No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONER

DAVID A. BERG
DOUGLAS MULLEN
Airlines for America
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4177

ROBERT K. SPOTSWOOD
Counsel of Record
KENNETH D. SANSOM
EMILY J. TIDMORE
Spotswood Sansom & Sansbury LLC
940 Concord Center
2100 Third Ave. North
Birmingham, AL 35203
(205) 986-3620
rks@spotswoodllc.com

Counsel for Amicus Curiae *Airlines for America*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

RULES

BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*[1]

Airlines for America (A4A), formerly known as the Air Transport Association of America, Inc., is the trade organization of the principal U.S. airlines. It represents the interests of fourteen airline members and one associate airline member, which together transport more than ninety percent of U.S. airline passenger and cargo traffic. Those members are AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; UPS Airlines; US Airways, Inc.; and Air Canada, which is an associate member.[2]

The mission of A4A is to foster a business and regulatory environment that ensures safe and secure

---

[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Further, *amicus* states that counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] A4A also has a number of airline-related industry partners and members, a list of which is available at www.airlines.org/Pages/Members.aspx.

air transportation while permitting U.S. airlines to flourish, thus stimulating economic growth locally, nationally, and internationally. As part of that mission, A4A seeks to identify, highlight, and challenge laws and government policies that impose inappropriate regulatory burdens or unfairly impinge on the free operation of the marketplace for the services of its members. Throughout its seventy-five year history, A4A has been actively involved in the development of the law applicable to commercial air transportation by advocating common industry positions on policy and legal issues of interest and importance to its members. A4A has frequently participated as *amicus curiae* before this Court and other courts. In particular, A4A has participated as *amicus curiae* in litigation relating to the preemption provision of the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified, as amended, at 49 U.S.C. § 41713(b)(1)), which has long prevented air carriers from being subject to a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations directly or indirectly "related to" an air carrier's prices, routes, or services.[3] This Court has recognized that the preemption provision in the subsequently enacted Federal Aviation Administration

[3] Contrary to what the Ninth Circuit's opinion says, the ADA is no longer codified at 49 U.S.C. app. § 1305(a)(1) and no longer refers to "rates" rather than "prices." *Cf. Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 396 n.8 (9th Cir. 2011). In 1994, the ADA was recodified at its current location with technical changes (including the change from "rates" to "prices") that Congress intended to have no substantive effect. *See Am. Airlines v. Wolens*, 513 U.S. 219, 222-23 & n.1 (1995).

Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-06 (1994) (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)), which is at issue in this case, has the same preemptive effect as the ADA, and cases interpreting the FAAAA also affect the ADA (and vice versa). *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008).

Proper application of ADA preemption, and by extension FAAAA preemption, is of critical importance to A4A's members, which rely on ADA preemption to shield airlines from a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations "related to" the prices, routes, or services of an airline. Carriers routinely rely on nationally uniform rules governing interstate transportation by air in structuring their business dealings with a variety of third parties, just as Congress envisioned they would. Uncertainty created by inconsistent judicial rulings regarding the scope of ADA preemption undermines the ability of A4A members to operate efficiently, innovate, plan and make informed decisions about their business relationships. The Ninth Circuit's decision below creates such uncertainty because it conflicts with decisions from both this Court and other circuits. Accordingly, authoritative resolution of those conflicts by this Court is crucial to A4A's members.

BACKGROUND AND INTRODUCTION

Because the preemptive language in the FAAAA is the same as that in the ADA, and cases

interpreting the FAAAA also apply to the ADA, the Ninth Circuit's decision below affects not only motor carriers, but also air carriers such as A4A's airline members because it impacts the interpretation of the ADA preemption provision on which they rely.

