No. 20-1077

In The

Supreme Court of the United States

AMAZON.COM, INC.,
and AMAZON LOGISTICS, INC.,

Petitioners,

v.

BERNARD WAITHAKA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR THE PETITIONERS

RICHARD G. ROSENBLATT
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

The circuits disagree about the FAA exemption. The latest decision in *Saxon* v. *Southwest Airlines Co.*, 993 F.3d 492 (7th Cir. 2021), dispels any doubt about the need for this Court's review. The Seventh Circuit's conclusion about loading and unloading airplanes directly contradicts the Fifth Circuit's conclusion about the same activity. Compare *id.* at 494, with *Eastus* v. *ISS Facility Servs., Inc.*, 960 F.3d 207, 212 (5th Cir. 2020). The Seventh Circuit even refused, explicitly, to "follow the Fifth Circuit." *Saxon*, 993 F.3d at 499.

Respondent concedes that *Saxon* split from *Eastus*, yet he contends that "this case offers no opportunity to resolve the disagreement." Br. in Opp. 18-19. That claim is wrong and rests on a mischaracterization of what *Saxon* held. This case turns on the same statutory language and same legal question: whether the FAA exemption covers classes of workers who perform local transportation activities that do not extend across state lines. This Court's answer to the question presented will settle the Fifth and Seventh Circuits' disagreement and close this ever-widening circuit split. And if the Court sides with the Fifth Circuit, it will resolve this case in petitioners' favor.

There is no reason to leave this split for another day. Respondent identifies no true vehicle problem; none exists. And no good comes from delaying this Court's inevitable resolution of the diverging

approaches already on display in seven circuits and about a hundred rulings. Delay would just cause more drawn-out, costly litigation over the FAA's scope when the whole point of the statute is to offer a quick and cheap alternative to litigating. The law is in a state of deep confusion, and contracting parties and lower courts need this Court's guidance.

A. The Circuit Split Is Clear

1. As petitioners' supplemental brief explained (at 1-2), *Saxon* and *Eastus* divided over the same class of workers—those who load and unload airplanes—and *Saxon* failed to reconcile the two cases. Respondent never claims that the conflict between these cases is illusory. See Br. in Opp. 3, 18-19. He instead ventures two reasons why *Eastus* and *Saxon* are irrelevant. Neither holds up.

First, respondent claims (at 18) that *Saxon* "does not address the intrastate transportation of goods that are traveling on an interstate journey" because the workers "did not actually transport goods at all." See also Br. in Opp. 2. But this description conflicts with *Saxon*'s holding. In the Seventh Circuit's view, "[a]ctual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines." *Saxon*, 993 F.3d at 498. The Seventh Circuit decided that "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate, too, is actual transportation." *Ibid.*

In fact, whether cargo loading is "actual transportation" is exactly where these two circuits differ. The Fifth Circuit sides with *Saxon*'s now-reversed district court: "workers who load or unload goods that others transport in interstate commerce are not transportation workers." *Eastus*, 960 F.3d at 211 (citing *Saxon* v. *Sw. Airlines Co.*, No. 19-cv-403, 2019 WL 4958247, at *1 n.2, *7 (N.D. Ill. Oct. 8, 2019)). The Seventh Circuit disagrees: "cargo loaders generally are a class of workers engaged in the actual transportation of goods." *Saxon*, 993 F.3d at 498. So respondent's first attempt to downplay this conflict flouts the cases' own reasoning.

Respondent's second attempt fares no better. He insists the dispute over cargo loaders is irrelevant because this case turns on "whether a *delivery driver* must physically cross state[] lines." Br. in Opp. 2 (emphasis added); see also *id.* at 19. But here too *Saxon* undermines respondent's claim. As *Saxon* notes, if cargo loaders are engaged in interstate commerce, then petitioners must be wrong in arguing that the exemption is "limited to those who physically cross state lines." *Saxon*, 993 F.3d at 502. On the other hand, if cargo loaders are not exempt, then petitioners must be right in arguing that local workers who are even a further step removed from the interstate transportation are not exempt, either. After all, the loading/unloading process "immediately and necessarily precedes" each discrete segment of cargo's multi-step journey from Point A to Point B. *Ibid.*

True, *Saxon* did not decide whether, if loading and unloading interstate vehicles counts as interstate commerce, the final step in multi-step transit—local delivery to the customer—does too. See 993 F.3d at 492; see Br. in Opp. 2-3. But to show that certiorari is warranted here, petitioners need not prove the Seventh Circuit would rule against them. The First and Ninth Circuits have already done that.

What is more significant is that petitioners prevail under the Fifth Circuit's approach in *Eastus*. Under that approach, the necessary step of unloading an interstate vehicle marks the dividing line between FAA-exempt interstate transportation and non-exempt local activity: "[l]oading or unloading a boat or truck with goods prepares the goods for or removes them from transportation." *Eastus*, 960 F.3d at 212. So local workers who perform activities *after* cargo loaders "remove[]" goods from interstate transportation are not engaged in the interstate transportation. In this way, the Fifth Circuit's views about loading and unloading foreclose the "continuous transportation" theory espoused by respondent and the First and Ninth Circuits. See Br. in Opp. 1, 7, 8; *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 915-916 (9th Cir. 2020); Pet. App. 13a, 19a-20a. A class of local delivery drivers does not take part in a "continuous" interstate transportation of goods in the "flow" or "stream" of interstate commerce because unloading goods from long-range vehicles and loading them into local drivers' cars breaks the continuity—just like unloading the airplane in *Eastus*.

