No. 21-309

IN THE
Supreme Court of the United States

SOUTHWEST AIRLINES CO.,
Petitioner,
v.
LATRICE SAXON,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF AIRLINES FOR AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Patricia N. Vercelli
Riva Parker
AIRLINES FOR AMERICA
1275 Pennsylvania Ave. NW
Washington, DC 20004

Ishan K. Bhabha
Counsel of Record
Marc L. Warren
Laurel Raymond
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
ibhabha@jenner.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Founded in 1936, Airlines for America (A4A) is the oldest and largest airline trade association in the United States. A4A represents ten passenger and cargo airlines nationwide: 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 the stable, uniform, and predictable rules necessary for efficient and safe air-transportation. The Seventh Circuit's decision below threatens that mission by imposing a malleable 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 numerous states every

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented in writing to the filing of this *amicus*.

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 benefit from uniform alternative-dispute-resolution programs to resolve their disputes efficiently. Contrary to Congress' intent, the Seventh Circuit's approach disregards those uniform programs in favor of unpredictable state-by-state inquiries. Amicus A4A thus has a very significant interest in the outcome of this case and believes its perspectives as to the practical realities of the airline industry will aid the Court in its consideration of the question presented.

SUMMARY OF ARGUMENT

This case presents an opportunity for the Court to clarify the meaning of Section 1 of the Federal Arbitration Act's (FAA) exemption from arbitration for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In resolving this question, the Court can put to rest an issue that has bedeviled the Courts of Appeals and complicated employer-employee relations in direct opposition to the goals of the FAA.

Arbitration is a vital means of resolving employer-employee disputes in the airline industry, and Congress understood as much when it passed the FAA in 1925 and extended the Railway Labor Act (RLA) to cover air transportation workers in 1936. These two acts operate in concert to provide the efficient and fair resolution of numerous employment disputes in the

aviation industry. This form of dispute resolution is critical to the industry's successful functioning, itself a major contributor to the U.S. economy.

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court instructed courts to construe the FAA's transportation worker exemption narrowly given its "explicit reference to 'seamen' and 'railroad employees,'" *id.* at 114. Nonetheless, in the decision below, the Seventh Circuit held that § 1 covers airline cargo loaders and their supervisors, like Respondent, simply because their work is "so closely related to interstate transportation as to be practically a part of it." Pet. App. 10a; *see also id.* at 19a (acknowledging that Respondent's work is not the same as transportation in interstate commerce but finding that such "closely related work is interstate transportation").

The indeterminacy of the Seventh Circuit's standard invites costly line-drawing inquiries and will result in the proliferation of unnecessary litigation from a statute meant to avoid it. The consequences of uncertainty over the meaning of § 1 are indisputable. Indeed, they are already occurring, as evidenced by the number of cases challenging the application of the FAA to various classes of workers, and the breadth of the tests circuit courts have devised to answer the concomitant questions. Not only is this confusion costly in terms of judicial and party resources, but some of the courts below, including the Seventh Circuit, have adopted broad, unclear tests that potentially sweep hundreds of thousands of workers out from FAA coverage. When federal law gives way, that still leaves

the question of arbitrability under state law. The result is at best a dizzying patchwork of rules undermining the efficiency that agreements to arbitrate are designed to promote. At worst, the result is unfairness among similarly situated employers and employees and disruption in the aviation industry, a consequence that Congress meant to prevent.

In resolving this case, this Court should clarify the scope and meaning of the FAA's residual exemption to provide much-needed predictability and stability for employers and employees alike. Consistent with the text of the FAA, the Court should adopt the Petitioner's proposed test and hold that the § 1 exemption reaches only classes of workers that actually move goods or people through the channels of foreign or interstate commerce. This clear-cut rule is not only consistent with Congressional intent; it will provide the practical certainty that is needed for the airline industry to continue its vital operations.

BACKGROUND ON THE COMMERCIAL AVIATION INDUSTRY

The U.S. aviation industry connects every aspect of modern American life. In 2019, U.S. commercial air carriers transported over 800 million people—well over twice the U.S. population—over more than 29 million square miles of U.S. airspace. Federal Aviation Administration, *FAA Aerospace Forecast, Fiscal Years 2021-2041*, at 14, https://bit.ly/3u3Z6Ij; U.S. Census Bureau, *U.S. and World Population Clock*, https://bit.ly/3HcS5bZ (last visited Jan. 26, 2022);

Federal Aviation Administration, *Air Traffic by the Numbers*, https://bit.ly/3g2pees (last visited Jan. 26, 2022) ("FAA by the Numbers"). Each day, 2.9 million passengers and their baggage fly into and out of U.S. airports. FAA by the Numbers.

