No. 25-1293

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CINDY CODONI, et al.,
Plaintiffs/Respondents,

v.

PORT OF SEATTLE, et al.,
Defendants/Petitioners.

On Petition for Permission to Appeal an Order of the
United States District Court for the Western District of Washington
No. 2:23-cv-00795-JNW (Hon. Jamal N. Whitehead)

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS/PETITIONERS' PETITION FOR PERMISSION TO APPEAL

Jennifer B. Dickey
Andrew R. Varcoe
U.S. Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Eric Grant
grant@hicks-thomas.com
Hicks Thomas LLP
701 University Avenue, Suite 106
Sacramento, California 95825
(916) 241-8141

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

RULE 26.1 DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

REGULATORY BACKGROUND 2

ARGUMENT 3

I. Reasonable judges might differ over the district court's express preemption rulings 4

II. The legal issues at stake have Circuit-wide and nationwide implications 7

III. The time to address the dispositive legal issues is now, before burdensome class certification issues and discovery 9

CONCLUSION 10

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases

Barnes v. FAA,
865 F.3d 1266 (9th Cir. 2017) 3

California v. Department of Navy,
624 F.2d 885 (9th Cir. 1980) 4–5, 9

Center for Community Action & Environmental Justice v. FAA,
61 F.4th 633 (9th Cir. 2023) 2

City of Burien v. Elwell,
790 Fed. Appx. 857 (9th Cir. 2019) 3

City of Los Angeles v. Benedict Hills Estates Ass'n,
2021 WL 4958990 (9th Cir. Oct. 26, 2021) 3

City of Los Angeles v. Dickson,
2021 WL 2850586 (9th Cir. July 8, 2021) 3

City of Sacramento v. FAA,
2021 WL 5150043 (9th Cir. Nov. 5, 2021) 3

County of San Mateo v. Chevron Corp.,
32 F.4th 733 (9th Cir. 2022) 8

Informing Citizens Against Runway Airport Expansion v. FAA,
757 Fed. Appx. 568 (9th Cir. 2018) 3

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992).....7

Reese v. BP Exploration (Alaska) Inc.,
643 F.3d 681 (9th Cir. 2011) 4

Save Our Skies LA v. FAA,
50 F.4th 854 (9th Cir. 2022) 3

Statutes

28 U.S.C. § 1292 ..... 4, 7

Clean Air Act,
42 U.S.C. § 7573..... 4

42 U.S.C. § 7607..... 3

Federal Aviation Act,
49 U.S.C. § 46110..... 2–3

Airline Deregulation Act,
49 U.S.C. § 41713.....5

Other Authorities

2024 Carlton Fields Class Action Survey, https://bit.ly/41HiZ8t 9

Federal Aviation Administration, *Air Traffic by the Numbers* (May 2024), https://bit.ly/3QMXVaz.....7

Sabin Center for Climate Change Law, *U.S. Climate Change Litigation: Common Law Claims*, https://bit.ly/4bJc3vj 8

IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community, including briefs on preemption issues.*

The Chamber has a strong interest in this case because it raises important and recurring questions concerning the extent to which state tort law may interfere with the prices, routes, services, and emissions of air carriers in the face of Congress's decision to expressly preempt such interference. Many of the Chamber's members either are airlines themselves or transact business on a nationwide scale and rely on the services of air carriers in their day-to-day operations. Indeed, the air carrier industry affects nearly every business in the United States, whether directly or indirectly, as well as countless American consumers.

---

* No counsel for any party authored this brief in whole or in part, and no entity or person — aside from amicus curiae, its members, or its counsel — made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

If permitted to prevail, Plaintiffs' expansive tort-law theories will significantly hamper the airline industry and prevent air carriers from competing freely and efficiently. It will also increase costs for businesses and consumers alike, as air carriers are forced to cope with the expense of tort-based regulatory burdens that Congress preempted in both the Airline Deregulation Act (ADA) and the Clean Air Act (CAA). Granting Defendants' petition to appeal — and reversing the denial of their motions to dismiss — would ensure that (consistent with the congressional design) businesses and consumers continue to enjoy a full range of air transportation services at prices determined largely by the free market and subject to uniform federal regulation, rather than a haphazard patchwork of state regulation in the guise of tort liability.