Congress passed the ADA in 1978 to release the air transportation industry from intensive regulation, based on its determination that deregulation would best further the goals of "efficiency, innovation, and low prices as well as variety and quality of air transportation services." *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992) (quotation marks and alterations omitted). Congress recognized, however, that the states could easily undo its deregulation efforts by enacting their own regulations governing air carriers. *Id.* With fifty states in the union, plus the District of Columbia and various territories, airlines were potentially subject to more than fifty regulatory schemes, not to mention an array of municipal and local regulations, each with its own obligations and prohibitions. The resulting patchwork of laws would utterly defeat Congress' goal of deregulating air carriers. Congress, unwilling to permit this evisceration of its efforts, resolved the problem by including a broad preemption clause in the ADA. *Id.* at 378-79 ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a preemption provision . . . ."). Subject to certain express exceptions, the ADA preempts any "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)(1).

Congress later recognized that motor and intermodal carriers also needed the benefit of this "deliberately expansive" preemption clause, *Morales*, 504 U.S. at 384, so it extended the same preemption to them through the FAAAA. The FAAAA expressly preempts, in relevant part, any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), or "air carrier or carrier affiliated with a direct air carrier through common controlling ownership," *id.* § 41713(b)(4)(A) (hereinafter, "intermodal carrier"). Congress made clear its intent that the preemptive effect of these provisions is the same as that of the ADA, and this Court has therefore held that cases interpreting one statute's preemption provision apply with equal force to the preemption provision of the other statute. *See Rowe*, 552 U.S. at 370.

This Court has addressed ADA and FAAAA preemption on three occasions, and each time it has reaffirmed its breadth and expansiveness. In *Morales*, this Court held that the preemptive language used by Congress in the ADA "express[es] a broad preemptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." 504 U.S. at 383-84. Given this starting point, the Court rejected the suggestion that the ADA prevents states only from "actually prescribing rates, routes, or services"; applies only to laws specifically addressed to the airline industry; or preempts only state laws that are inconsistent with federal law. *Id.* at 385-87. Instead, this Court held that the ADA preempts *any* state law having a connection with or reference to an

airline's prices, routes, or services, unless that connection or reference is "too tenuous, remote, or peripheral . . . to have preemptive effect." *Id.* at 384, 390.[4]

Three years later, in *American Airlines v. Wolens*, 513 U.S. 219 (1995), this Court reaffirmed the far-reaching scope of ADA preemption. It held that even state laws of general applicability affecting "non-essential" airline matters—such as frequent flier programs—are sufficiently "related to" air carriers' prices, routes and services as to be preempted by the ADA. *Id.* at 226-28. The Court also held that the ADA prevents states not only from enacting statutes or enforcing state common law in a way affecting an air carrier's prices, routes, or services, but also from enforcing, in breach of contract actions, anything other than the specific terms agreed on by the parties. *Id.* at 232-33 (the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement"). In sum, this Court held, states "may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," whether by statute or common law or equitable contract doctrines. *Id.* at 229 n.5.

Most recently, in 2008, relying on *Morales* and *Wolens*, this Court held that the FAAAA preempts local laws that affect motor carriers' services even

---

[4] Although the Court mentioned this outer limit, it "express[ed] no views about where it would be appropriate to draw th[at] line." *Id.* at 390.

indirectly. *Rowe*, 552 U.S. at 372 ("We concede that the regulation here is less 'direct' than it might be, for it tells *shippers* what to choose rather than *carriers* what to do."). The relevant inquiry is the *effect* of the local law, and the FAAAA preempts state regulation, whether direct or indirect, "of the essential details of a motor carrier's system for picking-up, sorting, and carrying goods—essential details of the carriage itself." *Id.* at 373.

Thus, this Court has on every occasion emphasized and affirmed the broad scope of ADA and FAAAA preemption.

