No. 21-309

In the Supreme Court of the United States

SOUTHWEST AIRLINES CO., PETITIONER

v.

LATRICE SAXON

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

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QUESTION PRESENTED

Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate "transportation workers" exempt from the Federal Arbitration Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.. i

TABLE OF AUTHORITIES...................................... iv

INTEREST OF AMICUS CURIAE............................ 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT.. 5

I. This case presents a certworthy circuit split. 5

A. The courts of appeals disagree about the scope of § 1's residual clause. 5

1. The Fifth and Eleventh Circuits require workers to transport goods or passengers across borders to fall within the § 1 exemption. 5

2. In the First and Ninth Circuits, workers who personally participate in transportation, even only on an intrastate leg, may fall within the exemption. 8

3. In the Third Circuit, the exemption covers transportation workers who cross state lines or supervise those who do. 11

4. The Seventh Circuit here has diverged from these precedents, and expressly from *Eastus*. 13

B. This case is an excellent vehicle because it would have come out differently in the other courts of appeals. 14

TABLE OF CONTENTS
(continued)

Page

1. The Fifth and Eleventh Circuits would have found that Respondent is not a transportation worker because she merely handles cargo......... 14
2. Respondent's case would also have come out differently under the First, Third, and Ninth Circuits' tests. 17

C. Only this Court can resolve the conflict. 18

II. This Court's intervention is critical, because the disagreement creates costly confusion and disruption nationwide, especially in the commercial aviation industry............................. 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011)..20

Capriole v. Uber Technologies, Inc.,
7 F.4th 854 (9th Cir. 2021)..........................9, 10, 11

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001).......................................*passim*

Eastus v. ISS Facility Services, Inc.,
960 F.3d 207 (5th Cir. 2020)..........................*passim*

Hamrick v. Partsfleet, LLC,
1 F.4th 1337 (11th Cir. 2021)........................*passim*

Harper v. Amazon.com Services, Inc.,
No. 20-2614, 2021 WL 4075350
(3d Cir. Sept. 8, 2021)...................................*passim*

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994)..22

In re Grice,
974 F.3d 950 (9th Cir. 2020)....................................8

International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC,
702 F.3d 954 (7th Cir. 2012)..................................16

Lenz v. Yellow Transportation, Inc.,
431 F.3d 348 (8th Cir. 2005)....................................6

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019).......................................17, 18

Palcko v. Airborne Express, Inc.,
372 F.3d 588 (3d Cir. 2004)......................11, 12, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Rittman v. Amazon.com, Inc.,
971 F.3d 904 (9th Cir. 2020)..........................*passim*

Rojas v. TK Communications, Inc.,
87 F.3d 745 (5th Cir. 1996)......................................6

Romero v. Watkins & Shepard Trucking, Inc.,
9 F.4th 1097 (9th Cir. 2021)....................................8

Singh v. Uber Technologies, Inc.,
939 F.3d 210 (3d Cir. 2019)..................................12

Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America,
207 F.2d 450 (3d Cir. 1953) (en banc)............12, 13

Waithaka v. Amazon.com, Inc.,
966 F.3d 10 (1st Cir. 2020)...........................*passim*

Wallace v. Grubhub Holdings, Inc.,
970 F.3d 798 (7th Cir. 2020)...........................10, 11

STATUTES

9 U.S.C. § 1...*passim*

45 U.S.C. § 151...22

45 U.S.C. § 151a...22

45 U.S.C. § 152...22

INTEREST OF AMICUS CURIAE

Founded in 1936, Airlines for America (A4A) is the oldest and largest airline trade association in the United States. A4A represents passenger and cargo airlines nationwide, including Alaska Airlines, American Airlines, Atlas Air, Delta Air Lines, FedEx, Hawaiian Airlines, JetBlue Airways, Southwest Airlines, United Airlines, and United Parcel Service. Together, A4A's members directly employ more than 80% of the airline industry's 750,000 workers. And in 2020, A4A's passenger carrier members and their marketing partners carried more than 227 million passengers—approximately 70% of the annual total—and A4A's all-cargo and passenger members together carried 80% of U.S. airlines' total cargo.*

As part of its core mission, A4A has long advocated laws and regulations promoting stable, uniform, and predictable rules necessary for an efficient air-transportation industry. The Seventh Circuit's decision below threatens that mission by splitting with other circuits and imposing a broad and unpredictable standard for determining when an employee is a transportation worker exempt from arbitration under § 1 of the Federal Arbitration Act. A4A's members operate in many states every day, employing many workers who—like Respondent here—do not cross state lines or move people or cargo even on an intrastate leg of an interstate journey. Those workers and the airlines alike agree to follow uniform alternative-