The way in which air travel is emmeshed in modern life becomes even clearer when one moves beyond passenger travel. In 2020, U.S. aircrafts carried 63,000 tons of cargo *per day* through the air. If you order goods online, chances are they spent time on an aircraft in their journey to your door. If you shop at brick-and-mortar stores, it is very likely that those goods as well travelled to your location via aircraft. During 2020, air travel accounted for 30% of total U.S. imports—$708 billion—and 32% of total U.S. exports—$453 billion. Bureau of Transportation Statistics, *Air Cargo Summary Data (All) October 2002-October 2021: Summary Table of Cargo Revenue Tons Enplaned* https://bit.ly/3G8lW4c (last visited Jan. 26, 2022) (daily number derived by dividing 2020 data by 365). In short, it is nearly impossible to live in the modern world and not rely on commercial air travel.

It is hardly surprising, therefore, that aviation has a substantial impact on the U.S. economy. Aviation accounts for more than 5% of the U.S. Gross Domestic Product, contributes $1.8 trillion in total economic activity and supports nearly 11 million U.S. jobs. Federal Aviation Administration, *The Economic Impact of Civil Aviation on the U.S. Economy* 5 (Jan. 2020), https://bit.ly/3r4gvii ("FAA Economic Impact Report"). Air transportation is the 7th leading contributor to

overall productivity in the United States. *Id.* Per A4A's calculations, every additional $1 of airline revenue ties to roughly $3.78 in additional U.S. GDP, and every U.S. airline job helps support an estimated nine U.S. jobs outside the industry (calculations based on data from FAA Economic Impact Report).

Correspondingly, the operations of U.S. aviation are immense and complex. There are 19,633 airports in the United States, 5,082 of which are public. FAA by the Numbers. At any given moment, there are over 5,000 aircraft in the skies. Federal Aviation Administration, *Air Traffic by the Numbers* 9 (Aug. 2020), https://bit.ly/3u5nRnG. Across the United States, air traffic controllers handle over 45,000 flights every day. FAA by the Numbers. A plane and crew regularly begin their day in one corner of the country, spend it in another, and end it in a third.

Keeping this operation running smoothy and safely relies on myriad workers spread among a wide range of roles. Though some of the jobs central to U.S. commercial aviation happen in the air, most airline employees work on the ground. Airlines employ customer service agents, who work at airports checking in customers and handling baggage at ticket counters and gates; operations agents who take tickets before passengers board the plane and monitor and adjust the proper weight and balance of the aircraft; customer representatives, who work the phones and make reservations and changes; mechanics who ensure that the machinery and technology remain fully functioning; and supervisors who ensure that this fleet of workers

keeps running smoothly—to give but a few examples. Altogether, the work of these employees has made commercial air travel the safest form of transportation. *See, e.g.*, IATA, *Aviation Safety*, https://bit.ly/3H50Chb (last visited Jan. 27, 2022).

In total, U.S. aviation directly employs 750,000 workers. According to one A4A member passenger airline, nearly 60% of their workers are employed in ground-based roles. This is consistent with industry-wide data: the average U.S. passenger aircraft, for example, supports 70-75 full time equivalent (FTE) employees. Bureau of Transportation Statistics, *Air Carrier Financial Reports (Form 41 Financial Data)*, https://bit.ly/3KLKTpD (last visited Jan. 27, 2022) (breakdown of employees derived comparing employee categories). Of these, 14% are pilots, 25% are flight attendants, 10% are maintenance, 16% fleet service (e.g., ramp/cargo workers); 17% are passenger service, and 18% are managerial, administrative, or otherwise employed. *Id.* The percentage of employees laboring entirely on the ground is even higher for cargo planes, which do not require flight attendants.

Because the industry's product is travel, the country's aviation workers are located across every state in the nation. Southwest Airlines, for example, flies to 103 domestic destinations spread across 45 of the 50 states. Southwest Media, *System Map*, https://bit.ly/3rVhReA (revised June 2021). Alaska Airlines flies to 38 states. Alaska Airlines, *Cities Served*, https://bit.ly/3KKQP26 (last visited Jan. 26, 2022). United Airlines serves 252 United States airports.