REGULATORY BACKGROUND

Defendants thoroughly explained how "the federal government pervasively regulates aircraft operations, flight paths, and emissions." Petition at 4 (section heading; capitalization altered). We add the observation that this regulation is not without judicial oversight. To the contrary, pursuant to 49 U.S.C. § 46110 — one of the statutes addressed by the district court's jurisdictional ruling, *see* Petition at 17–21 — the FAA's regulatory action governing operations, flight paths, and emissions is regularly subject to review by this Court, e.g.:

- *Center for Community Action & Environmental Justice v. FAA*, 61 F.4th 633, 637 (9th Cir. 2023) (challenge to construction and operation of air cargo facility at San Bernardino International Airport, including based on emissions of pollutants);

- *Save Our Skies LA v. FAA*, 50 F.4th 854 (9th Cir. 2022) (challenge to aircraft departure routes at Van Nuys and Burbank airports);

- *City of Sacramento v. FAA*, 2021 WL 5150043 (9th Cir. Nov. 5, 2021) (mem.) (challenge to local flight procedures);

- *City of Los Angeles v. Benedict Hills Estates Ass'n*, 2021 WL 4958990 (9th Cir. Oct. 26, 2021) (mem.) (challenge to aircraft departure routes at Hollywood Burbank Airport);

- *City of Los Angeles v. Dickson*, 2021 WL 2850586 (9th Cir. July 8, 2021) (mem.) (challenge to aircraft arrival routes at LAX);

- *City of Burien v. Elwell*, 790 Fed. Appx. 857, 858 (9th Cir. 2019) (challenge to aircraft departure routes at Sea-Tac);

- *Informing Citizens Against Runway Airport Expansion v. FAA*, 757 Fed. Appx. 568, 570 (9th Cir. 2018) (mem.) (challenge to approval to construct runway at Ravalli County Airport in Hamilton, Montana);

- *Barnes v. FAA*, 865 F.3d 1266 (9th Cir. 2017) (challenge to approval of new runway at Hillsboro Airport near Portland, Oregon, including based on aircraft emissions of lead); and

Thus, if state tort law is preempted in the present circumstances — the right result under the ADA and the CAA — regulation of aircraft operations, flight paths, and emissions will nevertheless be subject to judicial review. But it will be the review that Congress intended under 49 U.S.C. § 46110 and 42 U.S.C. § 7607(b)(1), namely, in this Court and other federal courts of appeals. *See* Petition at 11.

ARGUMENT

We address in turn the district court's express preemption ruling, the nationwide implications of that ruling, and the appropriate time to address that ruling.

I. Reasonable judges might differ over the district court's express preemption rulings.

A "substantial ground for difference of opinion" is one prerequisite for interlocutory review pursuant to 28 U.S.C. § 1292(b). There is a "credible basis" for such a ground when the putative "appeal involves an issue over which reasonable judges might differ." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (internal quotation marks omitted). Reasonable judges might differ over the issues raised by the district court's express preemption rulings because those rulings significantly undermine the federal schemes that Congress crafted in the two comprehensive statutes at issue here, the CAA and the ADA.

Section 233 of the CAA expressly provides that no state shall "attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical" to the federal standard." 42 U.S.C. § 7573. The district court acknowledged this Court's holding that the broad language of Section 233 covers not only "**direct** state regulation of aircraft or aircraft engines" but also "other state regulation which would **affect** the aircraft or engine." *Navy*, 624 F.2d at 888 (emphasis added). As stated plainly in their introductory paragraph of their operative complaint, Plaintiffs by this action attack "Defendants' emission" — **from aircraft engines** — of dangerously high levels of pollutants." District Court Document ("Doc.") 43, at 1:4–5.

