No. 21-309

# In The Supreme Court of the United States

SOUTHWEST AIRLINES CO.

*Petitioner,*

v.

LATRICE SAXON

*Respondent.*

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

## REPLY BRIEF FOR THE PETITIONERS


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## 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 courts of appeals are split 2–1 on a question of exceptional importance: whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport goods, are interstate "transportation workers" exempt from the Federal Arbitration Act (FAA). The Seventh Circuit here said "yes" and denied Southwest's motion to compel arbitration. But the Fifth Circuit, on materially indistinguishable facts, said the opposite. *Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207, 209 (5th Cir. 2020). And in the Eleventh Circuit, only workers who cross state or international borders with people or goods in tow fit the bill. *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1348-49 (2021). Had Respondent worked in Dallas or Miami rather than Chicago, the parties would be in arbitration proceedings, not federal court.

Respondent does little to engage with these points. She doesn't even address the Eleventh Circuit's decision. And she ultimately concedes that the Fifth Circuit "did say that cargo loaders are not exempt from the Federal Arbitration Act," Opp. 19, before expressing unjustifiable hope that the "split" will "fade away on its own," Opp. 20. That won't happen. The Fifth and Eleventh Circuits both reject the Seventh Circuit's reasoning. So does Judge Bress in dissent in the Ninth Circuit. *See Rittman v. Amazon.com, Inc.*, 971 F.3d 904, 926 (9th Cir. 2020) (Bress, J., dissenting)).

Perhaps understanding the uphill battle she faces in arguing against the circuit split, Respondent devotes the first 18 pages of her brief in opposition to trying to prove that "[t]he question presented here has been resolved for nearly a century," Opp. 3, and a full "year before the Federal Arbitration Act was passed." Opp. 13.

Aside from the obvious temporal problems with Respondent's argument, the Court held only recently that the FAA's Section 1 exemption applies narrowly to "transportation workers" who are actively "engaged in" foreign or interstate commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). The Court did not define the term "transportation worker," and in the 20 years since the Court's decision, lower courts have struggled to define its scope. But the Court did make one thing clear: The definition turns not on some freewheeling inquiry into the meaning of commerce, but rather on the specific "'engaged in commerce' language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose." *Id.* Courts must read "the phrase 'any other class of workers engaged in … commerce'" as a "residual provision" appearing "after specific categories of workers have been enumerated"—*i.e.*, "seamen" and "railroad employees." *Id.* And judges faithfully following that instruction have disagreed with the Seventh Circuit's interpretation here.

In short, Respondent's claim that this Court has decided the question presented simply begs her preferred question. As Judge Bress would put it, although she "spends considerable effort examining language in other statutes," those "other statutes cannot overcome the more natural import of the FAA's text, structure, and purpose." *Rittman*, 971 F.3d at 931 (Bress, J., dissenting).

The question presented is important. The disagreement creates costly confusion and disruption nationwide, especially in the commercial aviation industry. It creates unnecessary circuit-by-circuit, state-by-state, employee-by-employee inquiries that not only undermine the purposes of the FAA but also impose unpredictable and unprecedented costs on employers and employees. Only this Court can ensure that the FAA applies to the extent Congress intended.

This case is an excellent vehicle for resolving the circuit disagreement. There is no dispute that the Fifth and Eleventh Circuits would have sent this case to arbitration. There are no jurisdictional snags, antecedent issues, or procedural problems. To be sure, the arbitration question under state law remains undecided, with the District Court closely watching the proceedings before this Court. But that will be true in most cases—with the whole point of the FAA to provide a uniform, nationwide rule relieving parties of the need to resort to state law.

The Court should grant review.

### A. There Is a 2–1 Circuit Split Over Who Qualifies As an Exempt "Transportation Worker" Under Section 1 of the FAA.

As the petition and *amici* explain, there is a clear split among the circuits over how to interpret the Section 1 exemption and the Court's application of it in *Circuit City*. Pet. 13-22; Br. of Airlines for America as Amicus Curiae 5-14 ("A4A Br."). Under the Seventh Circuit's decision below, a supervisor of cargo loaders is a "transportation worker" simply because she loads cargo. Pet. 2a, 10a, 19a. She need not "cross state lines." Pet. 10a. The Fifth and Eleventh Circuits say just the opposite. On materially indistinguishable facts, the Fifth Circuit said that a supervisor of ticketing and gate agents who also handled passengers' luggage was not a transportation worker because she did not "engage[] in [the] aircraft's actual movement in interstate commerce." *Eastus*, 966 F.3d at 212. And the Eleventh Circuit says that the Section 1 exemption is limited to workers who "engage[] in the transportation of persons or property between points in one state (or country) and points in another state (or country)." *Hamrick*, 1 F.4th at 1350 (citing *Rittman*, 971 F.3d at 926 (Bress, J., dissenting)).