United, *Newsroom Corporate Fact sheet*, https://bit.ly/32D3SkY (last visited Jan. 26, 2022). JetBlue flies to destinations in 33 states. JetBlue, *Destinations: United States*, https://bit.ly/3G5PGP9 (last visited Jan. 26, 2022). Hawaiian Airlines flies between 10 states. Hawaiian Airlines, *North America*, https://bit.ly/3Ayekqm (last visited Jan. 26, 2022).

Altogether, A4A's member airlines serve every state in the nation; a single airline will employ ground-based workers across numerous states. The variation does not end there. Single states house airports that range in size from massive international hubs to regional mainstays. Georgia, for example, is home to Hartsfield-Jackson Atlanta International Airport (ATL), which is the United States' busiest airport with tens of millions of enplanements per year, and also to seven other commercial airports that range from just over one million enplanements to just over ten thousand per year. *Airports in Georgia: Primary Commercial Airports in Georgia*, AirportFlyer.com, https://bit.ly/3rQD8Gk (last visited Jan. 26, 2022). Airlines regularly fly connection flights between large hubs like ATL and regional airports, both within their state and across state lines. Delta's operations in ATL, to give one example, are by necessity far different from their operations at Burlington International Airport in Burlington, Vermont.

And even within one airport, traffic varies depending on the day of the week and the time of the year. The busiest day for passenger travel is Friday; the least busy is Saturday—and it is no secret that travelling

the day before Thanksgiving is far different than travelling on any given Wednesday. A4A's member airlines thus face complex staffing choices and require a dynamic staffing model that is sufficient to meet variable customer demands, all the while keeping air travel safe and on time.

ARGUMENT

I. Congress Has Recognized The Importance Of Arbitration For Labor Disputes In The Aviation Industry.

Congress has long recognized how important it is that airlines, as with other essential transportation employers, be able to resolve labor disputes efficiently and fairly through arbitration. Arbitration features "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). These attributes of arbitration are particularly important given the complexity of aviation operations and the centrality of aviation to the nation's economy.

The FAA, enacted in 1925, "seeks broadly to overcome judicial hostility to arbitration agreements." *Cir. City Stores*, 532 U.S. at 118 (quotation marks omitted). Though the FAA exempts "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," this carve-out does not represent a policy against arbitration for transportation workers. Far from it. As this Court noted in *Circuit City Stores*, 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"—namely the Railway Labor Act (RLA), enacted in 1926. 532 U.S. at 121; *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019) (noting that as of the adoption of the FAA, "Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers"). A closer examination of these two statutes makes clear Congress's desire for the broad use of arbitration in the aviation industry.

A. The RLA Reflects A Congressional Preference For Arbitration Of Labor Disputes In The Aviation Industry.

In 1936, Congress extended the RLA to cover air carriers and their employees. Railway Labor Act, Pub. L. No. 74-487, ch. 166, 49 Stat. 1189 (1936) (codified at 45 U.S.C. § 151 *et seq.*); *see also Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 685 (1963) (explaining that the "general aim" of extending the RLA to cover the aviation industry "was to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry"). As this Court has recognized, "[r]ailway (and airline) labor disputes typically present problems of national magnitude. A strike in one State often paralyzes transportation in an entire section of the United States, and transportation labor disputes frequently result in simultaneous work stoppages in

many States." *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969) (footnote omitted); *see also Bhd. of Locomotive Eng'rs & Trainmen (Gen. Comm. of Adjustment, Cent. Region) v. Union Pac. R.R. Co.*, 879 F.3d 754, 755 (7th Cir. 2017) ("No one wants to see the nation's transportation network brought to a standstill because of labor conflict.").

The aviation industry, and the country writ large, have experienced first-hand the wide-reaching results of protracted labor disputes between management and employees in the commercial aviation industry. When employers are locked in disputes with employees, air travel does not go smoothly—and when air travel does not go smoothly, planes do not fly on time, or fly at all. Disputes can impact aircraft safety and the U.S. economy. In 2019, delays in the U.S. commercial airline industry cost the United States $33 billion dollars. Federal Aviation Administration, FAA APO-100, *Cost of Delay Estimates: 2019* (2020), https://bit.ly/3KOws3W.

