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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curia*e briefs in cases that raise issues of concern to the Nation's business community.[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.33 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly submits *amicus* briefs in cases presenting issues of importance to the manufacturing community.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Many of *amici*'s members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with litigation in court. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation. Based on the policy reflected in the Federal Arbitration Act (FAA), *amici*'s members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

Amici therefore have a strong interest in reversal of the judgment below. The Seventh Circuit's decision holding that the FAA does not apply to workers who are several steps removed from the actual movement of goods in interstate commerce—here, a supervisor of workers who load and unload baggage onto airplanes—cannot be squared with either the text or historical context of the FAA. Moreover, the decision threatens to shrink considerably the FAA's protections, a result that will harm both businesses and workers.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly a century, the Federal Arbitration Act has embodied Congress's strong commitment to arbitration. Congress enacted the FAA in 1925 to "reverse the longstanding judicial hostility to arbitration agreements" and to "manifest a liberal federal policy favoring arbitration." *EEOC* v. *Waffle House, Inc.,* 534 U.S. 279, 289 (2002) (quotation marks omitted).

To that end, Section 2 of the FAA broadly protects arbitration agreements "evidencing a transaction involving commerce." 9 U.S.C. § 2. This Court has held

that the phrase "involving commerce" "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 277 (1995).

In recent years, plaintiffs increasingly have tried to avoid the FAA's reach by invoking a limited exemption in Section 1, which excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any *other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added).

This case presents a prime example. Respondent Saxon supervised "ramp agents," whose "primary duties include loading and unloading baggage and guiding planes to gates." Pet. App. 23a-24a (citation omitted). Saxon herself sometimes loaded or unloaded baggage. *Ibid.* But her work as a supervisor, and that of the ramp agents, never included transporting the luggage from the airport to another location, much less another location across state or national borders.

Nonetheless, Saxon resisted enforcement of her arbitration agreement by asserting that she is covered by the Section 1 exemption. The Seventh Circuit agreed, holding that Saxon's work loading and unloading baggage was sufficiently "closely related" to transportation. Pet. App. 10a, 17a.

That result, and the nebulous legal standard adopted by the court of appeals, are wrong.

Over two decades ago, this Court instructed that Section 1's exemption must be given a "narrow construction" and "precise reading." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118, 119 (2001). More recently, in addressing Section 1's reference to "contracts of employment," this Court explained that

courts must interpret the text of Section 1 based on the "ordinary meaning" of the words "at the time Congress enacted the statute." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations and quotation marks omitted). Courts must also interpret the text by reference to related provisions of the statute and the structure of the FAA. And the relevant language in Section 1—"other class of workers engaged in foreign or interstate commerce"—is further cabined by "the application of the maxim *ejusdem generis*" because it is a "residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.'" *Circuit City*, 532 U.S. at 114.

Under these principles, the phrase "class of workers engaged in foreign or interstate commerce"—at the time of the FAA's enactment in 1925—required that the work performed by the workers involve actual transportation across state or national borders. See, *e.g.*, *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337, 1350 (11th Cir. 2021) (citing *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 926 (9th Cir. 2020) (Bress, J., dissenting)). The class of workers to which Saxon belongs does not meet that requirement.

Saxon cannot avoid arbitration under the FAA for the additional and independent reason that the residual clause is limited to classes of workers whose duties *center* on interstate movement. Merely incidental crossing of state or national borders does not suffice. Then-Judge Barrett explained that, for a class of workers to perform work analogous to "seamen" and "railroad employees," "interstate movements of goods" must be "a central part of the class members' job description." *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 801 (7th Cir. 2020).

The contrary approach by the court below creates serious practical problems. If adopted, it would significantly increase litigation over whether the FAA applies to a broad and indeterminate array of workers. As a result, wide sectors of the economy could be deprived of the benefits secured by the FAA, including lower costs and greater efficiency. Still more businesses and workers will face uncertainty over whether the FAA governs their arbitration agreements. And the increased costs of litigating both the applicability of the Section 1 exemption, and, if necessary, the merits in court would be passed on in the form of decreased payments to workers or increased costs to consumers.

ARGUMENT

I. Section 1's Narrow Residual Clause Is Limited To Classes Of Workers Who Actually And Regularly Engage In Transportation Across State Or National Borders.