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* The parties have consented in writing after 10 days' notice to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission.

dispute-resolution programs to resolve their disputes efficiently. Contrary to Congress' intent, the Seventh Circuit's approach scraps those uniform programs in favor of unpredictable state-by-state inquiries. Only this Court's review can resolve the circuit disagreement and restore the law that Congress wrote.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is an excellent vehicle for resolving a costly circuit split over the Federal Arbitration Act's (FAA) exemption for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Despite this Court's instruction in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), to construe the clause narrowly given its "explicit reference to 'seamen' and 'railroad employees,'" *id.* at 114, the Seventh Circuit here found that the clause reaches airline cargo loaders and their supervisors, like Respondent, because their "closely related work *is* interstate transportation," Pet. App. 19a (emphasis in original).

In so doing, the Seventh Circuit split with several other courts of appeals. Most notably, the court broke from the Fifth and Eleventh Circuits, which require an employee to move goods or people across borders. But it also split from the First and Ninth Circuits, which have required movement of goods on a leg (even if only intrastate) of an interstate journey. Unless this Court intervenes, the resulting confusion will require costly arbitrability inquiries with varying results in different circuits and states. And it will disrupt airlines' carefully crafted arbitration programs and threaten disparate treatment of similarly situated

employees, contrary to Congress' goals in the FAA and Railway Labor Act (RLA).

I. This case presents an important question that has divided the circuits. And it is an excellent vehicle because it would have come out differently in other courts of appeals.

A. The courts of appeals apply divergent tests to determine whether an employee falls within the § 1 exemption. In the Seventh Circuit, an employee is a transportation worker if her work is "closely related" enough to interstate commerce that it "*is* interstate transportation," Pet. App. 19a (emphasis in original). Under that know-it-when-we-see-it standard, the court below held that Respondent qualified because "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate … is actual transportation." Pet. App. 10a.

The Fifth and Eleventh Circuits reject that approach. On materially indistinguishable facts, the Fifth Circuit declared that loading and unloading a plane does *not* make an employee a transportation worker. And the Eleventh Circuit restricts the exemption to those classes of employees that transport goods across state or national borders, while the Third Circuit throws in direct supervisors of such employees. The First and Ninth Circuits, in contrast, take a more expansive approach, finding that the § 1 exemption encompasses workers who move goods on an intrastate leg of an interstate journey.

B. This case shows the importance of getting the test right. A4A's members operate in every circuit. Up until the Seventh Circuit's decision here, they could use arbitration agreements covered by the FAA to ensure fair rules nationwide for non-unionized

employees not otherwise covered by the RLA's nationwide bargaining scheme. Indeed, a worker like Respondent is not exempt in the Fifth Circuit and wouldn't be in the Eleventh or likely the First, Third, or Ninth Circuits, either. But the Seventh Circuit's divergent decision will force airlines to follow different rules in different places and therefore treat similarly situated workers differently.

II. The circuit disagreement creates costly confusion nationwide, especially in the commercial aviation industry. Based largely on geographic accident, airlines and employees alike will be unable to predict whether their arbitration agreements are binding under federal law. And when federal law gives way, that still leaves the question of arbitrability under state law. The result is a dizzying patchwork of rules undermining the efficiency that agreements to arbitrate are designed to promote.

The problems aren't theoretical. Although the Fifth and Eleventh Circuits' tests produce clear and predictable results, the Seventh Circuit's test (and sometimes the First and Ninth Circuits' approach, too) generates more questions than it answers. Are aircraft maintenance technicians transportation workers? What about customer assistance representatives, fleet service agents, or ground operations crews?

The costs extend beyond litigation expenses and delay. The Seventh Circuit's decision pries open a regulatory gap Congress never intended to create. At best, the consequence is unintended inefficiency. At worst, it is unfairness among similarly situated employees that Congress meant to prevent.

ARGUMENT

I. This case presents a certworthy circuit split.

The courts of appeals are intractably split on the scope of the FAA's transportation-worker exception. As Southwest explains, a cargo loader at Love Field in Dallas is not a transportation worker because she does not move goods interstate, but the same cargo loader at Chicago O'Hare or Midway is (and so is her supervisor) simply because the Seventh Circuit says that loading *is* transportation.