Congress enacted the RLA "to bring about stable relationships between labor and management" in the transportation industry. *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 40 (1957). At the "heart" of the RLA is the duty "to settle all disputes … to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." *Bhd. of R.R. Trainmen*, 394 U.S. at 378 (quoting 45 U.S.C. § 152). Accordingly, the RLA establishes a

"comprehensive framework for resolving labor disputes" featuring "mandatory arbitral mechanism[s] for the 'prompt and orderly settlement'" of disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (quoting 45 U.S.C. § 151).

The RLA establishes two different dispute-resolution schemes, one for so-called "major disputes" and one for so-called "minor disputes." In both types of disputes, the RLA reflects a strong preference for arbitration. Major disputes relate to "'the formation of collective agreements or efforts to secure them,'" while minor disputes arise "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Consol. Rail Corp. v. Ry. Lab. Execs.' Ass'n*, 491 U.S. 299, 302 (1989) (quotation marks omitted). For major disputes, parties must engage in bargaining and mediation before the National Mediation Board, but if that fails, the RLA requires that the Board "as its final required action…to induce the parties to submit their controversy to arbitration." 45 U.S.C. § 155. For minor disputes, the preference for arbitration is even stronger. Minor disputes are subject to "compulsory and binding arbitration" before an adjustment board, which has "exclusive jurisdiction." *Consol. Rail*, 491 U.S. at 303-04. "Judicial review of the arbitral decision is limited." *Id.* at 304.

B. Expanding The FAA's Transportation Worker Exemption Creates A Regulatory Gap Congress Did Not Intend.

The RLA applies only to the transportation industry's union-represented employees—and so does not reach the nonunion or management employees like Respondent here. Were respondent a ramp *agent* as opposed to a ramp *supervisor*, her claims would indisputably be subject to mandatory arbitration as a "minor dispute" under the RLA. The FAA closes the gap: upon promotion to supervisor, Saxon signed an alternative dispute resolution agreement to submit to individual arbitration and became subject to the FAA. Pet. App. 26a.

Within the transportation industry, arbitration is the rule by Congressional design. Respondent is asking to be the exception. In so doing, she asks the Court to pry open a regulatory gap Congress never intended. Construing § 1's exemption too broadly creates myriad problems of workability and fairness, as the facts of this case alone make clear. "Ramp supervisors and ramp agents alike spend a significant amount of their time engaged in physically loading baggage and cargo onto planes." Pet. App. 10a. Because the Seventh Circuit believes "that cargo-loading work is interstate or foreign commerce," it held that Saxon would be exempt from mandatory arbitration of her dispute under the FAA. Yet the employment disputes of the ramp agents she works alongside—whose job is *actually* loading the cargo—*are* subject to mandatory arbitration under the

RLA. *See* Pet. App. 9a (explaining that the act of cargo loading "is officially the role of the ramp *agents*, not the supervisors"); *see also Crooms v. S.W. Airlines Co.*, 459 F. Supp. 3d 1041, 1046-47 (N.D. Ill. 2020) (holding that in a different dispute with Southwest that began when she worked as a ramp agent, Saxon was "represented by the Union" and therefore subject to arbitration under the RLA, and also noting that the complained-of conditions were the same for ramp agents and supervisors). Yet the Seventh Circuit leaves open the question of "whether supervision of cargo loading alone would suffice." Pet. App. 10a. Under this reasoning, Saxon is exempt from arbitration *only* because she sometimes does the *very same work* as employees for which Congress expressly provided compulsory arbitration. This is the very definition of treating similarly situated employees differently.

Not only would weakening the FAA create different treatment for employees based on a job title as opposed to the tasks they perform, but it would also lead to differential treatment based on state of residence. Airline employees covered under the FAA sign substantially similar arbitration agreements, regardless of the state in which they work. But when workers are exempt from the FAA, the inquiry over arbitrability does not end there—instead, courts and litigants must turn to difficult choice-of-law questions, a panoply of state arbitration statutes and, depending on the claim, state employment laws. Indeed, this Court has recognized that the benefits of arbitration agreements "may be of particular importance in employment litigation" because of "the difficult choice-of-law questions that are often

presented in disputes arising from the employment relationship…and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others." *Cir. City Stores*, 532 U.S. at 123 (citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 149 (2001) for its explanation of possible "choice-of-law problems" presented by state laws affecting administration of Employment Retirement Income Security Act of 1974 plans). For the airline industry, expanding the FAA's residual exemption would result in a dizzying array of litigation, substantial litigation costs for airlines and employees alike, and the risk that similarly situated employees would be treated differently based on geographic accident.