The Ninth Circuit's decision undermines this established breadth and expansive scope of FAAAA and ADA preemption, however, in at least two ways. First, the Ninth Circuit read into the FAAAA a broad, non-textual "market-participant" exception to save from preemption certain local requirements that "relate to" carriers' prices, routes or services. The Ninth Circuit applied this non-textual exception to the FAAAA in disregard of relevant decisions from this Court. Second, the Ninth Circuit used a constricted view of both what it means for a local requirement to "relate to" a carrier's prices, routes, or services, and of the term "services." These rulings conflict with this Court's recent decision in *Rowe* and decisions from other circuits. The uncertainty created by these conflicts, and the persistence of the Ninth Circuit's minority view, is particularly problematic given that the primary purpose of ADA and FAAAA preemption is to avoid a non-uniform patchwork of regulations around the country. Review of the Ninth Circuit's decision by this Court is needed

to resolve these conflicts, clarify the scope of ADA and FAAAA preemption, and establish a single, national preemption standard under these acts.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT INAPPROPRIATELY APPLIED A NON-TEXTUAL MARKET-PARTICIPANT EXCEPTION TO THE FAAAA IN DISREGARD OF RELEVANT DECISIONS FROM THIS COURT.

This case warrants review because the Ninth Circuit inappropriately created a broad exception that is nowhere contained in the FAAAA—the market-participant exception—to save from preemption local requirements that "relate to" carriers' prices, routes or services. *Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 406-07, 409 (9th Cir. 2011). The Ninth Circuit's application of this broad, non-textual exception to the FAAAA, in disregard of relevant decisions from this Court, concerns air carriers because courts may also attempt to apply it to the ADA, notwithstanding that the ADA, unlike the FAAAA, contains an express but limited market-participant exception to preemption.

The Ninth Circuit's decision below marks a continued expansion by lower courts of the contexts in which a market-participant exception is applied. The market-participant doctrine initially arose in a series of dormant Commerce Clause cases. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980); *S. Cent. Timber Dev. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality). Since then, courts, including this

Court, also have applied a market-participant exception in cases involving implied preemption under the National Labor Relations Act ("NLRA"). *See, e.g.*, *Bldg. & Constr. Trades Council of the Metro. Dist. v. Assoc. Bldrs. & Contractors of Mass./R.I.,* (*"Boston Harbor*"), 507 U.S. 218, 226-27 (1993). Some lower courts, particularly the Ninth Circuit, have gone further and created a market-participant exception to statutes, including the FAAAA, that contain express preemption provisions but no market-participant exception. *See, e.g.*, *Assoc. Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1182-85 (9th Cir. 1998) (creating a market-participant exception to ERISA's express preemption provision); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 498 F.3d 1031, 1043 (9th Cir. 2007) (creating a market-participant exception to the Clean Air Act's express preemption provision); *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 691 (5th Cir. 1999) (creating a market-participant exception to the FAAAA's express preemption provision).[5]

The Ninth Circuit's creation of a market-participant exception to the FAAAA in this case is contrary to relevant decisions from this Court regarding the applicability of the exception. This Court has made clear that a market-participant exception does not apply in all contexts where Congress has acted: "the 'market participant' doctrine reflects the particular concerns underlying

[5] Prior to this case, however, no court had applied a market-participant exception to the FAAAA outside the limited factual circumstance of the provision of nonconsensual towing services to a municipality. Pet. at 10-11.

the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289 (1986). In considering whether a market-participant exception to preemption applies, a court must assess whether there is "*any* express *or implied* indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests," which precludes application of a market-participant exception. *Boston Harbor*, 507 U.S. at 231-32 (emphasis added). As this Court has recently reiterated, "[w]hen a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of the U.S. v. Whiting*, __ U.S. __, 131 S.Ct. 1968, 1977 (2011).

Here, the Ninth Circuit created a market-participant exception to FAAAA preemption without conducting the necessary inquiry about congressional intent. Specifically, the Ninth Circuit failed to consider whether there is "any express or implied indication by Congress" against application of a market-participant exception to FAAAA preemption. *Boston Harbor*, 507 U.S. at 231-32. In fact, there are several concrete indications against such an exception. To start, there is the plain statutory language. Congress carefully calibrated FAAAA preemption through a number of specific, express exceptions—for state requirements related to motor-vehicle safety, highway route controls and limits, and insurance; the transportation of household goods; non-consensual towing; and the state of Hawaii—yet

it omitted any general market-participant exception like the one applied by the Ninth Circuit. 49 U.S.C. §§ 14501(c)(2)–(5), 41713(b)(4)(B).