But the split runs deeper than that. The Eleventh Circuit interprets § 1's transportation-worker exemption to reach only classes of workers that move goods across state or international borders. So cargo loaders and their supervisors in Atlanta would not qualify. Worse still, the First and Ninth Circuits have stated yet other tests. And cargo loaders and their supervisors wouldn't qualify under those approaches either, because they do not move goods or people on even an intrastate leg of an interstate journey. They put luggage on planes and take it off. The Seventh Circuit here short-circuits all these analyses, expanding the reach of § 1 far beyond what Congress intended, by simply declaring that cargo loading *is* transportation.

A. The courts of appeals disagree about the scope of § 1's residual clause.

1. The Fifth and Eleventh Circuits require workers to transport goods or passengers across borders to fall within the § 1 exemption.

Unlike the Seventh Circuit, the Fifth and Eleventh Circuits both limit § 1's residual clause to those

classes of workers who transport goods or passengers across state or international lines.

a. Taking its cue from this Court, the Fifth Circuit limits § 1's residual clause to those workers "actually engaged in the movement of goods in interstate commerce," *Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207, 209 (5th Cir. 2020) (quoting *Circuit City*, 532 U.S. at 112), "in the same way that seamen and railroad workers are," *id.* at 210 (quoting *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996)). In other words, the class of workers must engage in "actual movement in interstate commerce." *Id.* at 212. In reaching that conclusion, the court rejected the Eighth Circuit's multifactor test from *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348, 352 (8th Cir. 2005), finding that it "unduly adds to the complexity of the analysis." *Eastus*, 960 F.3d at 211.

Eastus involved facts nearly indistinguishable from those here. The Fifth Circuit asked whether a supervisor of ticketing and gate agents who also handled passengers' luggage was a transportation worker under § 1's residual clause. *Id.* at 208-09. It concluded that she was not. To be sure, the supervisor was involved in getting passengers and baggage onto planes. *Id.* at 211-12. But the court found "a distinction between handling goods and moving them in Section 1 of the FAA's enumeration of seamen and not longshoremen, who are the workers who load and unload ships." *Id.* at 211. A worker who loads a plane "prepares the goods for or removes them from transportation," but she does not, without more, "engage[] in [the] aircraft's actual movement in interstate commerce." *Id.* at 212. Her role precedes movement in interstate commerce. *Id.* at 211.

b. The Eleventh Circuit followed the Fifth Circuit's lead in *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021). Favorably citing *Eastus*, *id.* at 1343, the court held that the correct test is whether the worker is both "employed in the transportation industry" and is a member of a class that actually "move[s] goods in interstate commerce" by "transport[ing] [them] across state lines," *id.* at 1346.

The workers in *Hamrick* were "final-mile delivery drivers"—that is, "drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse." *Id.* at 1340. The district court thought they fell within § 1 "because they transported goods that had traveled in interstate commerce." *Id.* at 1343-44. That reasoning, as explained below, tracks the First and Ninth Circuits' standard. *See infra* pp. 8-11.

The Eleventh Circuit disagreed, holding that *Circuit City* dictates a "narrow construction." *Hamrick*, 1 F.4th at 1349 (quoting *Circuit City*, 532 U.S. at 118). Merely carrying goods and materials that "traveled in foreign or interstate commerce" is not enough. *Id.* at 1346. Instead, the core inquiry is whether "the class of workers actually engages in the transportation of persons or property between points in one state (or country) and points in another state (or country)." *Id.* at 1350 (citing *Rittman v. Amazon.com, Inc.*, 971 F.3d 904, 926 (9th Cir. 2020) (Bress, J., dissenting)). Seamen and railroad employees "travel from state-to-state, or country-to-country, going from one place to the other." *Id.* at 1351. Although workers needn't "sail on ships" or "ride the rails" to fall within the residual clause, *id.* at 1344, workers who only make "'intrastate trips' transporting goods that have moved in interstate commerce" do not sufficiently resemble

seamen or railroad employees. *Id.* at 1351. They don't "actually engage in interstate or international commercial transportation." *Id.* The Eleventh Circuit remanded so the district court could determine whether the class of workers crossed borders. *Id.* at 1351-52.

2. In the First and Ninth Circuits, workers who personally participate in transportation, even only on an intrastate leg, may fall within the exemption.