Congress did not intend this result. The residual exemption to § 1, as a carve-out to a liberal arbitration scheme, ought to "be afforded a narrow construction," as this Court has previously instructed. *Cir. City Stores*, 532 U.S. at 113. Anything else will disrupt employers' carefully crafted arbitration procedures, create distinctions without differences between employees, and subvert Congress's balanced, uniform protections for the nation's transportation industry.

II. Clear And Uniform Rules Are Critical To Realizing The Benefits Of Arbitration For The Commercial Aviation Industry.

Just as it is critical that § 1 of the FAA "be afforded a narrow construction," it must also be given a "precise reading." *Cir. City Stores*, 532 U.S. at 118-19.

Amorphous inquiries into whether a dispute is arbitrable "call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Cir. City Stores*, 532 U.S. at 123 *(*quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S 265, 275 (1995)).

Indeed, various circuit judges have already warned of the undesirable consequences of misguided, fact-specific tests. In an earlier Seventh Circuit case, then-Judge Barrett underscored that without a focus on "the worker's active engagement in the enterprise of moving goods across interstate lines," as "*Circuit City* demands," 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." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020).

Other judges have likewise recognized the dangers of a broad and unbounded test that could sweep in thousands if not millions of workers and requires "perplexing and costly factual inquiries that in turn create uncertainty as to whether a dispute is arbitrable." *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 921 (9th Cir. 2020) (Bress, J., dissenting), *cert. denied*, 141 S. Ct. 1374 (2021). In an increasingly global marketplace where nearly every product contains, at the very least,

component parts that crossed state or country lines at some point, failing to adhere to the text of § 1 invites questions that are "more a matter of metaphysics than legal reasoning" and which "have no right answer, at least according to the tools available to lawyers and judges." *Id.* at 937 (Bress, J., dissenting); *see also Harper v. Amazon.com Services, Inc.*, 12 F.4th 287, 298-99 (3d Cir. 2021) (Matey, J., concurring) (explaining that in an "increasingly borderless commercial world," the breadth and corresponding uncertainty of the Third Circuit's standard "seems likely to stump both district courts and litigants").

Malleable standards "will inevitably mean more complex civil litigation over the availability of a private dispute resolution mechanism that is supposed to itself reduce costs," a result that is directly "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." *Rittman*, 971 F.3d at 921, 937 (Bress, J., dissenting). Without course correction, the route ahead will be costly and inefficient for litigants and courts alike.

A. The Seventh Circuit's Test Injects Uncertainty Into The Industry And Creates An Exception That Swallows The Rule.

Instead of a "precise" and "narrow" construction, the Seventh Circuit's interpretation of § 1 is costly, fact-intensive and leaves unclear which of the airline

industry's myriad workers fall into the FAA's residual transportation worker exemption. *Cir. City Stores*, 532 U.S. at 113, 118-19.

The Seventh Circuit suggests that an employee is a "transportation worker" for the purpose of this clause so long as their work is "closely related" enough to interstate commerce that it "*is* interstate transportation." Pet. App. 19a. (emphasis added). Under its reasoning, because Respondent's work "both immediately and necessarily precedes" interstate transportation, it is *itself* interstate transportation—and Respondent is exempt from the FAA. Pet. App. 19a. This "know it when we see it" test is standardless and unpredictable, turning on a court's sense of when a job that does not actually transport goods or passengers in interstate commerce nonetheless "is actual transportation." Pet. App. 10a.

The impossible nature of the line-drawing exercise the Seventh Circuit requires is readily apparent when considering some of the many types of workers that airlines employ.