**1. a.** Respondent doesn't dispute that her case would have come out differently in the Fifth or Eleventh Circuits. In fact, she doesn't even *address* the Eleventh Circuit's standard. That all but amounts

to a concession that this Court's review is required to sort out the circuit disagreement.

**b.** Respondent's only answer is to attack the Fifth Circuit's decision in *Eastus*. But her arguments only confirm that the courts are doggedly divided. *See* A4A Br. 15-17. In fact, she *admits* that "the Fifth Circuit did say that cargo loaders are not exempt from the Federal Arbitration Act." Opp. 19. Respondent's whole argument, of course, is that cargo loaders are categorically exempt from the FAA.

Respondent first says *Eastus* "did not involve 'identical workers.'" Opp. 19. She neglects to mention that "Eastus would herself handle passengers' luggage" as well. *Eastus*, 960 F.3d at 208. But Respondent does concede that "the plaintiff in *Eastus* supervised and assisted 'ticketing and gate agents,' workers who 'ticketed passengers,' tagged 'baggage and goods,' and 'placed' them 'on conveyor belts' for others to screen and load." Opp. 19 (quoting *Eastus*, 960 F.3d at 208). It's unclear why Respondent thinks that any of those responsibilities differ meaningfully from her own job of supervising and sometimes handling baggage. Pet. 3a, 9a-10a. And, of course, Respondent herself argues that there's no meaningful distinction between passengers and cargo. *See* Opp. 11 n.6.

Respondent next claims that the Fifth Circuit's "conclusion" that "cargo loaders are not exempt from the Federal Arbitration Act" "was based on the plaintiff's concession that 'longshoremen'—people

who load and unload boats—and 'delivery-truck loaders are not' exempt from the statute." Opp. 19 (quoting *Eastus*, 960 F.3d at 212). And, in her view, that "concession is obviously wrong." *Id.*

That argument misrepresents what the Fifth Circuit said, and said quite clearly. Only *after* drawing its *own* "distinction between handling goods and moving them" did the Fifth Circuit observe that "Eastus *properly* conceded during oral argument that longshoremen and delivery-truck loaders are not transportation workers." *Id.* at 211-12 (emphasis added). There's just no way to equate "properly," *id.*, with "obviously wrong."

Respondent's Hail Mary toss is to suggest that the Seventh Circuit's split with *Eastus* is "likely to fade away on its own." Opp. 20. And that's not because the decision below is the 2–1 outlier, in her view, but because "*Eastus*'s analysis is perplexing." Opp. 20. After this Court's decision in *New Prime v. Oliveira*, 139 S. Ct. 532 (2019), she says, surely the Fifth Circuit will get the message. Opp. 20.

But the Fifth Circuit decided *Eastus* more than a year after *New Prime*. And it relied on this Court's decision in *Circuit City* and this Court's precedent establishing that "seamen do not include land-based workers." *Eastus*, 960 F.3d at 212 (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 348 (1991)).

Then there's the Eleventh Circuit's inconvenient decision in *Hamrick*, decided more than two years after *New Prime*. In *Hamrick*, the Eleventh Circuit interpreted the Section 1 exemption as applying only to classes of workers that actually "move goods in interstate commerce" by physically "transport[ing] [them] across state lines." *See* 1 F.4th at 1346; *see also* A4A Br. 5, 7-8. In doing so, the Eleventh Circuit rejected the Seventh Circuit's broad interpretation of the transportation worker exemption and instead adopts *Circuit City*'s "narrow construction" and "precise reading" of Section 1, as the Fifth Circuit did in *Eastus*. *Hamrick*, 1 F.4th at 1348 (quoting *Circuit City*, 532 U.S. at 118); *see also id.* at 1343 (citing *Eastus*, 960 F.3d at 208). But Respondent says not a word about *Hamrick*.