Like the Fifth and Eleventh Circuits, the First and Ninth Circuits ask whether workers "actually transport people or goods in interstate commerce." *In re Grice*, 974 F.3d 950, 955 (9th Cir. 2020) (emphasis omitted). Unlike the Fifth and Eleventh Circuits, however, the First and Ninth Circuits do not require those workers to cross state or international lines.

a. In *Rittman*, the Ninth Circuit held that § 1 encompasses "workers employed to transport goods that are shipped across state lines," even if they carry the goods only on an intrastate leg. 971 F.3d at 910, 915-16. Workers who deliver packages locally from Amazon warehouses satisfy that rule because their intrastate transportation is "still a part of a continuous interstate transportation." *Id.* at 916. The packages do not "come to rest," because they "are not held at warehouses for later sales to local retailers." *Id.*; *accord Romero v. Watkins & Shepard Trucking, Inc.*, 9 F.4th 1097, 1100 (9th Cir. 2021) (driver who locally delivered furniture and carpet originating out of state fell within exemption).

Judge Bress dissented. In his view, a delivery worker is exempt only if he "belong[s] to a 'class of

workers' that crosses state lines in the course of making deliveries." *Rittman*, 971 F.3d at 921 (Bress, J., dissenting). Only that interpretation adheres to this Court's instruction to give the exemption "a narrow construction" and a "precise reading." *Id.* at 922 (quoting *Circuit City*, 532 U.S. at 118-19); *see id.* at 926. "[T]he interstate provenance of Amazon packages" is not enough. *Id.* at 926.

Judge Bress disagreed with the majority for two main reasons. *First*, the majority's view is atextual. The statute says nothing about "continuous interstate interpretation." But it does specifically enumerate "'seamen' and 'railroad employees'"—who typically "operate in a cross-boundary capacity." *Id.* at 927.

Second, the majority's approach creates nightmarish "problems of workability and fairness." *Id.* at 930. What is the textual basis for distinguishing between the journey a bottle of Cherry Coke takes when a customer orders it from Amazon (and receives it from an exempt last-mile driver) and the journey it takes when the customer orders it from the local pizza shop (and receives it from a non-exempt delivery driver)? *Id.* at 930-31. How has a jar of tomato sauce moved "continuously" in interstate commerce, without "com[ing] to rest," when it arrives at an Amazon warehouse in a pallet and must be unpackaged and repackaged for delivery to the customer? *Id.* at 930.

Even so, the Ninth Circuit's test is not without limits. For example, the court recently found that the § 1 exemption does not cover Uber drivers. *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 858 (9th Cir. 2021). The court started from the premise that § 1's residual clause reaches "employees who actually transport people or goods in interstate commerce." *Id.* at 861

(emphasis omitted). Uber drivers do not meet that test because they mainly make intrastate trips, even though they sometimes "cross state lines" or shuttle passengers to or from airports. *Id.* at 863. That downstream "interstate movement" is not enough, because it is not "a 'central part of the class members' job description.'" *Id.* at 865 (quoting *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801 (7th Cir. 2020)). The court contrasted the work in *Rittman* on "the last leg of a single, unbroken stream of interstate commerce coordinated by Amazon from origin to destination." *Id.* at 866. "Uber drivers are unaffiliated, independent participants in [a] passenger's overall trip, rather than an integral part of a single, unbroken stream of interstate commerce." *Id.* at 867.

b. The First Circuit reached the same conclusion about last-mile Amazon drivers in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020). The court held that the exemption reaches "workers who transport goods or people within the flow of interstate commerce." *Id.* at 13; *see id.* at 26. Last-mile Amazon drivers fit that description because they "haul goods on the final legs of interstate journeys," *id.* at 26—they are "workers moving goods or people destined for, or coming from, other states," *id.* at 22. *See also id.* at 20 (relying on precedent about "workers who were transporting goods").

c. Until the decision below, the Seventh Circuit took this view as well, likewise requiring workers to "be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Wallace*, 970 F.3d at 802 (Barrett, J.). In *Wallace*, the court held that local Grubhub food delivery drivers failed to show that "the interstate movement of goods is a central part" of their job description. *Id.* at 801,

803; *see also Capriole*, 7 F.4th at 865 (9th Cir.) (citing *Wallace* with approval). Then-Judge Barrett underscored that "the inquiry is always focused on the worker's active engagement in the enterprise of moving goods across interstate lines," as "*Circuit City* demands." *Wallace*, 970 F.3d at 802.

Then-Judge Barrett also explained the consequences of losing sight of the "transport" requirement. *Id.* Without that requirement, the statute "would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport—for example, dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy." *Id. Circuit City* forecloses that result, she stressed, by requiring "a narrow construction" limiting the residual clause's scope to the type of "work done by seamen and railroad workers." *Id.* (citing *Circuit City*, 532 U.S. at 106, 118).