Customer Service Agents, for example, take tickets at the jetway before passengers board the plane. Sometimes, as in *Eastus v. ISS Facility Services, Inc.*, 960 F.3d 207 (5th Cir. 2020), they are referred to as gate or ticketing agents. Nomenclature aside, these employees may also help load baggage and monitor and adjust the proper weight and balance of the aircraft. Their work "immediately and necessarily" precedes the interstate transportation of goods, and like ramp agent

supervisors, they sometimes assist with loading the plane. *See Eastus*, 960 F.3d at 208 (describing the work of Heidi Eastus, a gate agent supervisor, as "supervis[ing] 25 part-time and 2 full-time ticketing and gate agents" who "ticketed passengers, accepted or rejected baggage and goods, issued tags for all baggage and goods, and placed baggage and goods on conveyor belts to transport for additional security screening and loading," and as necessary, "would herself handle passengers' luggage"). The Seventh Circuit insists that just because airline ramp supervisors are considered transportation workers "does not necessarily mean that the work of a ticketing or gate agents [sic] qualify [as well]." Pet. App. 19a. Yet simply because the Seventh Circuit says so in *dicta* does not make it so. Disputes over these types of line-drawing exercises will proliferate given the size of the aviation industry causing substantial costs to courts and airlines alike.

Customer assistance representatives help check in customers' baggage at kiosks, review customers' documents, and accept customers' self-tagged baggage. Again, their work "necessarily precedes" the movement of planes across the border. Are they "transportation workers" under the FAA?

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. Do their duties overlap with the duties of employees who have cargo

handling control such that they would fall into the exemption in the Seventh Circuit?

Aircraft maintenance technicians service planes, doing everything from preventive maintenance and inspections to replacing and repairing parts. Would the Seventh Circuit think that their work "is interstate transportation"? Pet. App. 19a. Certainly, they are an "essential" part of the transportation of the goods on board, and in many cases, their work "immediately and necessarily precedes the moment the vehicle and goods cross the border." *Id.* But mechanics do not travel in interstate commerce themselves in their professional capacity, nor do they transport passengers. How the Seventh Circuit would categorize their position is simply unclear.

Ground service equipment technicians troubleshoot, repair, and perform preventive maintenance on ground service equipment. Though unlike the aircraft mechanics, they do not work on the actual vehicle that crosses borders, nonetheless their work is essential to airline operations and without them, no planes could safely take off or land. Is their work any less "closely related" to transportation?

Facility maintenance technicians maintain airlines' buildings and troubleshoot electrical (including high-voltage) issues. As with ground service equipment technicians, their work enables, and is essential to, aircraft travel and the commerce it supports. Do they fall into the exemption under the Seventh Circuit's approach? Likely not, but will

airlines be forced to contend with an employee-by-employee inquiry into each task a technician performed to determine whether disputes can be arbitrated?

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. These agents do not move goods across borders in interstate commerce—but their job does essentially involve "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate." Pet. App. 10a. Are they transportation workers under the Seventh Circuit's test—or is there a distinction between fleet service agents and ramp cargo loaders such that one's work "*is* transportation" in the way that the other's is not?

The uncertainty of this standard makes it extremely likely that similarly situated employees will be treated differently in different places. Suppose that the Western District of Wisconsin decides that in addition to ramp supervisors like Respondent here, the work of aircraft mechanics is "closely related" enough to interstate commerce that it "is interstate transportation," while the Southern District of Indiana disagrees? Should an airline litigate the disputes of their aircraft mechanics at Dane County Regional Airport in Madison in the courts, but arbitrate the disputes of employees in the same job description who work at Indianapolis International Airport? Or, what if the disagreement arises within the District of

Massachusetts? Where does that leave relations between aircraft mechanics at Boston's Logan Airport versus the mechanics in Indianapolis—though both sets of mechanics may do the same job, for the same airline, at large air travel hubs? *See, e.g.*, *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 20 & n.9 (1st Cir. 2020) (reserving the question of whether workers are "practically a part" of interstate transportation such as workers "servicing cars or trucks used to make deliveries" fall under the FAA's § 1 exemption), *cert. denied*, 141 S. Ct. 2794 (2021).

Moreover, though the Seventh Circuit insists that its test evaluates "the broader occupation, not the individual worker," Pet. App. 5a, it in fact requires individualized assessment for each employee. Under its reasoning, Saxon is exempt from arbitration because she periodically loads and unloads cargo, even though it is not in her job description as a supervisor. Pet. App. 9a-10a. Would this also be the case for airline ramp supervisors at a less busy airport, where an airline ramp supervisor may not be required to pitch in and handle cargo, the way they are at Chicago's Midway airport—which bills itself as one of the world's "Busiest Square Miles"? Midway Airport, (@fly2midway), Instagram, https://bit.ly/340zce7 (last visited Jan. 27, 2022). Would these two workers, employed by the same carrier, with identical job titles, have different entitlements to arbitration? The Seventh Circuit does not provide an answer. *See* Pet. App. 10a (reserving the question of whether "supervision of cargo loading alone would suffice"). Logically, however, its reasoning requires arbitration for one employee, but exempts the other.