A. The Residual Clause Must Be Interpreted In Accordance With Its Plain Meaning When Enacted And The Structure Of The FAA.

The FAA's principal substantive provision, Section 2, provides that an arbitration agreement in "a contract evidencing a transaction *involving commerce* * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). This Court has instructed that "involving commerce" must be read "expansively" to reach all arbitration agreements within Congress's commerce power. *Allied-Bruce,* 513 U.S. at 274.

Section 1 creates a limited exception to this broad coverage, providing that the FAA's federal-law protections for arbitration agreements do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In contrast to the expansive reach of Section 2, the Section 1 exemption requires a "narrow construction" and "precise reading." *Circuit City*, 532 U.S. at 118-19.

This Court's prior decisions specify several interpretive principles that inform the proper "narrow" and "precise reading."

First, the Section 1 exemption must be interpreted based on the "ordinary meaning" of the statutory text "at the time Congress enacted the statute" in 1925. *New Prime*, 139 S. Ct. at 539 (alterations and quotation marks omitted). That reflects the "fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning * * * at the time Congress enacted the statute." *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018) (quotation marks omitted). "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Ibid.*; see also *New Prime*, 139 S. Ct. at 539 (recognizing the "reliance interests in the settled meaning of a statute").

Second, "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1888 (2019)

(quoting *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). In *New Prime*, for example, this Court looked to "a neighboring term in the statutory text" to inform its interpretation of the phrase "contract of employment" in Section 1. 139 S. Ct. at 540-41.

Third, with respect to Section 1's residual clause in particular, the Court has instructed that the clause also should be read narrowly because of "the maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City*, 532 U.S. at 114-15 (quotation marks omitted); *cf. Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1625 (2018) ("[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'") (quoting *Circuit City*, 532 U.S. at 115).

Here, the phrase "any other class of workers engaged in foreign or interstate commerce" is the third entry in a list, following the enumerated terms "seamen" and "railroad employees." 9 U.S.C. § 1. As *Circuit City* explains, the residual clause "should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." 532 U.S. at 115. In other words, the residual clause must be construed narrowly to reach only classes of workers that are similar—in terms of their engagement with foreign or interstate commerce—to the enumerated groups of "seamen" and "railroad employees."

B. The Text And Structure Of The FAA Demonstrate That Saxon Is Not Included Within A "Class Of Workers Engaged In * * * Interstate Commerce."

The ramp agents supervised by respondent Saxon, and occasionally Saxon herself, loaded and unloaded luggage on and off airplanes. For two independent reasons, that work does not qualify for the narrow Section 1 exemption.

To begin with, Section 1's exclusion encompasses only classes of workers who engage in actual transportation across state or national borders. As then-Judge Barrett has put it, engaging in foreign or interstate commerce requires "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 (emphasis added); see also *Hamrick*, 1 F.4th at 1350. Yet it is undisputed that neither ramp-agent supervisors like Saxon nor ramp agents themselves ever transport baggage across state lines in performing their work.

Section 1 also requires the crossing of state or national lines to be a "central part" of the work performed by the class of workers. *Wallace*, 970 F.3d at 801. Occasional or incidental border crossing does not qualify. That follows from what it means to be "engaged in foreign or interstate commerce" in a similar fashion to "seamen" and "railroad employees," 9 U.S.C. § 1, "whose occupations are centered on the transport of goods in interstate or foreign commerce," *Wallace*, 970 F.3d at 802.[2]

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[2] Because the ramp agents Saxon supervised sometimes handled "commercial" or "freight" cargo, Pet. App. 3a, 8a, the Court does

1. The residual clause is limited to classes of workers responsible for transporting goods across state or national borders.

