No. 25-2830

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CINDY CODONI, et al.,
Plaintiffs/Appellees,

v.

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

Appeal from 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/APPELLANTS

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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.

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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.

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* 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.

This Court should reverse the district court's denial of Defendants' motions to dismiss because Plaintiffs' claims are expressly preempted by two major federal statutes — the Airline Deregulation Act (ADA) and the Clean Air Act (CAA). If permitted to prevail, Plaintiffs' expansive tort-law theories would significantly hamper the airline industry and prevent air carriers from competing freely and efficiently. Accepting such theories also would increase costs for businesses and consumers alike, as air carriers would be forced to cope with the expense of tort-based regulatory burdens that Congress preempted in both the ADA and the CAA. By contrast, enforcing statutory preemption in this litigation would ensure — consistent with the congressional design — that 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-by-state regulation in the guise of tort liability.

ARGUMENT

I. The FAA's regulatory action governing operations, flight paths, and emissions is regularly subject to review by this Court.

Defendant Delta Air Lines thoroughly explained how "the federal government pervasively regulates aircraft operations, flight paths, and emissions." Delta Brief (DktEntry 18.1) at 5 (section heading; capitalizations omitted). Defendant Alaska Air Group has documented how the "EPA and FAA extensively regulate aircraft emissions," and how the "FAA extensively regulates flight operations and paths."

Alaska Brief (DktEntry 21.1) at 14, 18 (section headings). We add the observation that all of this federal regulation is not without judicial oversight. To the contrary, under 49 U.S.C. § 46110 — one of the statutes addressed by the district court's jurisdictional ruling, *see* Excerpts of Record (E.R.) 15-17 — 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 this Court holds that state tort law is preempted in the present circumstances — the correct result under the ADA and the CAA — regulation of aircraft operations, flight paths, and emissions will nevertheless be subject to judicial review. And it will be the review that Congress intended under 49 U.S.C. § 46110 and 42 U.S.C. § 7607(b)(1), namely, direct review in this Court and other federal courts of appeals. *See* Delta Brief at 24-35.

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

As attested by the wide variety of cases cited on the previous page, 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* 51 (June 2024), https://bit.ly/4m0ICZX. 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 43. 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." E.R. 4:19–20. 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 43 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); *cf. City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) (holding that state-law claims seeking to remediate climate change are preempted by federal law).

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

this Court should enforce those provisions as written, to the benefit of such travelers, consumers, and commerce.

III. The district court's express preemption rulings are wrong.

The district court rejected Defendants' arguments that Plaintiffs' claims are expressly preempted by the CAA and the ADA. *See* E.R. 25–29. As explained below, those rulings necessarily undermine the federal regulatory schemes that Congress crafted in those two comprehensive statutes.

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." *California v. Department of Navy*, 624 F.2d 885, 888 (9th Cir. 1980) (emphasis added). As stated explicitly in the first paragraph of their complaint, Plaintiffs by this action attack "Defendants' emission" of alleged pollutants **from aircraft engines**. E.R. 41:4–5.

The district court rightly acknowledged a serious CAA preemption problem: "if Plaintiffs' claims necessitate aircraft alterations as a factual matter, then they may be preempted" by Section 233 as construed in *Navy*, 624 F.2d at 888. E.R. 29:7–8. But the district 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. E.R. 29:9. 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. *Navy*, 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* E.R. 42–63, ¶¶ 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).

That is not a difficult point. This Court has long held that the term *service* as used in the ADA "refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Air Transportation Ass'n of America v. City & County of San Francisco*, 266 F.3d

1064, 1071 (9th Cir. 2001) (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265–66 (9th Cir. 1998). And the Supreme Court has long held that the ADA's "key phrase 'related to' expresses a 'broad pre-emptive purpose,'" and that a state-law "claim satisfies this requirement if it has 'a connection with, or reference to, airline' prices, routes, or services." *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 280, 284 (2014) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–94 (1992)). Thus, a state-law-based ruling that expressly compels airlines to reduce the frequency of flights to and from Sea-Tac "relates to" air carrier *service*.