Congress knows how to include expressly a market-participant exception when it wants to do so. *See, e.g.*, *id.* § 32919(c) (expressly excepting from preemption state fuel economy standards for automobiles obtained for the state's own use); *id.* § 32304(i) (same for state motor vehicle labeling requirements); 15 U.S.C. § 1476(b) (same for state packaging requirements for household substances obtained for the state's own use); *id.* § 1203(b) (same for state flammability standards for fabric obtained for the state's own use); *see also* Pet. at 30. Congress' omission of such an express market-participant exception from the FAAAA indicates that Congress did not intend for it to apply.[6] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984) ("Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress" did not intend for the exclusion to apply); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

---

[6] Arguably, the FAAAA's exception for state requirements relating to the price of non-consensual towing services, 49 U.S.C. § 14501(c)(2)(C), is a market-participant exception, Pet. at 30. The contrast between that narrow, express exception and the expansive, non-textual market-participant exception created by the Ninth Circuit is striking.

The omission of an express market-participant exception from the FAAAA is even more significant given that Congress specifically *included* such an exception—albeit a narrow one[7]—in the ADA. Section 41713(b)(3) of Title 49 expressly provides that the ADA's preemption provision "does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." Congress included this express exception when enacting the ADA because it "recognized that airport proprietors—the majority of which are municipalities . . . —were best equipped to handle local problems arising at and around their facilities." *Am. Airlines v. DOT*, 202 F.3d 788, 805 (5th Cir. 2000) (citation omitted).

Congress was undeniably aware of the ADA's preemption provision, and its narrow market-participant exception for state and local airport proprietors, when it enacted the FAAAA. In fact, the stated purpose of the FAAAA was to extend ADA preemption to motor and intermodal carriers, and Congress used the ADA's preemption language in the FAAAA. H.R. Rep. No. 103-677, at 82-85 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-60. Yet, Congress failed to include an analogous market-participant exception in the FAAAA. This omission strongly indicates that Congress did not intend for a market-participant exception to apply to

[7] See discussion, *infra*, at 15.

the FAAAA. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (explaining that if Congress had intended to restrict a statutory section, it would have done so expressly, as it did in another section) (quotation marks and alteration omitted); *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979) (refusing to read language from one provision into parallel provisions because "Congress did not write the statute that way"); *Pac. Operators Offshore, LLP v. Valladolid*, No. 10-507, __ U.S. __, 2012 WL 75045, at *6 (Jan. 11, 2012) ("Our usual practice is to make the . . . inference" that Congress acts intentionally and purposely when it includes a restriction in one section of a statute but omits it in another section).

Finally, there are "express or implied indication[s]" that Congress respects carriers' contracts with third parties and would not want state or local authorities imposing their "public policies or theories" as a precondition to the carriers' fulfillment of those contracts under a market-participant exception. As this Court has previously concluded, Congress, in enacting the ADA, "presuppose[d] the vitality of contracts governing transportation by air carriers." *Wolens*, 513 U.S. at 230. Thus, this Court held on the one hand that private parties may pursue breach of contract actions to enforce "a term" that an airline itself had "stipulated." *Id.* at 232-33. On the other hand, this Court held that the ADA forbids state or local authorities from seeking "to impose

their own public policies or theories of competition or regulation on the operations of an air carrier." *Id.* at 229 n.5. Here, the Ninth Circuit's market-participant exception improperly allows the port authorities to impose their "public policies or theories" on carriers as a precondition to the port access necessary for fulfilling the carriers' drayage contracts with third parties.