The Fifth Circuit's approach therefore resolves this case in petitioners' favor. And by the same token, petitioners' proposed answer to the question presented—that the exemption applies only to workers who, considered as a class, are engaged to transport goods or passengers across state or national boundaries, Pet. 16—settles the disagreement between *Eastus* and *Saxon*.

2. While the sharp split between *Eastus* and *Saxon* is reason enough to grant this petition,[1] respondent's long discussion of other appellate decisions only gives more support. See Br. in Opp. 11-20. Nowhere does respondent claim that all circuits interpret the exemption in basically the same way. Nor could he. With three circuits parsing defunct FELA case law for clues, *Rittmann*, 971 F.3d at 912-913; *Saxon*, 993 F.3d at 500-502; Pet. App. 16a-25a, two circuits using murky multifactor standards, *Lenz* v. *Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005); *Singh* v. *Uber Techs. Inc.*, 939 F.3d 210, 228 (3d Cir. 2019), and one circuit requiring *both* interstate transportation and membership in the "transportation industry," *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1289-1290 (11th Cir. 2005), the circuits are anything but unified in how they approach the exemption.

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[1] Respondent implies (at 18) that petitioners are inconsistent in emphasizing *Saxon*'s expansive application of the exemption after arguing that *Wallace* v. *GrubHub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020) (Barrett, J.), took a narrower approach. But there is nothing odd or improper about reacting to intervening developments in circuit precedent.

And though respondent may prefer to overlook the confusion, it is obvious to observers. Thanks to stark differences in their basic approaches, courts' holdings in FAA exemption cases "have proven as varied as the job descriptions that come before them." Tamar Meshel, *If Apps Be the Food of the Future, Arbitrate On!: Mobile-Based Ride-Sharing, Transportation Workers, and Interstate Commerce*, 15 Va. L. & Bus. Rev. 1, 13 (2020). The result is "a legal landscape that will remain muddled absent intervention by the nation's top court." Robert Iafolla, *Court Fights Surge Over Arbitration Carveout for Workers*, Bloomberg Law (Apr. 15, 2021, 1:21 PM), https://news.bloomberglaw.com/daily-labor-report/court-fights-surge-over-arbitration-carveout-for-workers. The Court should intervene now.

B. The Decision Below Is Wrong

Much of the brief in opposition seeks to defend the First Circuit's holding on the merits. But these merits-related arguments do not weigh against review, ignore several of petitioners' points, and are unpersuasive in their own right.

Start with respondent's "ordinary meaning" argument. Rather than confront the dictionary definition of "*interstate* commerce," respondent praises the *Rittmann* majority's discussion of the dictionary definition of "commerce." See Br. in Opp. 21; *Rittmann*, 971 F.3d at 910. Excising "interstate" from the statutory text does make it easier to extend the exemption to intrastate activities. But courts lack authority to cut

words from a statutory text. See, *e.g.*, *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014). And as Judge Bress explained, the dictionary definition of "interstate commerce" supports petitioners. Pet. 16; cf. *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting).

That may be why respondent quickly pivots away from ordinary meaning. He first cites a legal reference work, claiming that "an express company taking goods from a steamer or railroad" always engages in interstate commerce. Br. in Opp. 22 (quoting *Bouvier's Law Dictionary and Concise Encyclopedia* 532 (8th ed. 1914)). But the cited source does not support that theory. The quoted passage merely describes the trial court's decision in *Barrett* v. *City of New York*, 189 F. 268, 269-270 (C.C.S.D.N.Y. 1911), *rev'd in part on other grounds*, 232 U.S. 14 (1914). As this Court's opinion in that case shows, however, the express company's vehicles were continually crossing the New York/New Jersey border. See *Barrett*, 232 U.S. at 28. So if anything, this case supports petitioners' definition of "interstate commerce," not respondent's.

Like the court of appeals below, respondent's main argument (at 22-23, 25-28) rests on FELA cases. The First, Seventh, and Ninth Circuits have started making heavy use of those cases to interpret the FAA, even though this Court warned that this FELA jurisprudence rests on "the evident purpose of Congress in adopting [that] act," *Shanks* v. *Del., Lackawanna & W. R.R. Co.*, 239 U.S. 556, 558 (1916), which was to extend federal remedies to injured workers. See Pet. 19. Worse still, this case law was so confusing and

unpredictable that Congress had to rewrite the statute. *Id.* at 19-20.