The district court rightly acknowledged a serious CAA preemption problem here: "if Plaintiffs' claims necessitate aircraft alterations as a factual matter, then they may be preempted" by Section 233 as construed in *California v. Department of Navy*, 624 F.2d 885, 888 (9th Cir. 1980) (*Navy*). Exhibit 1, at 26:7–8. But the court held that it could not make a "necessitate" finding at the motion-to-dismiss stage, hypothesizing "ways of controlling emissions without" effecting alterations of the aircraft or engine. *Id.* at 26:9. That holding misunderstands *Navy*. When this Court held that Section 233 covers state regulation that would "affect the aircraft or engine," that holding swept more broadly than mere structural alteration; rather, this Court held that Section 233 covers anything "affecting the design, structure, **operation, or performance**" of the aircraft or engine. 624 F.2d at 888 (emphasis added).

The district court suggested no "ways of controlling emissions" that would enable airlines to avoid liability under Plaintiffs' theories **without** falling within the broad scope of Section 233. Neither did Plaintiffs. Of course, it is conceivable for airlines to avoid (or at least minimize) their liability by flying fewer aircraft or by altering an aircraft's flight or landing "path" — a term that Plaintiffs' complaint deploys no fewer than seven times. *See* Doc. 43, ¶¶ 4, 27, 54, 61, 63, 66, 67 n.9. But using state law to achieve such a result would run headlong into the ADA, which expressly preempts state regulation "related to a price, **route, or service** of an air carrier." 49 U.S.C. § 41713(b)(1) (emphasis added).

In the district court, Plaintiffs acknowledged the horns of a dilemma: airlines "must either 'alter their flight paths or the frequency of their flights' (which would be preempted by the ADA) or they must 'alter the "design, structure, operation or performance" of their aircraft' (which would be preempted by the CAA)." Doc. 79, at 9:9–11. Plaintiffs purported to escape this dilemma on the ground that the district court "concluded that the facts at this stage are not sufficiently developed to determine whether [airlines] could avoid liability by changing certain behavior . . . that is not expressly regulated by either the ADA or the CAA." *Id.* at 9:13–16. In Plaintiffs' view, that behavior was "mitigating pollution on Plaintiffs' property." *Id.* at 9:15.

That does not solve Plaintiffs' dilemma. If "mitigate" here means "lessen," then we are back to the same fundamental question to which neither the district court nor Plaintiffs have an answer: how can airlines lessen aircraft emissions at Sea-Tac **without** either (1) altering their flight paths or frequency of flights or (2) altering the design, structure, operation or performance of their aircraft? If "mitigate" here means "remediate" — as in Plaintiffs' prayer for monetary relief measured by "the cost to remediate Plaintiffs' and Class members' properties of the contamination caused by Defendant's conduct," Doc. 43, at 48:22–23 — then airlines could "avoid liability" only by **embracing** liability.

That result would directly undermine the federal scheme that Congress adopted. Congress enacted the ADA to promote efficiency, innovation, and low prices in

the airline industry. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992). Congress even included an express preemption provision to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* On the specific subject of emissions, Congress separately provided for the federal government to set uniform standards. Allowing a tort suit like this one — covered in either direction by an express preemption provision — to sidestep federal law would significantly undermine Congress's work.

In sum, the district court erred in failing to dismiss this action as expressly preempted by the Airline Deregulation Act or the Clean Air Act or both. At the very least, as to express preemption, there is "substantial ground for difference of opinion" within the meaning of § 1292(b).

II. The legal issues at stake have Circuit-wide and nationwide implications.

As attested by the wide variety of cases cited on Pages 2–3 above, conflicts over aircraft operations, flight paths, and emissions are not confined to Sea-Tac. The FAA describes the nation's "Core 30 Airports" as the "30 airports with the highest number of operations." Federal Aviation Administration, *Air Traffic by the Numbers* 42 (May 2024), https://bit.ly/3QMXVaz. Sea-Tac is one of those Core 30, as are six others located within this Circuit: the international airports in Honolulu, Las Vegas, Los Angeles, Phoenix, San Diego, and San Francisco. *See id.* at 34. There is every reason to believe that, if the present challenge to aircraft operations, flight paths, and

emissions is not stopped, similar challenges will spread throughout this Circuit and, indeed, throughout the nation.