The port authorities' attempt to control participation in the drayage services market (a market in which they undisputedly do not participate) through the concession agreements is analogous to state efforts to influence the labor market through restrictions on the receipt or use of state funds. *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 70-71 (2008); *Gould*, 475 U.S. at 291.[8] This Court correctly has held that such activity—which is "neither specifically tailored to one particular job nor a legitimate response to state procurement constraints or to local economic needs"—is that of a market regulator, and thus is not saved from preemption by a market-participant exception. *Brown*, 554 U.S. at 70 (quotation marks omitted). As this Court has recognized, because "government occupies a unique position of power in our society," it can exercise its proprietary powers in ways that are "tantamount to regulation," and "its conduct, regardless of form, is" therefore "rightly

[8] It is likewise analogous to Alaska's effort to use its proprietary timber rights to influence timber processing, a market in which Alaska did not participate. *Wunnicke*, 467 U.S. at 95-99; *id.* at 99 ("Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate, economic relationships of its trading partners . . . .").

subject to special restraints." *Gould*, 475 U.S. at 289-90.

The Ninth Circuit's improper application of a non-textual market-participant exception to the FAAAA is an important issue to air carriers. Although the ADA, unlike the FAAAA, does include an express market-participant exception, as discussed above, that exception is narrowly limited to specific proprietary powers and rights related to airports. 49 U.S.C. § 41713(b)(3). Courts have recognized the narrow scope of this exception. *See Am. Airlines*, 202 F.3d at 806 (explaining that "courts have recognized that local proprietors play an 'extremely limited' role in the regulation of aviation," and citing cases). The non-textual market-participant exception created by the Ninth Circuit in this case, however, is broadly expansive. *See* Pet. at 32. Given that cases interpreting the FAAAA also apply to the ADA, and vice versa, the Ninth Circuit's decision could result in courts applying this broad, non-textual market-participant exception to the ADA, notwithstanding the limited, express market-participant exception in the ADA itself. Accordingly, review of this case is warranted to clarify that, for purposes of the ADA and FAAAA, the only applicable market-participant exceptions (like all exceptions to ADA and FAAAA preemption) are those that are expressly found in the statutes themselves.

II. THE NINTH CIRCUIT'S CONSTRICTED INTERPRETATIONS OF "RELATED TO" AND "SERVICES" CONFLICT WITH THIS COURT'S DECISION IN *ROWE* AND DECISIONS OF OTHER CIRCUITS, AND IMPROPERLY NARROW THE REACH OF ADA AND FAAAA PREEMPTION.

This case also warrants review because the Ninth Circuit narrowly interpreted the terms "related to" and "services" in conflict with this Court's *Rowe* decision, thereby improperly restricting the preemptive scope of the ADA and FAAAA. The Ninth Circuit construed "related to" in a manner that blatantly snubs this Court's decisions in *Morales*, *Wolens*, and *Rowe*. The Ninth Circuit also persisted in using a discredited definition of "services," which conflicts with both *Rowe* and decisions from other circuits.

A. "Related to"

The Ninth Circuit inappropriately limited the phrase "related to" in the FAAAA's preemption provision to instances where a state law "binds the . . . carrier to a particular price, route or service." *ATA,* 660 F.3d at 397. This construction turns this Court's *Rowe* decision on its head and improperly narrows the scope of FAAAA and ADA preemption.

In *Rowe*, this Court held that the FAAAA preempted "recipient verification" and "deemed to know" provisions of Maine's tobacco-delivery law because those provisions essentially compelled motor carriers to provide services the carriers would not necessarily provide otherwise. 552 U.S. at 372 ("[T]he effect of the [recipient-verification] regulation

is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate."); *id.* at 373 ("The [deemed-to-know] provision thus requires the carrier to check each shipment for certain markings and to compare it against the Maine attorney general's list of proscribed shippers. And it thereby directly regulates a significant aspect of the motor carrier's package pickup and delivery service."). Thus, this Court concluded, the two Maine provisions had the "'significant' and adverse 'impact' in respect to the [FAAAA's] ability to achieve its pre-emption-related objectives" that this Court forbade in *Morales*. *Id.* at 371-72. On the facts in *Rowe*, this Court thus made clear that state law cannot be applied to compel an air or motor carrier to provide a service it does not wish to provide.