Each of the tools that the Court has employed to interpret the Section 1 exemption's residual clause—the text, related provisions, and the exemption's more specific terms—point in the same direction: the residual clause requires that the class of workers as a whole actually engages in transportation "*between* points in one state (or country) and points in another state (or country)." *Hamrick*, 1 F.4th at 1350 (emphasis added) (citing *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting)).

a. At the time the FAA was enacted, "engaged" in an activity meant to be "occupied" or "employed" at it. Webster's New International Dictionary (1st ed. 1909); see also Webster's Collegiate Dictionary (2d ed. 1919) (same); The Desk Standard Dictionary of the English Language 276 (new ed. 1922) (defining "engage" as "[t]o bind or obtain by promise"). Congress's

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not have occasion in this case to address the dispute among the lower courts over whether Section 1 is limited to classes of workers who transport goods, and does not include those who transport passengers and their effects. Compare, *e.g.*, *Tyler* v. *Uber Techs., Inc.*, 2020 WL 5569948, at *5 (D.D.C. Sept. 17, 2020); *Heller* v. *Rasier, LLC*, 2020 WL 413243, at *6-9 (C.D. Cal. Jan. 7, 2020); *Kowalewski* v. *Samandarov*, 590 F. Supp. 2d 477, 484 (S.D.N.Y. 2008) (all holding that the residual clause does not apply to workers who transport passengers), with *Singh* v. *Uber Techs., Inc.*, 939 F.3d 210, 219-26 (3d Cir. 2019) (holding that Section 1 is not limited to workers who transport goods rather than passengers); *Osvatics* v. *Lyft, Inc.*, 535 F. Supp. 3d 1, 13-14 (D.D.C. 2021) (same).

use of the word "engaged" therefore focuses the inquiry on the particular activities that the class of workers is tasked with performing.

"Interstate commerce," in turn, referred to actual transportation across state lines. Black's Law Dictionary, for example, defined "interstate commerce" as "commerce between two states," specifically—"*traffic*, intercourse, commercial trading, or [] *transportation*" "between or among the several states of the Union, or from or between points in one state and points in another state." Black's Law Dictionary 651 (2d ed. 1910) (emphasis added). Another contemporaneous legal dictionary defined "interstate commerce" as "commercial transactions * * * between persons resident in different States of the Union, or carried on by lines of transport extending into more than one State." The Century Dictionary & Cyclopedia (1914).

Put together, then, to be a member of the "class of workers engaged in * * * interstate commerce" in 1925 meant to be part of a group of workers actually "employed" or "occupied" in the "traffic" or "transportation" of goods "between or among the several states." See *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting) (observing that contemporary sources confirm that to be "engaged in interstate commerce" within the meaning of that phrase at the time of the Federal Arbitration Act's enactment requires "transporting goods across state lines"); see also *Hamrick*, 1 F.4th at 1350 (reaching the same conclusion and citing Judge Bress's dissent).

Precedent confirms this common understanding of what it means to be engaged in foreign or interstate commerce. This Court has emphasized that while "'in commerce' does not, of course, necessarily have a uniform meaning whenever used by Congress," "the

phrase '*engaged in* commerce'" generally "indicat[es] a *limited* assertion of federal jurisdiction." *United States* v. *Am. Bldg. Maint. Indus.*, 422 U.S. 271, 277, 280, 283 (1975) (emphasis added); see also *Circuit City*, 532 U.S. at 115, 118 (recognizing that the term "engaged in" is far narrower than other terms relating to Congress's commerce power, such as "affecting" or "involving.").

Here, where "engaged in" is combined with a specific reference to "foreign or interstate commerce," the requirement that the class of workers be engaged in transportation across state or national boundaries is clear.[3]

b. Related provisions of the statute confirm that "engaged in foreign or interstate commerce" requires actual movement across borders. Section 1 includes several definitions before it creates the exemption at issue here—including a broad definition of "commerce." "Commerce," the provision states in pertinent part, "means commerce among the several States or with foreign nations." 9 U.S.C. § 1.

Section 2's coverage of "transactions involving commerce," 9 U.S.C. § 2, uses the defined term "commerce"—thereby incorporating Section 1's definition.

Congress could have similarly incorporated the defined term in the residual clause, by stating "any other

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[3] Saxon's effort to invoke the Section 1 exclusion suffers from an even more fundamental defect: engaging in interstate or foreign commerce requires that a worker transport something. The transfer of luggage from the tarmac onto an airplane does not constitute "transportation" as that term was commonly used in 1925. See Southwest Br. 17 (citing Black's Law Dictionary 1168 (2d ed. 1910); *United States v. Ohio Oil Co.*, 234 U.S. 548, 562 (1914)).

