturing, Inc. v. United Parcel Service, Inc., 557 F.3d 849 (8th Cir. 2009), *cited in* Opp. at 24-25, is even less on point. The "basis for all of [the plaintiff's] claims" was a "$10 re-billing charge" that was imposed by its carrier, UPS, for particular shipments. *Id.* at 852. That is to say, the claims were literally, not just relatedly, based on "a price . . . of any motor carrier." FAAAA, 49 U.S.C. § 14501(c)(1). No wonder the claims (including a fraudulent misrepresentation claim) were easily found to be preempted. By contrast, Falcon's fraud claim did not concern any particular price (or any particular service) of DHL.

In the end, DHL cannot seriously dispute that "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." Pet. at 10. In particular, DHL cannot come close to showing that an express reference or a significant economic effect is merely a *sufficient* (but not *necessary*) condition for preemption. The court below, following the longtime precedent of the Texas Supreme Court, did not apply this standard. *See* Pet. at 13-16. A split is manifest.

III. This Court's existing decisions do not resolve the conflict in the lower courts.

The remainder of DHL's brief is devoted to the proposition that "the decision below properly follows this Court's preemption decisions." Opp. at 15 (section heading; capitalization altered). With all due respect, DHL's shallow analysis ignores this Court's recent teaching about ADA/FAAAA preemption and demonstrates the need for the Court's further development of the law.

DHL's five-page survey of this Court's opinions reveals that "this Court has consistently held that the ADA and FAAAA preemption provisions express a 'broad preemptive purpose.'" Opp. at 15 (quoting *Morales*, 504 U.S. at 383). Indeed, *broad* is DHL's mantra, that word and its cognates appearing again and again in the brief in opposition. *See* Opp. at i, 10, 11, 12, 14, 15, 16, 19, 20, 21, 27. But as all but DHL must know, that preemption is *broad* does not tell us *how* broad.

Moreover, the sheer breadth of the plain text of the applicable preemption provisions — "*related to* a price, route, or service" of an air or motor carrier, 49 U.S.C. §§ 41713(b)(1), 14501(c)(1) (emphasis added) — has been a cause for concern, not an excuse to end the inquiry. As the Court recently warned in *Dan's City Used Cars, Inc. v. Pelkey* (which DHL fails even to discuss), "the breadth of the words 'related to' does not mean the sky is the limit." 133 S. Ct. 1769, 1778 (2013). Having ignored this warning, it is no wonder that DHL (together with the court below) has fallen into the trap of "uncritical literalism," under which "for all practical purposes pre-emption would never run its course." *Id.* (quoting *New York State Conference*, 514 U.S. at 655-56).

DHL finds "particularly instructive" the Court's decision last year in *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014). Opp. at 19. In fact, on the point in dispute here, *Ginsberg* added little. As to whether the plaintiff's "breach of implied covenant claim 'relates to' 'rates, routes, or services'" of an air carrier, the Court unanimously found that it did, because the plaintiff admittedly sought "to obtain reduced rates and enhanced services" from Northwest. 134 S. Ct. at 1430-31. Undoubtedly, this claim would have had a *significant economic effect* on Northwest's rates, if not its services as well. *See id.* at 1431 ("When miles are used [as sought by the plaintiff], the rate that a customer pays, i.e., the price of a particular ticket, is either eliminated or reduced.").

In the final analysis, the Court is rightly cognizant that ADA/FAAAA preemption is broad. At the same time, the Court is rightly concerned that these statutes not be applied with an uncritical literalism under which only the sky is the limit, i.e., no limit at all. Under the latter regime, as advocated by DHL and as adopted and here applied by the Texas courts, "no law would govern the resolution of a non-contract-based dispute arising from" fraud like that which a unanimous jury found DHL to have committed. *Dan's City*, 133 S. Ct. at 1780.

The Court appropriately rejected that anomalous regime in *Dan's City*, and the Court should take the opportunity to reject it here as well. In so doing, the Court can resolve the evident split in the lower courts over the proper scope of ADA/FAAAA preemption.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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