In this case, the Ninth Circuit, relying on a decision of its own that pre-dates *Rowe*, purported to recognize this principle that an air or motor carrier cannot be compelled to provide a service it does not wish to provide: "In . . . a 'borderline' case, the proper inquiry is whether the provision, directly or indirectly, 'binds the . . . carrier to a particular price, route or service and thereby interferes with competitive market forces within the . . . industry.'" *ATA*, 660 F.3d at 396-97 (quoting *Air Transp. Ass'n of Am. v. City & Cnty. of S.F.,* 266 F.3d 1064, 1072 (9th Cir. 2001)). According to the Ninth Circuit, a "borderline case" is one in which the preemptive effect of a provision of state law "'is only indirect.'" *ATA*, 660 F.3d at 397 (quoting *Rowe*, 552 U.S. at 370). Thus, under the Ninth Circuit's decision below, provisions of state law affecting air or motor carriers

indirectly are preempted *only* when they bind carriers to particular prices, routes, or services. *ATA*, 660 F.3d at 397.

Although the Ninth Circuit's decision is based on the idea, shared by *Rowe*, that carriers cannot be bound or compelled to provide particular services, the conclusion itself is directly contrary to *Rowe*. *Rowe* did not hold that provisions of state law affecting air or motor carriers indirectly are preempted *only* when they bind carriers to particular prices, routes, or services. Instead, this Court's preemption holding rested overtly on the Court's observations that, because laws with less direct effect are preempted, laws with a binding effect like those in *Rowe* are necessarily preempted. Specifically, this Court observed that *Morales* found preemption where the generally applicable, state consumer-protection laws at issue there affected only "advertising *about* carrier rates and services," rather than actually binding carriers to any particular prices, routes, or services. *Rowe*, 552 U.S. at 372 (emphasis in original). Similarly, this Court observed that *Wolens* found preemption where the generally applicable, state consumer-protection laws at issue there affected only "the details of an air carrier's frequent flyer program, a program that primarily *promotes* carriage," rather than actually binding carriers to any particular prices, routes, or services. *Id.* at 373 (emphasis in original). In effect, this Court's *Rowe* decision is based, in relevant part, on the Court's stated awareness that, because state laws with only indirect effects are preempted, a state law actually binding carriers to a particular service *a fortiori* is preempted.

That is, *Rowe* very clearly articulates a floor on preemption, rather than a ceiling.

The Ninth Circuit's decision in this case, however, reverses this aspect of *Rowe* by making "service-binding" a prerequisite to preemption whenever the effects of state laws are indirect. The Ninth Circuit held that the financial capability requirement was not preempted solely because the port authorities had not yet enforced it and, thus, it did not bind carriers to a particular price, route or service. *ATA*, 660 F.3d at 404. This approach cannot be squared with *Rowe*'s reading of *Morales* and *Wolens*. Moreover, it flies in the face of the fundamental point made by this Court in *Morales* that states should not be able to regulate indirectly what they cannot regulate directly. *Morales*, 504 U.S. at 386. Thus, the petition for certiorari should be granted.

B. "Services"

The Ninth Circuit, in its decision below, also continued its use of a discredited, constricted definition of "services" that conflicts with this Court's recent decision in *Rowe* and decisions from other circuits, and inappropriately restricts the preemptive scope of the ADA and FAAAA. *ATA*, 660 F.3d at 396.

As explained in the Petition, prior to *Rowe*, the circuits were split regarding the definition of the term "services," as used in the ADA and FAAAA. Pet. at 24-25. The Ninth Circuit had adopted a narrow view of "services," holding that it is limited to things such as "the frequency and scheduling of

transportation, and to the selection of markets to or from which transportation is provided," and excludes things such as "the pushing of beverage carts, keeping the aisles clear of stumbling blocks, the safe handling and storage of luggage, assistance to passengers in need, or like functions." *Charas v. Trans World Airlines*, 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc).