class of workers engaged in commerce." But Congress instead employed different language in the residual clause—"engaged in *foreign* or *interstate* commerce." 9 U.S.C. § 1 (emphasis added). That choice emphasizes the requirement of a connection between "engaged in" and "foreign or interstate commerce"—and further underlines the clause's restrictive scope. See, *e.g.*, *Collins* v. *Yellen*, 141 S. Ct. 1761, 1782 (2021) (Congress "acts intentionally" when it "includes particular language in one section of a statute but omits it in another section of the same Act"). For the reasons discussed above, the plain meaning of those terms limits the residual clause to classes of workers engaged in transportation across state or national borders.

c. The *ejusdem generis* principle further supports limiting the residual clause to classes of workers engaged in cross-border transportation. That is the type of work that Congress in 1925 understood the classes of "seamen" and "railroad employees" to perform.

At the time of the FAA's enactment, railroad employees and maritime workers routinely and typically moved goods across long distances and state or national borders. See Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 275 (2003).

For example, one study reported that in 1920, the average freight haul by railroad was 308 miles. See L.E. Peabody, *Forecasting Future Volume of Railway Traffic*, in 66 Railway Age 899, 900 (Samuel O. Dunn et al. eds., 1924); see also, *e.g.*, Thirty-Third Annual Report on the Statistics of Railways in the United States 37 (Interstate Commerce Comm., Bureau of Statistics 1933) (in 1919, the average freight haul of a Class I railroad traveled 178.29 miles).

Another study reported that the average freight ship haul shortly after the Act's enactment was 660 miles. Harold Barger, *The Transportation Industries, 1889-1946: A Study of Output, Employment and Productivity* 128 (1951).

The "typical 'seamen' and 'railroad employees'" of the 1920s thus "actually engage[d] in interstate or international commercial transportation." *Hamrick*, 1 F.4th at 1351.

In sum, the plain text of the residual clause, its relationship to other parts of the statutory text, and its link to the enumerated terms "seamen" and "railroad employees" all lead to the same conclusion: The residual clause is limited to classes of workers responsible for transporting goods across state or national borders. Because Saxon does not belong to such a class, she is not exempt from the FAA's coverage.

2. A class of workers is covered by the residual clause only if actual transportation across state or national borders is a central part of the workers' job description.

In addition, the exemption's residual clause applies only if transportation across state or national borders is *central* to the work performed by the relevant class of workers.

As then-Judge Barrett has explained, Congress viewed seamen and railroad employees as workers "whose occupations [we]re *centered* on the transport of goods in interstate and foreign commerce." *Wallace*, 970 F.3d at 802 (emphasis added); see also page 8, *supra*.

Under the residual clause, therefore, a party seeking to avoid the FAA's coverage must also "demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong." *Wallace*, 970 F.3d at 803; see also *Eastus* v. *ISS Facility Servs., Inc.*, 960 F.3d 207, 210 (5th Cir. 2020) (workers must "engage in the movement of goods in interstate commerce in the same way that seamen and railroad workers are") (quotation marks omitted).

Applying this standard, the First and Ninth Circuits have agreed, for example, that rideshare drivers (such as those who use the Uber and Lyft platforms to offer rides) do not fall within the Section 1 exemption because they overwhelmingly provide local, intrastate rides. See *Cunningham* v. *Lyft, Inc.*, 17 F.4th 244, 252-53 (1st Cir. 2021); *Capriole* v. *Uber Techs., Inc.*, 7 F.4th 854, 865-66 (9th Cir. 2021). It "cannot even arguably be said" that rideshare drivers and other local workers, unlike seamen and railroad employees, are a class of "workers primarily devoted to the movement of goods and people beyond state boundaries." *Cunningham*, 17 F.4th at 253. Or, as the Ninth Circuit similarly put it, such local workers, even if they occasionally cross state lines, stand in stark "contrast" to "seamen and railroad workers," for whom "the interstate movement of goods and passengers over long distances and across national or state lines is an indelible and 'central part of the job description.'" *Capriole* 7 F.4th at 865 (quoting *Wallace*, 970 F.3d at 803).

Limiting the residual clause to those workers whose engagement with foreign or interstate commerce mirrors that of seamen and railroad employees is not just required by the text and structure of the

FAA. It also ensures that Section 1's narrow exemption does not sweep in countless workers who engage in "incidental" interstate transportation, such as "the interstate 'transportation' activities of * * * a pizza delivery person who delivered pizza across a state line to a customer in a neighboring town." *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005) (holding that Section 1 did not exempt an account manager for a rent-to-own company who occasionally crossed the border between Georgia and Alabama in delivering furniture and other items to customers).