3. In the Third Circuit, the exemption covers transportation workers who cross state lines or supervise those who do.

In the Third Circuit, a class of workers is exempt if it transports people or goods across state lines or supervises workers with those responsibilities.

In *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 590, 594 n.2 (3d Cir. 2004), the Third Circuit held that a "direct supervisor" of drivers who transported packages for a company engaged in interstate and international shipping fell within the § 1 exemption. The court reasoned that the supervisor was responsible for "monitoring and improving the performance of drivers" to ensure "timely and efficient delivery of

packages." *Id.* at 593. Those responsibilities made her work "so closely related [to interstate and foreign commerce] as to be in practical effect part of it." *Id.* (alteration in original; quoting *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452 (3d Cir. 1953) (en banc)). The court dismissed any "slippery slope" concerns by cabining its rule to the "direct supervisor of … drivers that transported packages." *Id.* at 594 n.2.

The Third Circuit later clarified that personal participation in transporting passengers (and not just goods) could bring a class of workers under the § 1 exemption. *Singh v. Uber Techs., Inc.*, 939 F.3d 210, 226 (3d Cir. 2019). In *Singh*, the court remanded for further discovery when confronted with allegations that at least one Uber driver "frequently transported passengers on the highway across state lines." *Id.*

Earlier this month, the Third Circuit further suggested it takes a narrower view of the § 1 exemption than the First and Ninth Circuits. In *Harper v. Amazon.com Services, Inc.*, No. 20-2614, 2021 WL 4075350 (3d Cir. Sept. 8, 2021), the court declined to decide whether last-mile Amazon drivers fall within the exemption under "the very [same] agreement at issue" in *Rittman* and *Waithaka*, *id.* at *13 (Shwartz, J., dissenting), instead finding the issue "uncertain" and remanding for the district court to assess the question of arbitrability under state law to see if the § 1 question could be avoided, *id.* at *2-3, *5 & n.8 (majority opinion). Concurring, Judge Matey opined that the Third Circuit's *Tenney* test is still too broad because it asks whether the employee is engaged in "*work so closely related to*" interstate transportation "*as to be practically a part of it*." *Id.* at *7 (Matey, J.,

concurring) (quoting *Tenney*, 207 F.2d at 453). Judge Matey would reconsider that broad standard, which leads to "hard questions" and disregards the FAA's history and text. *Id.* at *7-9. Like the Fifth and Eleventh Circuits and Judge Bress in the Ninth Circuit, he would ask instead whether "the interstate movement of goods [is] a 'central part of the class members' job description,'" *id.* at *10, and whether "the class of workers operate[s] 'in a cross-boundary capacity' the way seamen and railroad workers do," *id.* (quoting *Rittman*, 971 F.3d at 927 (Bress, J., dissenting)).

4. The Seventh Circuit here has diverged from these precedents, and expressly from *Eastus.*

In the decision below, the Seventh Circuit broke with all these precedents and expressly declined to follow the Fifth Circuit's decision on materially indistinguishable facts in *Eastus*. The crux of the court's decision was that mere loading *is* transportation. *Eastus* specifically rejects that proposition, citing the district court's decision here. *See* 960 F.3d at 211 (citing Pet. App. 24a-25a n.2, 38a-39a). *Hamrick* necessarily rejects it by requiring transportation across borders. And the Seventh Circuit's test doesn't square with the First, Third, or Ninth Circuit's tests, either, which all require actual movement of goods or people.

In the Seventh Circuit's view, Respondent fell within the § 1 exemption because "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate, too, is actual transportation." Pet. App. 10a; *see* Pet. App. 2a ("loading cargo onto a vehicle to be transported interstate is itself commerce"). The court simply declared that "this closely related work *is* interstate transportation." Pet. App. 19a (emphasis

in original). And the court made clear that it was not following *Eastus*' "logic." Pet. App. 14a. Unlike the Fifth and Eleventh Circuits, the Seventh Circuit reasoned that "[a]ctual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines." Pet. App. 10a.

B. This case is an excellent vehicle because it would have come out differently in the other courts of appeals.

The circuit conflict matters because it produces different results on the same facts, as this case shows. A4A's member airlines operate nationwide, working with employees performing identical work in every circuit. They cannot treat their employees uniformly and fairly if they must follow different rules in different circuits.