As numerous courts and the United States itself have recognized, however, this Court implicitly overruled the Ninth Circuit's narrow definition of "services" in *Rowe*. *See, e.g.*, Statement of Interest by the United States at 13, *Nat'l Fed'n of the Blind v. United Airlines*, No. C-10-4816 (N.D. Cal. Apr. 8, 2011), ECF No. 45 ("[T]he Supreme Court's later holding in *Rowe* created a conflict with the Ninth Circuit's narrow definition of 'service.'"); Pet. at 25 (citing cases). In *Rowe*, this Court held that the term "services" in the FAAAA includes all the "essential details" of a carrier's provision of transportation, including the carrier's method for "picking-up, sorting, and carrying goods." 552 U.S. at 373, 376. By concluding that Maine's law related to carriers' "service" even though it did not affect the frequency and scheduling of transportation or the selection of markets to or from which transportation was provided, this Court necessarily has rejected the Ninth Circuit's narrow definition of "services."

Nevertheless, the Ninth Circuit has stubbornly maintained its narrow definition of "services" after *Rowe*, including in this case. *ATA*, 660 F.3d at 396 ("The terms 'rates, routes, and services' were 'used by Congress in the public utility sense; that is, service

refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.'"); *see also* Pet. at 25-26 (citing cases). Despite the multiple decisions to the contrary, the Ninth Circuit has never even bothered trying to explain how its pinched definition of "services" can be squared with *Rowe*. Instead, it has chosen simply to ignore direct and binding precedent from this Court addressing the term "services" under the FAAAA.

Accordingly, review by this Court is warranted even more now than it was when three Justices of this Court dissented from the denial of certiorari in *Northwest Airlines v. Duncan*, 531 U.S. 1058 (2000). The Ninth Circuit's definition of "services" now conflicts with decisions from at least four other circuits and binding precedent from this Court. *See Hickox-Huffman v. US Airways,* 788 F. Supp. 2d 1036, 1039 (N.D. Cal. 2011) ("There is an unresolved split among the Courts of Appeal with respect to what constitutes 'service' for purposes of ADA preemption."). And resolution of this issue is highly important to air carriers, as Justices O'Connor, Rehnquist and Thomas recognized in *Duncan*. 531 U.S. at 1058 ("Resolution of this question would provide needed certainty to airline companies.") The applicable definition of "service" is often dispositive as to whether ADA or FAAAA preemption applies. For example, the Maine tobacco laws at issue in *Rowe* would not have been preempted under the Ninth Circuit's constrained definition of "services" because they regulated neither the frequency and scheduling of transportation, nor the selection of markets to or from which transportation is provided. Likewise, the

New York "passenger bill of rights" at issue in *Air Transport Association of America v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008), which required airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays, would not have been preempted under the Ninth Circuit's narrow "services" definition, which excludes the provision of food, drinks and other amenities. *Charas*, 160 F.3d at 1266.

Air carriers and courts should be able to rely with confidence on this Court's pronouncements regarding what "services" means in the FAAAA and, by extension, the ADA. The Ninth Circuit's disregard of *Rowe*, however, calls such reliance into question and results in differing scopes of ADA and FAAAA preemption around the country—exactly the type of patchwork that Congress sought to avoid with the enactment of the ADA and FAAAA. *See Duncan*, 531 U.S. at 1058 ("Because airline companies operate across state lines, the divergent pre-emption rules formulated by the Courts of Appeals currently operate to expose the airlines to inconsistent state regulations."). Thus, the petition for certiorari should be granted.

CONCLUSION

A4A respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. BERG
DOUGLAS MULLEN
Airlines for America
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4177

ROBERT K. SPOTSWOOD
Counsel of Record
KENNETH D. SANSOM
EMILY J. TIDMORE
Spotswood Sansom & Sansbury LLC
940 Concord Center
2100 Third Ave. North
Birmingham, AL 35203
(205) 986-3620
rks@spotswoodllc.com

January 23, 2012