C. The Historical Context Of Section 1 Further Confirms Its Narrow Reach.

The context in which Congress enacted Section 1 provides strong additional support for limiting Section 1's exemption to classes of workers responsible for transporting goods across state or national boundaries—the role performed by "seamen" and "railroad employees."

This Court has recognized that "seamen" and "railroad employees" were excluded from the Act because "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers"; "grievance procedures existed for railroad employees under federal law"; "and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Circuit City*, 532 U.S. at 121 (citing, respectively, the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577).

Although "the legislative record on the § 1 exemption is quite sparse," what little there is

"suggest[s] that the exception may have been added in response to the objections of [Andrew Furuseth,] the president of the International Seamen's Union of America." *Circuit City*, 532 U.S. at 119; see also *United Elec., Radio & Mach. Workers* v. *Gen. Elec. Co.*, 233 F.2d 85, 99 (1st Cir. 1956); *Tenney Eng'g, Inc.* v. *United Elec. Radio & Mach. Workers*, 207 F.2d 450, 452 (3d Cir. 1953); Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 9 (1923) (statement of W.H.H. Platt, Am. Bar Ass'n). Furuseth argued in part that seamen's contracts should be excluded because they "constitute a class of workers as to whom Congress had long provided machinery for arbitration." *Tenney,* 207 F.2d at 452; see also Matthew W. Finkin, *"Workers' Contracts" under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 300-02 (1996) (quoting Andrew Furuseth, Analysis of H.R. 13522 (1923)).[4]

Congress's inclusion of "railroad employees" in Section 1 appeared to stem from the same concerns. Congress had previously enacted special dispute-resolution procedures for that industry, too, in response to a long history of labor disputes. Indeed, by the time the FAA was enacted, mediation and

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[4] While this Court recognized in *Circuit City* that "the fact that a certain interest group sponsored or opposed particular legislation" is not a basis for discerning the meaning of a statute, it pointed to the history as context for its conclusion that the "residual exclusion" of "'any other class of workers engaged in foreign or interstate commerce'" is "link[ed] to the two specific, enumerated types of workers identified in the preceding portion of the sentence." *Circuit City*, 532 U.S. at 120-21.

arbitration had been central features of the railroad dispute resolution process for nearly forty years.[5]

Congress thus decided to carve out narrow classes of workers so as not to "unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at 120-21. The residual category of other transportation workers was included for a similar reason. That is, Congress contemplated extending similar legislation to other categories of workers engaged in transportation across state or national lines: "Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and [certain of] their employees." *Id.* at 121.[6]

This history supports interpreting Section 1's residual clause in accordance with its plain meaning and requiring a close link to the enumerated terms that proceed it. Doing so reflects Congress's decision "to ensure that workers in general would be covered

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[5] See, *e.g.*, Act of October 1, 1888, 25 Stat. 501 (providing for voluntary arbitration); Erdman Act of June 1, 1898, 30 Stat. 424, ch. 370, §§ 2, 3 (establishing a more detailed procedure involving both mediation and arbitration); Newlands Act of July 15, 1913, 38 Stat. 103, 45 U.S.C. § 101 *et seq.* (establishing a permanent Board of Mediation and Conciliation); Title III of the Transportation Act of 1920, 41 Stat. 456, 469 (establishing a Railroad Labor Board and more detailed provisions for resolution of railroad labor disputes); see also *Gen. Comm. of Adjustment of Bhd. of Locomotive Eng'rs for Missouri-Kansas-Texas R.R.* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 328 n.3 (1943) (summarizing the "fifty years of evolution" of the railroad dispute resolution framework).

[6] As non-unionized employees, Saxon and other ramp-agent supervisors are not subject to the alternative dispute resolution mechanisms found in the Railway Labor Act. See Pet. App. 20a.

by the provisions of the FAA, while reserving for itself" the ability to regulate separately "those engaged in transportation" across state or national borders in the same manner as maritime and railroad workers. *Circuit City*, 532 U.S. at 121.