Yet respondent asserts (at 29) that petitioners' proposal is just as unpredictable as his FELA-driven approach. Far from it. On petitioners' straightforward reading, the FAA exemption does not cover the many classes of transportation workers who perform work within a specific metropolitan area. Pet. 20. Respondent's contrary suggestion seems to rest on the false premise that quirks of geography—like metropolitan areas near state borders—could yield different outcomes in some cases, because local drivers in those areas may cross state borders for their work. But most courts agree with petitioners that the proper level of generality when applying the exemption does not zoom in on individual metropolitan areas: "the relevant 'class of workers' must be defined at a *nationwide* level, and should not be limited to a particular geographic area within the United States." *Osvatics* v. *Lyft, Inc.*, No. 20-cv-1426, 2021 WL 1601114, at *10 (D.D.C. Apr. 22, 2021); see also, *e.g.*, *Rogers* v. *Lyft, Inc.*, 452 F. Supp. 3d 904, 916 (N.D. Cal. 2020) ("Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers.").[2]

[2] Respondent cites a complaint from another case to claim that Amazon Flex drivers sometimes "travel[] long distances to make deliveries." Br. in Opp. 29; see also *id.* at 21 n.5. That claim is misleading: the cited allegations merely state the *aggregate* distance one Amazon Flex driver drove one week. See Second Am. Compl. ¶ 22, *Rittmann* v. *Amazon.com, Inc.*, 383 F. Supp. 3d 1196 (W.D. Wash. 2019) (No. 16-cv-1554).

In all events, if the pre-1925 legal backdrop helps understand the exemption, FELA cases are hardly the most instructive data points. The petition noted, for example, that the separate dispute resolution regimes for seamen and railroad workers—which, unlike FELA, this Court has previously consulted to interpret the exemption—often did not apply to local versions of that work. Pet. 17-18. Respondent does not deny that this part of the historical record supports confining the exemption's residual clause to long-distance transportation.

He also gives short shrift to this Court's views about the precursors of last-mile delivery drivers. Pet. 20 n.2. His brief mention (at 28 n.6) of *New York ex rel. Pennsylvania Railroad Co.* v. *Knight*, 192 U.S. 21 (1904), misses the case's main lesson: even in a "continuous interstate transportation" where the company "complete[s] the continuous transportation of interstate passengers" or cargo, there is a legally significant "separation" between the intrastate and interstate components. *Id.* at 25-27. The final, intrastate leg of the interstate trip is not necessarily "a part of" the interstate commerce. *Id.* at 28. This Court made a similar point in *ICC* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 167 U.S. 633 (1897), which respondent simply ignores. There, a railroad company made local deliveries of goods that had just arrived from out of state, and this Court agreed that these local deliveries were "a new and distinct service" from the interstate rail transportation. *Id.* at 643. The interstate transportation, and the ICC's jurisdiction, ended

when the goods were "discharged from" the interstate train. *Id.* at 644. These cases support the Fifth Circuit's view in *Eastus*: when a company coordinates each step in an interstate transportation of goods or persons, the unloading of the interstate vehicle marks the end of the interstate part of the journey.

In short, respondent's theories depart from FAA's plain meaning, distort the relevant history, and undermine the statute's objectives. The Court should repudiate the First Circuit's deeply flawed interpretation of this important statutory provision.

C. The Issue Needs Resolution Now

Respondent does not dispute that this case is an excellent vehicle for the question the petition presents. Nor does he deny that the full nine-Member Court can participate in this case, which may not be true for *Saxon*. See Pet. Supp. Br. 3; Br. in Opp. 19 n.4. Instead, he merely repurposes his mistaken claims that there is no relevant circuit split and that the First Circuit decided the case correctly. Br. in Opp. 30-32.[3] He thus concedes there are no obstacles to deciding the question presented.

And there is no reason for this Court to prefer more percolation to immediate resolution. The

[3] Respondent incorrectly claims (at 31) that every circuit views workers' border-crossing as unnecessary. As petitioners have shown, the Fifth and Eleventh Circuits both require the class of workers to be engaged in actual interstate movement. *Eastus*, 960 F.3d at 212; *Hill*, 398 F.3d at 1290.

question here is a pure question of statutory interpretation that lower courts have already had ample opportunity to explore. According to a recent count, there have been nearly one hundred federal-court decisions on whether various workers fall within the exemption. Iafolla, *supra*. But while this "[l]itigation has skyrocketed," it has produced "conflicting decisions and lack of clarity." *Ibid.*

It is no exaggeration to say, as one arbitration scholar has said, that this status quo "is horrific for arbitration." Iafolla, *supra* (quoting Prof. Imre Szalai). Arbitration is supposed to "be a relatively fast and inexpensive way to resolve claims," but that promise is empty if parties must "spend years battling over whether they'll proceed in court or arbitration before they even get to the merits of their cases." *Ibid.*

In the past, this Court has recognized that the FAA's applicability should be clear. Otherwise the statute actually "breed[s] litigation" when it is supposed to help parties avoid it. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001) (quoting *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995)).

That warning has proven true for scores of litigants over the past few years. And it will continue to do so unless this Court grants review. Only this Court can resolve the existing split of authority and clear up the confusion. It should do so without delay.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RICHARD G. ROSENBLATT
MORGAN, LEWIS &
BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

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