**2.** The First and Ninth Circuits' decisions likewise confirm that the split won't go away on its own. Respondent says there is no "actual confusion" because, in her view, the First and Ninth Circuits state bright-line rules. Opp. 20. In reality, those courts' opinions reflect the very confusion and disagreement described above.

Start with *Rittman*, which resulted in a split panel. The majority held that last-mile delivery drivers are exempt because intrastate, local delivery is "part of a continuous interstate transportation." 971 F.3d at 916. Judge Bress's dissent, in contrast, explains that a delivery driver is exempt only if he "belong[s] to a class of workers that crosses state lines

in the course of making deliveries." *Id.*, at 921 (Bress, J., dissenting). Judge Bress makes the very same arguments that the Eleventh Circuit recently adopted in *Hamrick* (discussed above). *See also Hamrick*, 1 F.4th at 1350 (citing *Rittman*, 971 F.3d at 926 (Bress, J., dissenting)). In short, the Ninth Circuit has considered both sides of the split and set out both views in detail. Further percolation won't resolve that disagreement or help this Court resolve the issue.

Finally, consider the First Circuit, which recently joined with the Ninth Circuit in holding that the exemption does not cover rideshare drivers who transport passengers locally, even if trips cross state lines. *See Cunningham v. Lyft, Inc.*, Nos. 20-1373, 20-1379, 2021 WL 5149039, at *7 (1st Cir. Nov. 5, 2021); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 858 (9th Cir. 2021). Far from suggesting that the split here "will fade away on its own," Opp. 20, the First Circuit's decision in *Cunningham* emphasized three times that the FAA must be narrowly construed. 2021 WL 5149039, at *5-7. The court contrasted the Sherman Act, which "is broadly construed," with "the FAA exception at issue here," which "is narrowly construed." *Id.* at *5 (citation omitted; citing *Circuit City*, 532 U.S. at 118). The court recognized that it needed to "construe the general language of the residual phrase" in light of its enumeration of "seamen" and "railroad" employees. *Id.* at *7 (citing *Circuit City*, 532 U.S. at 115).

If anything, that language in *Cunningham* sounds like Judge Bress's dissent in *Rittman*, which criticized the majority for "spend[ing] considerable effort examining language in other statutes: the Federal Employers' Liability Act (FELA), the Clayton Act, and the Robinson-Patman Act" and ignoring "the more natural import of the FAA's text, structure, and purpose." 971 F.3d at 931 (Bress, J., dissenting). As discussed below, the circuit courts don't think that this Court resolved the disagreement over the FAA's residual exception in the 1920s.

### B. Respondent's Implausible Claim that this Court Has Already Decided the Question Presented Reflects Her Incorrect View of the Merits.

Rather than confronting the clear circuit split, Respondent claims "[r]eview is unnecessary because this Court has already answered the question presented." Opp. 13. And, she says, the Court did so "[j]ust one year before the Federal Arbitration Act was passed." *Id.*

That is not a serious argument, despite the space Respondent devotes to it. The circuit split, not to mention the forward march of time, proves just the opposite. And all the cases Respondent cites aren't FAA cases (*especially* those before the FAA was enacted), as she eventually concedes. Opp. 14. Respondent's view on the merits may be that the courts *should follow* this Court's guidance in old cases decided under different statutes. But that's an

argument on which the courts of appeals have divided, and one she can make on plenary review before this Court.

Beyond all that, this court's *actual FAA* cases prove that Respondent's merits view doesn't hold water anyway. As the Court put it in *Circuit City*, courts "must, of course, construe the 'engaged in commerce' language … with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose." 532 U.S. at 118. That task involves reading "the phrase 'any other class of workers engaged in … commerce'" as a "residual provision" appearing "after specific categories of workers have been enumerated." *Id.* Of course, that's exactly what the Fifth Circuit did in *Eastus* and the Eleventh Circuit did in *Hamrick* in deciding the question presented against Respondent by reading the Section 1 exemption to cover only those workers "actually engaged in the movement of goods in interstate commerce … in the same way that seamen and railroad workers are." *Eastus*, 960 F.3d at 209-10 (citations omitted). That means "going from one place to the other" across state or international borders. *Hamrick*, 1 F.4th at 135051. As Judge Bress put it, "other statutes" cannot "overcome the more natural import of the FAA's text, structure, and purpose." *Rittman*, 971 F.3d at 931 (Bress, J., dissenting).