D. The Court Of Appeals Erred By Relying On The Meaning Of FELA To Support Its Broad Interpretation Of The Residual Clause.

The decision below rested heavily on broader interpretations given to "engaged in commerce" language in the Federal Employers' Liability Act of 1908 (FELA). See Pet. App. 10a, 16a-19a. For example, the court of appeals borrowed from the FELA context the notion that work carried out by classes of workers who do not actually transport anything can nonetheless be "so closely related to interstate transportation as to be practically a part of it." Pet. App. 10a (quoting *Balt. & Ohio S.W. R.R.* v. *Burtch*, 263 U.S. 540, 544 (1924)). And the court similarly borrowed from the FELA context its conclusion that a "railroad employee" was understood to include a rail worker who did not accompany the trains interstate. Pet. App. 10a, 15a-18a.

That reliance on FELA is wrong for two reasons.

First, FELA does "not share the FAA's text, 'context,' or 'purpose.'" *Rittmann*, 971 F.3d at 931 (Bress, J., dissenting); see also *Hamrick*, 1 F.4th at 1348 ("We don't give 'in commerce' or 'engaged in commerce' the same meaning it has in the other statutes just because Congress used the same terms in the Federal Arbitration Act.").

Indeed, this Court has cautioned against assuming that "statutory jurisdictional formulations neces-

sarily have a uniform meaning whenever used by Congress"—and directed courts to "construe the '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." *Circuit City*, 532 U.S. at 118 (quotation marks omitted).

The language in FELA invoked by the court below governs the reach of that statute. It provided that "[e]very common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." 45 U.S.C. § 51 (1908). The "engaging in commerce" text thus "does not appear in a residual clause at all, much less in an exception to a general coverage provision." *Rittmann,* 971 F.3d at 931-32 (Bress, J., dissenting). It instead serves the role played by the FAA's broad definition of its scope—set forth in Section 2—and is not at all analogous to an exemption from federal protection such as the residual clause.

Moreover, FELA is a "broad remedial statute" intended to protect railroad workers' substantive rights. *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 562 (1987). That is why, unlike the Section 1 exemption, which requires a "precise reading" and "narrow construction," *Circuit City,* 532 U.S. at 118, 119, the provision determining FELA's scope has long been "construed liberally," *Jamison* v. *Encarnacion*, 281 U.S. 635, 640 (1930); see also, *e.g.*, *Shanks* v. *Del., Lackawanna & W. R.R.*, 239 U.S. 556, 558 (1916).

Southwest explains (Br. 17-19), that this Court's decisions interpreting "engaged in commerce" language in the Clayton Act and Robinson-Patman Act require direct participation in interstate commerce rather than a mere "'nexus' to commerce." *Gulf Oil Corp.*

v. *Copp Paving Co.*, 419 U.S. 186, 198 (1974); see also *Am. Bldg. Maint. Indus.*, 422 U.S. at 283-85. For example, the *American Building Maintenance* Court held that "simply supplying localized services to a corporation engaged in interstate commerce" did not satisfy the Clayton Act's applicable "in commerce" requirement. *Ibid.*

Those decisions—construing "engaged in commerce" much more narrowly than FELA—further preclude any contention that FELA provides a definitive guide to interpreting the FAA's residual clause.

The different structure of Section 1 also weighs against relying on FELA to determine the meaning of "engaged in foreign or interstate commerce." As discussed above (at 11-12), Congress drew a distinction by not utilizing its defined term "commerce," and employing instead the limiting phrase "foreign or interstate commerce" in the residual clause—a distinction that does not exist in FELA. In addition, the FAA's references to "seamen" and "railroad employees" also help "give the § 1 residual clause some of its meaning" and further distinguish FELA. *Rittmann,* 971 F.3d at 931 (Bress, J., dissenting).

In sum, each of the tools the Court has employed to interpret the Section 1 exemption's residual clause—the text, related provisions, and the exemption's more specific terms—points *away* from relying on FELA.[7]

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[7] To the extent the Court concludes, contrary to our submission, that FELA cases have any relevance, it is notable that, even in the FELA context, railroads and their employees were held not to be engaged in interstate commerce under FELA when they performed intrastate work that was not integrated with an interstate trip. See, *e.g.*, *McCluskey* v. *Marysville & Northern Ry. Co.*,

Second, the Seventh Circuit's focus on who qualified as a "railroad employee" at the time of the FAA's enactment asks the wrong question for purposes of the residual clause, which instead focuses on whether the work performed by the relevant class of workers requires them "to engage in the movement of goods in interstate commerce in the same way that seamen and railroad workers are." *Eastus*, 960 F.3d at 210 (quotation marks omitted).