There is nothing in the nature of Plaintiffs' claims that would naturally confine them to Sea-Tac or even to airports in the State of Washington. As the district court observed, Plaintiffs assert garden-variety tort claims of the kind recognized in the laws of every state: "negligence, battery, continuing intentional trespass, and public nuisance." Exhibit 1, at 1:19–20. If they succeed here, why not take them everywhere from ATL (Hartsfield-Jackson Atlanta International) to TPA (Tampa International)? The nationwide wave of "climate change" litigation grounded in common-law claims for nuisance and the like suggests just this scenario: if allowed to proceed, Plaintiffs' claims will proliferate. *See, e.g.*, Sabin Center for Climate Change Law, *U.S. Climate Change Litigation: Common Law Claims* (listing 40 cases, most initiated in the past eight years), https://bit.ly/4bJc3vj; *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 744 (9th Cir. 2022) (resolving jurisdictional issues in three separate actions each initiated against more than 30 energy companies).

Such litigation would harm the business community and the national economy more broadly. Travel and supply chains are configured for competitive and efficient air and motor carrier service. And in many cases, such supply chains are years in the making. If flights are reduced or delayed, if routes become more circuitous, or if prices are increased to account for costs and liability from tort suits like this one,

there will be a ripple effect on travelers, consumers, and commerce nationwide — and indeed on commerce and intercourse with foreign nations. Congress determined such impacts important enough to warrant two express preemption provisions, and the construction and enforcement of those provisions is likewise important enough to warrant this Court's attention.

III. The time to address the dispositive legal issues is now, before burdensome class certification issues and discovery.

In its order denying Defendants' motion to dismiss, the district court cited this Court's "case-by-case approach" to resolving preemption issues under Section 233 of the Clean Air Act. Exhibit 1, at 26:3 (quoting *Navy*, 624 F.2d at 889). The district court appeared to believe that under such an approach, the court could not appropriately resolve "Defendants' Section 233 preemption argument at this stage," i.e., on a motion to dismiss as opposed to a motion for summary judgment or at trial. *Id.* at 26:14–16. That was a category mistake: a **case-by-case** approach does not mandate a **fact-intensive** approach. Given that no one has even suggested a means for reducing emissions apart from means preempted by the ADA or the CAA, factual development is not required to resolve Defendants' express preemption arguments.

Allowing putative class actions like this one to proceed past a motion to dismiss is not costless. Most direct are litigation costs themselves: class action defense costs have skyrocketed in this country, with such costs projected to exceed $4 billion last year. *2024 Carlton Fields Class Action Survey* 7, https://bit.ly/41HiZ8t. This

case alone comprehends "approximately 300,000 putative class members." Doc. 43, at 4:23–24, ¶ 11. Multiplying that number across all Core 30 Airports yields some nine million class members. Moreover, discovery would necessarily be intensive and voluminous given the highly regulated and technical aspects of aircraft design, not to mention the numerous sources of emissions in major metropolitan areas. Finally, there is the uncertainty that can hamper economic growth, the potential for settlements that bear no relationship to the merits of the underlying claims, and the burdens on an already quite busy federal judiciary. The costs and risks of litigation can themselves distort decisions that air carriers and airports make affecting prices, routes, services, and emissions — an effect Congress sought to avoid when it directed that such matters should be governed solely by federal law.

In sum, the district court had it right when it observed that "[e]arly appellate guidance" — i.e., granting permission to appeal — "would benefit both the parties and the [district] Court by potentially avoiding extensive discovery, motion practice, and trial proceedings if the claims are ultimately found to be preempted or jurisdictionally barred." Exhibit 2, at 2:18–21. This Court should so conclude.

CONCLUSION

For the foregoing reasons, Defendants' petition for permission to appeal should be granted.

March 7, 2025

Respectfully submitted,

s/ *Eric Grant*
Eric Grant
Hicks Thomas LLP

Jennifer B. Dickey
Andrew R. Varcoe
U.S. Chamber Litigation Center

Counsel for Amicus Curiae
the Chamber of Commerce
of the United States of America

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 25-1293

I am the attorney or self-represented party.

This brief contains 2,457 words, including no words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties.
[ ] a party or parties are filing a single brief in response to multiple briefs.
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Eric Grant

Date March 7, 2025