Put succinctly, this Court's precedent requires reading the transportation worker exemption in the

context of the FAA—not by reference to the various other statutes Respondent discusses on page after page of her brief. The FAA's narrow exemption points to workers who take an "active" role in the movement of goods across state lines. *See Circuit City*, 532 U.S. at 115-16. As Southwest explained in its petition, the Seventh Circuit here did just the opposite. Pet. 25.

### C. These Important and Recurring Issues Warrant the Court's Review Now.

Respondent does not refute the FAA's importance, nor could she. Instead, she implausibly claims "potential disuniformity" would not cause problems. Opp. 24. But disuniformity undercuts the very purpose of the FAA, as both the petition and *amici* explain. Pet. 8-9; A4A Br. 19-23; Br. of Washington Legal Foundation as Amicus Curiae 6-15 ("WLF Br."). This is especially true in the transportation industry. A4A Br. 19-23; WLF Br. 6-15.

As this case shows, the Seventh Circuit's opinion in *Saxon* "breed[s] litigation from a statute that seeks to avoid it," *Circuit City*, 532 U.S. at 123, and in so doing creates a regulatory gap. As this Court noted in *Circuit City*, "[i]t is reasonable to assume that Congress" created the Section 1 exemption to account for existing "federal legislation providing for the arbitration of disputes" and the anticipated passage of the Railway Labor Act, *id.* at 121, which does not cover the many airline employees who are

not union-represented. *Id.* at 121. The RLA's arbitration mechanisms were designed "to provide for the prompt and orderly settlement of all disputes" so as "[t]o avoid any interruption to commerce or to the operation of any carrier. 45 U.S.C. § 151a.

Like the RLA, the FAA promotes federal interests in enforcing uniform and efficient arbitration agreements. The statute establishes a single standard favoring arbitration. If the decision below stands, national and international employers will struggle to maintain alternative dispute resolution schemes and will be forced to rely on the vagaries of state law to try to compel the very arbitration the employee agreed to. *See also* A4A Br. 19-23; WLF Br. 6-15. And, of course, many state laws are hostile to arbitration, which may result in an transportation employee falling outside the purview of arbitration altogether. Pet. 27-29; A4A Br. 20-22. Surely, this was not Congress' intent. A4A Br. 23; WLF Br. 6-12.

As the petition explained, the Seventh Circuit's regime is likely to lead to the precise labor friction the FAA was designed to prevent. Pet. 29. Without this Court's guidance, the Seventh Circuit's approach will require a circuit-by-circuit, state-by-state, employee-by-employee inquiry, in which similarly situated employees will be treated differently, with the obvious unfairness that comes from unequal treatment. Pet. 28; A4A Br. 23. Federal law must be administered with an even hand.

The enforceability of arbitration agreements is of profound legal and commercial significance, with sweeping implications for employer-employee relations in the transportation industry. A4A Br. 20-22. This Court should resolve this important question now.

### D. This Case is an Excellent Vehicle.

This case is an excellent vehicle for resolving the question presented. The Fifth and Eleventh Circuits would have found that Respondent is not a transportation worker because she merely handles cargo or supervises those who do.

Respondent nonetheless contends that "any decision from this Court will be irrelevant" because the District Court may eventually order arbitration under Illinois law. Opp. 23. Leaving aside Respondent's vigorous opposition to arbitration under state law, the record shows the District Court is monitoring this case closely for developments in this Court. Dist. Ct. Trans. 5:12-13, June 10, 2021; *see* Joint Status Rept., June 21, 2021, Dkt. 48. Should this Court grant the petition, it or the District Court could simply stay further proceedings before the District Court.

* * *

The courts of appeals are intractably divided. The Fifth and Eleventh Circuits would have compelled arbitration under the FAA if confronted

with this case. Instead, Respondent ignores the Eleventh Circuit entirely, mischaracterizes what the Fifth Circuit said, and claims that this Court resolved the question presented (notwithstanding the circuit disagreement) before Congress even enacted the FAA. Those tactics are just more delay of the sort that frustrates the FAA's objectives of predictable, prompt, and cost-effective dispute resolution. This Court should grant review.

## CONCLUSION

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

Respectfully submitted,

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