Reasoning exclusively by analogy to the legal definitions of the enumerated terms under other statutes also threatens incoherent results. As Southwest explains (Br. 26-27), different statutes defined "railroad employees" differently. For example, the Hours of Service Act § 1, 34 Stat. 1415, 1416 (1907), and Boiler Inspection Act § 1, 36 Stat. 913, 913 (1911), defined the term more narrowly than in the FELA context. The decision below offered no justification for picking the broadest possible meaning.

If anything, the narrower interpretation is far more harmonious with the technical meaning of "seaman," which is unambiguously narrow. In the 1920s, "seaman" was a "maritime term of art" that meant "a person * * * employed on board a vessel in furtherance of its purpose." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342, 346 (1991). By 1927, with passage of the Longshore and Harbor Workers' Compensation Act, "Congress established a clear distinction between land-based and sea-based maritime workers," such that "seamen" did not include longshoremen, who

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243 U.S. 36, 38-40 (1917); see also *Rittmann*, 971 F.3d at 932-33 (Bress, J., dissenting) (discussing other examples of pre-1925 FELA cases in which railroad employees were held not to be engaged in interstate commerce).

loaded and unloaded vessels in port. *Id.* at 347-48; see also *id.* at 348 ("Whether under the Jones Act or general maritime law, seamen do not include land-based workers."); *Eastus*, 960 F.3d at 211 ("Further, there is 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.").[8]

Even crediting the Seventh Circuit's rationale that the meaning of "railroad employees" under FELA is broad, that offers little guidance into the meaning of the *residual clause*. The meaning of "seamen" under federal maritime law is narrow, and at best those definitions therefore would point in opposite directions. The bottom line is that the text and structure of the residual clause carry the day. And they limit the residual clause to classes of workers responsible for transportation across state or national borders.

II. An Improperly Expansive Construction Of The Residual Clause Exemption Will Harm Businesses And Workers And Burden Courts.

Failing to cabin Section 1's residual clause in accordance with its plain meaning will produce three significant adverse consequences. It will generate considerable complexity and uncertainty, requiring time-consuming and costly litigation over the FAA's application—thereby undermining one of Congress's key goals in enacting the FAA. It will result in unequal

[8] Southwest explains in detail why the court of appeals erred in reasoning that land-based maritime workers could have been considered "seamen" in 1925. See Southwest Br. 24-26, 42-44.

treatment of similar workers. And it will deprive businesses and individuals from securing the benefits of arbitration protected by the FAA.

1. This Court has long recognized "Congress' clear intent, in the [Federal] Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Straightforward, easily administrable rules are therefore especially important in the context of the FAA.

Thus, the *Circuit City* Court emphasized that Section 1 should not be interpreted in a manner that introduces "considerable complexity and uncertainty * * *, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

Interpreting the residual clause in accordance with its plain meaning—requiring that the class of workers engage in transportation across state lines or national boundaries as a central part of their job descriptions—produces an easy-to-apply test. It should not be difficult or factually complex in the mine run of cases to determine whether a class of workers actually transports goods across state lines or national boundaries as a central part of their job. For example, it is clear that neither ramp agents nor ramp-agent supervisors like Saxon do so. And the same is true of countless other classes of workers whose work takes place in a single location.

The Seventh Circuit's contrary approach, however, gives rise to complicated line-drawing. See Pet. App. 10a. If intrastate work can sometimes qualify as

engagement in foreign or interstate commerce, then courts will be forced to decide the circumstances in which classes of workers who primarily (or even entirely) carry out their work within a single state are nevertheless somehow sufficiently bound up with interstate transportation to fall under the residual clause. And the court below offers no standard for making that determination.

Many other types of airline employees, for example, play roles related to "interstate and international flights," Pet. App. 9a. If gate-ramp supervisors are "engaged in * * * interstate commerce," what about the attendants in airport lounges? The baggage handlers at ticket-check-in? The mechanics who service the airplanes? What of other workers at the airport generally—such as caterers delivering meals to airplanes, shuttle-bus drivers, cleaning staff, or restaurant and kiosk staff?