As another example, consider a member of the ground operations crew at ATL, whose job might entail driving a ground vehicle that ferries bags from one plane to a passenger's connecting flight. That worker never leaves the airport, let alone the state. Under the Seventh Circuit's test, would their work be "closely related" to interstate commerce? How would a member of the ground operations crew at Burlington International Airport (BTV)—which is not typically a connecting airport—fare under the same test? Does it matter if the cargo is customer baggage, which generally consists of personal possessions, versus freight, which generally consists of goods for sale? The day-to-day job of a ground operations worker or ramp cargo loader at an airport like BTV, which services mostly passenger airlines, is very different from the job of a ground operations worker at either Ted Stevens Anchorage International Airport, a major freight hub, or an employee at Memphis International Airport, FedEx's main airport. *See* Greg Wolf, *Ted Stevens Anchorage International Airport Serves the World*, Alaska Business (Feb. 2019), https://bit.ly/3u0TXkv. The Seventh Circuit's test, in reality, requires airlines and courts to dig deep into the individual facts of each employee's workday, rather than conducting a simple review of their job description.

Further, by asking whether an employee's work is "closely related" to interstate transportation, the Seventh Circuit creates an exception with the potential to swallow the rule—particularly for companies whose business is transportation, such as airlines. Aviation employs hundreds of thousands of workers, most of

whom do not themselves cross state lines, but all of whom are essential to its work. Under the Seventh Circuit's test, one of A4A's member airlines estimated that as many of 90% of their workers—in essence, all workers who are based out of airports instead of corporate facilities—could argue that they are exempt from the FAA. The Seventh Circuit insists this is not the case, dismissing fears of "a slippery slope." Pet. App. 18a. Regardless of whether its prediction is correct, its malleable standard guarantees repeated rounds of fact-intensive litigation—burdening airlines, employees, and courts alike.

B. This Court Should Adopt Petitioner's Interpretation Of § 1's Residual Clause.

Under the Seventh Circuit's test, airlines and employers must inevitably engage in protracted litigation over whether a dispute is arbitrable before even reaching the substance of the dispute itself. Disagreements then flounder in state-by-state inquiries over arbitrability that introduce variation into identical employees' terms of employment and confound lower courts with murky-line drawing exercises. This is not the result the FAA intended. Nor is it a result beneficial to employees, airlines, or the courts.

In contrast to the Seventh Circuit, Petitioner's position returns the understanding of the residual exemption to § 1 to its text and the meaning Congress intended: § 1's exemption reaches only classes of workers that participate directly in the cross-border transportation of goods or people, which means actually

moving goods or people through the channels of foreign or interstate commerce. This standard is clear, objective, narrow, and most importantly, predictable. Rather than asking philosophically whether a worker's job "is transportation," Pet. App. 19a, prospective litigants and courts can instead look to "the extent to which…workers cross state or international lines," a standard that "is relatively easy to apply." *Rittmann*, 971 F.3d at 928 (Bress, J., dissenting). Moreover, this standard treats workers with the same job title the same, regardless of the state or size of the airport in which they work. Neither a supervisor at Midway nor a supervisor at a smaller airport crosses state lines. Nor does an aircraft mechanic at Boston's Logan airport or Indiana's Indianapolis airport, or a ground operations worker at Atlanta's major hub or Burlington's smaller operation.

And finally, this standard closes the gap in the arbitration of disputes in the transportation industry that the Seventh Circuit opened. To arbitrate disputes of ramp agents under the RLA, but to litigate the disputes of ramp supervisors *because they do the work of ramp agents*, is an absurd result that implicates basic questions of fairness in employer-employee relations. The practical result will be an exacerbation, rather than a resolution, of labor-management issues.

CONCLUSION

This Court should adoption Petitioner's interpretation of the § 1 exemption and reverse the judgment of the Seventh Circuit.

Respectfully submitted,

Patricia N. Vercelli
Riva Parker
AIRLINES FOR AMERICA
1275 Pennsylvania Ave. NW
Washington, DC 20004

Ishan K. Bhabha
Counsel of Record
Marc L. Warren
Laurel Raymond
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
Ibhabha@jenner.com

Counsel for Amici Curiae