1. The Fifth and Eleventh Circuits would have found that Respondent is not a transportation worker because she merely handles cargo.

a. The analysis under the Fifth and Eleventh Circuits' tests, Judge Bress's Ninth Circuit dissent, and Judge Matey's Third Circuit concurrence is straightforward. Respondent does not move goods or people across state or international borders. Instead, just as in *Eastus*, her work precedes cross-border transportation because it involves "handling goods" but not "moving them." 960 F.3d at 211. And she can't satisfy *Hamrick*, because she doesn't transport "persons or property between points in one state (or country) and points in another state (or country)." 1 F.4th at 1350. As Judges Bress and Matey would put it, she does not "belong to a 'class of workers' that crosses state lines." *Rittman*, 971 F.3d at 921 (Bress,

J., dissenting); *see Harper*, 2021 WL 4075350, at *10 (Matey, J., concurring).

b. Respondent may contend that the Seventh Circuit distinguished *Eastus*. But that argument doesn't wash. *Eastus* would control in the Fifth Circuit, and nothing the Seventh Circuit said suggests otherwise.

First, the Seventh Circuit tried to wave away *Eastus* as involving "the parties' agreement that longshoremen were not an exempted class of workers," reasoning that *Eastus*' "logic" does not apply "without that starting point." Pet. App. 14a. But nobody thinks that airline employees *are* longshoremen or seamen.

More to the point, the Fifth Circuit did not rest its holding on that concession. Instead, only after drawing its *own* "distinction between handling goods and moving them" did the Fifth Circuit note that "Eastus *properly* conceded during oral argument that longshoremen and delivery-truck loaders are not transportation workers." *Eastus*, 960 F.3d at 211-12 (emphasis added). Based on its own logic that "Eastus' duties could at most be construed as loading and unloading airplanes," the Fifth Circuit concluded that Eastus "was not engaged in an aircraft's actual movement in interstate commerce," such that the exemption did not apply. *Id.* at 212.

Second, the Seventh Circuit suggested that *Eastus*' analysis, unlike its own, "rested on a decision interpreting the term 'seaman' under § 1 and expressly disclaiming reliance on the residual clause." Pet. App. 15a. But the Fifth Circuit squarely decided that "Eastus falls into that residual category." *Eastus*, 960 F.3d at 209. Attacking the Fifth Circuit's

reasoning doesn't change its result. It only proves the disagreement.

Third, the Seventh Circuit claimed that the Fifth Circuit held that Eastus was "not a transportation worker just because she [was] not a seaman." Pet. App. 15a. Again, nobody thinks the question is whether an airline employee *is* a "seaman." The Fifth Circuit's point was that Eastus merely loaded and unloaded planes. She didn't move goods or people in interstate commerce and so wasn't a transportation worker. *Eastus*, 960 F.3d at 211-12.

Fourth, the Seventh Circuit claimed that Eastus "did not personally load and unload cargo, and so was at least one step removed from either longshoremen or ramp supervisors like [Respondent]." Pet. App. 15a. But the Fifth Circuit said she *did*: "Eastus would herself handle passengers' luggage" when needed. *Eastus*, 960 F.3d at 208. And the Fifth Circuit accepted that Eastus also participated in loading passengers, finding that the key distinction was between handling or loading, on the one hand, and moving, on the other (and not between goods and passengers). *Id.* at 211. "[L]oading and unloading airplanes" doesn't cut it, because it doesn't constitute "actual movement in interstate commerce." *Id.* at 212.

Finally, the Seventh Circuit claimed that the Fifth Circuit's interpretation would read the residual clause "out of the statute entirely" because the clause must reach beyond seamen and railroad workers. Pet. App. 15a. But nobody disputes that other, unenumerated classes of workers, like truckers and airline pilots, qualify because they move goods and passengers across state lines and international borders. *See, e.g.*, *Int'l Bhd. of Teamsters Loc. Union No. 50 v.*

Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012) (truck drivers who "cross[ed] state lines" fell within exemption).

2. Respondent's case would also have come out differently under the First, Third, and Ninth Circuits' tests.

a. The tests set forth by the First, Third, and Ninth Circuits also would have produced a different result here. As noted, the First and Ninth Circuits ask whether the class of workers moves goods, even if that transportation is just an intrastate leg. *Supra* pp. 8-11. But Respondent's class does not "mov[e] goods or people" or "haul," *Waithaka*, 966 F.3d at 22, 26, or "transport goods," *Rittman*, 971 F.3d at 910. Nor do those workers satisfy the Third Circuit's approach in *Palcko*, because they supervise no one who transports anything. *See* 372 F.3d at 590, 593-94 & n.2.

b. Respondent may argue that the First Circuit left itself room to reach a different result in a case like hers. Unlikely.