The point is even more obvious as to *routes*, which in the ADA "refers to courses of travel." *Air Transportation Ass'n*, 266 F.3d at 1071 (quoting *Charas*, 160 F.3d at 1265). A state-law-based ruling that expressly compels an airline to alter an aircraft's flight or landing path — literally, an aircraft's course of travel — doubtless "relates to" air carrier *routes*. The ADA's preemption of state law makes especial sense in this context, given that the FAA precisely prescribes flight and landing paths by binding regulation, and has done so at Sea-Tac. *See* Delta Brief at 5-9 (so explaining and illustrating).

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 (Dec. 20, 2024). Plaintiffs purported to escape this dilemma on the ground that the district court had "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. For such behavior, Plaintiffs offered but a single suggestion: "mitigating pollution on Plaintiffs' property." *Id.* at 9:15.

Mitigating pollution 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," E.R. 88:22–23 — then airlines could "avoid liability" only by **embracing** liability.

That result would directly — and sharply — undermine the federal scheme that Congress adopted. Congress enacted the ADA to promote efficiency, innovation, and low prices in the airline industry. *See Morales*, 504 U.S. at 378–79. Congress 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 in the CAA for the federal government to set uniform pollution standards. Permitting a state-law tort lawsuit like this one to sidestep federal preemption would necessarily compromise the uniformity mandated by both statutes.

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.

IV. No further fact development is required; the dispositive legal issues can and should be decided by dismissing the litigation now.

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. E.R. 29:3 (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**," that is, at the motion-to-dismiss stage, as opposed to a motion for summary judgment or at trial. E.R. 29:14–16 (emphasis added). In the opposition to the petition to appeal, Plaintiffs similarly argued that "discovery is necessary to facilitate proper consideration of Defendants' threshold preemption . . . questions." DktEntry 10.1, at 7; *accord, e.g.*, *id.* at 3 (arguing that "the factual record needs development to assess whether Defendants' actions conform to the relevant regulatory framework and whether Plaintiffs' remedies would require Defendants to deviate from it").

This reasoning is premised on a category mistake. A **case-by-case** approach does not mandate a **fact-intensive** approach. It would be one thing if Plaintiffs (or the district court) had even suggested a possible means for reducing emissions apart from means preempted by the ADA or the CAA. But they did not, and Part III above demonstrates that they cannot. Further factual development is simply not required to resolve Defendants' express preemption arguments.

Letting putative class actions like this one to proceed past a motion to dismiss is far from costless. As to direct litigation costs alone, class action defense costs have skyrocketed in this country, and are projected to exceed $4.5 billion this year. *See 2025 Carlton Fields Class Action Survey* 7, https://bit.ly/41qGFgO. The complaint shows that this litigation alone comprehends "approximately 300,000 putative class members." E.R. 44:23–24, ¶ 11. Multiplying that number across all Core 30 Airports would yield a rough estimate of nine million class members. Moreover, discovery would likely be intensive and voluminous given the highly regulated and technical aspects of aircraft design, not to mention numerous sources of emissions in major metropolitan areas. And then there are other costs, such as 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. *See, e.g.*, U.S. Chamber of Commerce Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 12–

18 (hampering economic growth), 22–26 & n.88 (merits-unrelated settlements) (Aug. 2022), https://bit.ly/3UPzVFI. The costs and risks of litigation can themselves distort decisions that air carriers and airports make, and so affect prices, routes, services, and emissions — an effect that Congress sought to preclude when it mandated that such matters should be governed solely by federal law.

Resolving preemption issues as a matter of law at the motion-to-dismiss stage is often appropriate, *see, e.g., Pardini v. Unilever United States, Inc.*, 65 F.4th 1081, 1084 (9th Cir. 2023), and it has the salutary effect of "avoiding extensive discovery, motion practice, and trial proceedings," as the district court observed, E.R. 35:18–21. Because Plaintiffs' claims are preempted on the face of the complaint, this Court should order dismissal now.

CONCLUSION

For all the foregoing reasons, the district court's order denying Defendants' motion to dismiss should be reversed.

August 15, 2025

Respectfully submitted,

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