To be sure, *Waithaka* stated that it was "not imply[ing] that the contracts of workers 'practically a part' of interstate transportation—such as workers sorting goods in warehouses during their interstate journeys or servicing cars or trucks used to make deliveries—necessarily fall outside the scope of the Section 1 exemption." 966 F.3d at 20 n.9. But that statement does not suggest a different result in this case. Cargo loaders' work is separate from, and often "precede[s]," interstate movement. *Eastus*, 960 F.3d at 211. It does not occur "during the[] interstate journey." *Waithaka*, 966 F.3d at 20 n.9. And the fact that "shipboard surgeons who tended injured sailors were considered 'seamen'" when the FAA was enacted, *New*

Prime Inc. v. Oliveira, 139 S. Ct. 532, 542-43 (2019), just reinforces the *Eastus* line. By definition, "shipboard surgeons" literally fall into the same boat as other seamen as they all transport people and goods across the water.

In any event, even assuming the First Circuit might agree with the Seventh Circuit, that only reinforces the need for this Court's intervention. The courts of appeals are split. And at least two of them—the First and Ninth Circuits—have devised a test that will only lead "to perplexing and costly factual inquiries that in turn create uncertainty as to whether a dispute is arbitrable." *Rittman*, 971 F.3d at 921 (Bress, J., dissenting). As Judge Bress put it, "[t]hat is contrary to the FAA's objective that the intended efficiencies of arbitration should not be overwhelmed by the inefficiency of litigation over whether a dispute is arbitrable." *Id.*

C. Only this Court can resolve the conflict.

This split will not resolve itself. The courts of appeals are aware of each other's decisions and simply disagree. The Seventh Circuit here rejected *Eastus*. Pet. App. 14a. The Eleventh Circuit in *Hamrick* followed *Eastus*, agreed with Judge Bress's dissent in *Rittman*, 1 F.4th at 1343, 1350, and recently denied a request for rehearing en banc claiming that its decision split with *Rittman* and *Waithaka*, *see* Pet. for Reh'g En Banc 1, 11-14, *Hamrick*, No. 19-13339 (July 13, 2021). And the Third Circuit earlier this month declined to go as far as *Rittman* or *Waithaka* on the very same Amazon agreement, *Harper*, 2021 WL 4075350, at *5-6, with Judge Matey further opining that Third Circuit precedent warranted reconsideration to bring it in line with Judge Bress's views, *id.* at *7-10 (Matey,

J., concurring). The disagreement and confusion will only worsen until this Court intervenes.

II. This Court's intervention is critical, because the disagreement creates costly confusion and disruption nationwide, especially in the commercial aviation industry.

The Seventh Circuit's approach risks substantial disruption to airline operations nationwide. The test is standardless and unpredictable, turning on the court's amorphous or even idiosyncratic sense of when a particular job responsibility "is actual transportation." Pet. App. 10a. As the petition explains, that uncertainty is costly for several reasons.

1. For starters, the circuit disagreement will "lead[] to perplexing and costly factual inquiries that in turn create uncertainty as to whether a dispute is arbitrable." *Rittman*, 971 F.3d at 921 (Bress, J., dissenting); *accord Harper*, 2021 WL 4075350, at *8 (Matey, J., concurring) ("If hard questions about the scope of the FAA arise from enjoying a six-pack, it seems fair to ask whether we are on the right road."). As the petition explains (at 28-29), many workers likely will fall within the Seventh Circuit's broad, ill-defined reading of the residual § 1 exemption, but not without a fact-intensive inquiry first. The First and Ninth Circuits' test will be costly, too: Do operators of trains or buses carrying passengers from one terminal to another perform a qualifying "intrastate leg"? And the arbitrability inquiry isn't over just because a court determines that the FAA doesn't apply. The court must then examine state law. *See* Pet. App. 20a-21a; *see also Harper*, 2021 WL 4075350, at *5-6. Those substantial litigation costs and delays undermine the purpose of arbitration. "[P]arties forgo the procedural

rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

2. The costs go beyond litigation expense and delay. They also undermine Congress' intent to give § 1's residual transportation-worker exemption "a narrow construction." *Circuit City*, 532 U.S. at 118. A4A's member airlines employ thousands of workers who do not cross state lines or move passengers or cargo on even an intrastate leg of an interstate trip. As the Fifth and Eleventh Circuits would correctly conclude, those workers do not fall within the § 1 residual exemption. In the Seventh Circuit, however, many of those employees could fall outside the FAA's coverage.

Just consider some of the jobs in the airline industry that do not involve any regular cross-border responsibilities:

Aircraft maintenance technician. These technicians service planes, doing everything from preventive maintenance and inspections to replacing and repairing parts. In the Fifth and Eleventh Circuits, they would not qualify as transportation workers. But would the Seventh Circuit think that their essential work "*is* interstate transportation"? Pet. App. 19a. What about the First Circuit, which says it has left open the question as to workers "servicing cars or trucks used to make deliveries"? *Waithaka*, 966 F.3d at 20 n.9; *see supra* pp. 17-18.

Customer assistance representative. Customer assistance representatives help check in customers' baggage at kiosks, review customers' documents, and

accept customers' self-tagged baggage. None of those responsibilities make them transportation workers in the Fifth or Eleventh Circuits, or should in the First, Third, or Ninth Circuits either. But do they satisfy the Seventh Circuit's expansive test?

Customer service representative. These representatives help customers book or rebook reservations, print boarding passes, and find alternative flight options. Is their work "closely related" enough to transporting passengers to satisfy the Seventh Circuit?

Facility maintenance technician. These technicians maintain airlines' buildings and troubleshoot electrical (including high-voltage) issues. Presumably they would not satisfy any circuit's test—although the Seventh Circuit's intangible approach leaves much room for guesswork.

Fleet service agent. Fleet service agents handle items on and off aircraft, including carts, containers, and trucks. They receive, weigh, document, and deliver cargo to and from warehouses and loading docks and transport items between terminals and aircraft. Again, the answer is clear in the Fifth and Eleventh Circuits, because these agents do not move goods across borders in interstate commerce. But the question is harder in the First and Ninth Circuits (do they perform intrastate legs?), and the Seventh Circuit's decision here portends a similar result.

Ground operations crew. The ground operations crew loads and unloads customers' bags, operates ground-based vehicles, coordinates aircraft service, helps prepare aircraft cabins for departure, and assists with ramp-service duties, including waste disposal. As usual, the answer is straightforward in

the Fifth and Eleventh Circuits, and should be in the First and Ninth Circuits as well. But does the overlap in duties here with cargo handling control in the Seventh Circuit?

Ground service equipment technicians. These technicians troubleshoot, repair, and perform preventive maintenance on ground service equipment. Presumably these technicians would not satisfy any circuit's standard, although their work is essential to airline operations.

As these descriptions show, the Fifth and Eleventh Circuits' bright-line rules are "easy to apply." *Rittman*, 971 F.3d at 928 (Bress, J., dissenting). They produce clear and predictable results and thus promote efficient airline operations. The Seventh Circuit's test—and even the First and Ninth Circuits' approach—in contrast, generates more questions than it answers.

3. The difference matters, because many airline employees are not covered by the Railway Labor Act's (RLA's) "mandatory arbitral mechanism[s]." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994) (citing 45 U.S.C. § 151 *et seq.*, §§ 181-188). Those mechanisms were designed "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" so as "[t]o avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. § 151a. To that end, the Congress sought to give carriers and their employees "complete independence … in the matter of self-organization." *Id.* But the RLA's provisions for mediation and arbitration apply to union-represented employees, *id.* § 152, and so do not

reach numerous nonunion or management employees like Respondent here, *see* Pet. 31-32.

The Seventh Circuit's broad approach creates a regulatory gap Congress did not intend. *See* Pet. 30-32. As this Court noted in *Circuit City*, "[i]t is reasonable to assume that Congress" calibrated the § 1 exemption to account for existing "federal legislation providing for the arbitration of disputes between seamen and their employers" and the anticipated "imminent" "passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes"—*i.e.*, the RLA. 532 U.S. at 121; *see also Harper*, 2021 WL 4075350, at *8-9 (Matey, J., concurring).

* * *

The Seventh Circuit's approach—and the circuit disagreement it underscores—"breed[s] litigation from a statute that seeks to avoid it." *Circuit City*, 532 U.S. at 123. Airlines will struggle to maintain the alternative-dispute-resolution procedures that help keep air travel running smoothly nationwide. Without this Court's intervention, the Seventh Circuit's test will create state-by-state variation in identical employees' terms of employment, and employees will likely view that unequal treatment as unfair. *See* Pet. 29. The consequence is likely to be the very labor-management friction and inefficiency that the RLA and FAA were designed to prevent. The Court should intervene now.

CONCLUSION

Southwest's petition should be granted.

Respectfully submitted.

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