As these examples illustrate, a broad interpretation of Section 1's residual clause like the one adopted below "suffers from serious problems of practical application." *Rittmann*, 971 F.3d at 936 (Bress, J., dissenting). And "[u]ndertaking such confounding inquiries in the context of the FAA is particularly undesirable when the result will inevitably mean more complex civil litigation over the availability of private dispute resolution mechanism that is supposed to itself reduce costs." *Id.* at 937 (Bress, J., dissenting) (citing *Circuit City*, 532 U.S. at 123; *Allied-Bruce*, 513 U.S. at 275).

Indeed, allowing Section 1 to sweep in classes of workers who are several steps removed from the actual interstate transportation of goods would generate countless, expensive disputes over the enforceability of arbitration agreements with workers never before

considered to be "engaged in * * * interstate commerce." Even if some of the parties' disputes are eventually compelled to arbitration, the intervening litigation over the FAA's application would severely undermine the FAA's purpose of ensuring speedy and efficient dispute resolution. And this expensive and time-consuming litigation would burden courts as well.

Further compounding the costs and delays associated with resolving the FAA's application under an overly-expansive reading of the Section 1 exemption is the risk of court-ordered discovery that threatens to drag on for months. See *Singh*, 939 F.3d at 227-28; *Golightly* v. *Uber Techs., Inc.*, 2021 WL 3539146, at *3-4 (S.D.N.Y. Aug. 11, 2021); see also *Singh* v. *Uber Techs., Inc.*, --- F. Supp. 3d ----, 2021 WL 5494439, at *14 (D.N.J. Nov. 23, 2021) (concluding, over two years after the Third Circuit's remand and after months of discovery, that rideshare drivers "are not exempt from the FAA" under the residual clause), *appeal docketed*, No. 21-3234 (3d Cir. Dec. 6, 2021).

2. The Seventh Circuit's approach also threatens to "treat[] similarly situated workers unequally." *Rittmann*, 971 F.3d at 936 (Bress, J., dissenting). Because the Section 1 exemption "is focused on classes of workers," it should be construed to avoid "the inequitable result that workers performing the same work are subject to different legal regimes." *Id.* at 937 (quotation marks and alterations omitted). Judge Bress explained why it makes little sense to treat local delivery drivers differently based on whether they work for a company responsible only for intrastate transportation of the good being delivered or for a company that handles both intrastate and interstate transportation. *Id.* at 937-38.

The Seventh Circuit's approach would create those very "inequities." *Rittmann*, 971 F.3d at 938 (Bress, J., dissenting). For example, the court suggested that the work of ramp agents could be distinguished from the ticketing and gate agents at issue in *Eastus*. Pet. App. 19a. But both "handle passengers' luggage" within the airport, *Eastus*, 960 F.3d at 208, and the Seventh Circuit offered no principled distinction between placing luggage on an airplane as opposed to placing it "on conveyor belts" for "security screening and loading," *ibid.*

Similarly unjustifiable distinctions between classes of workers are not hard to imagine. For example, the First Circuit has left open the question whether Section 1 exempts from the FAA a class of workers that "servic[es] cars or trucks used to make deliveries" of goods that have moved across state or national lines. *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10, 20 n.9 (1st Cir. 2020). But—apart from the fact that such an approach takes too narrow an approach to defining a "class of workers"—deeming that subcategory of workers to be exempt from the FAA on the theory that the workers are "'practically a part' of interstate transportation," *ibid.*, would yield inconsistent results. Some groups of auto mechanics would be exempt from the FAA while others would not, even though all of those mechanics perform exactly the same type of local work. The upshot of the Seventh Circuit's expansive interpretation of the residual clause is that courts will be forced into an endless series of inquiries that produce different results "for reasons that have nothing to do with the on-the-ground work [the workers] perform." *Rittmann*, 971 F.3d at 938 (Bress, J., dissenting).

3. The failure to give Section 1 the proper narrow construction carries another significant adverse consequence. It will deprive businesses and individuals from obtaining the benefits of arbitration secured by the FAA. Absent that uniform federal protection, whether businesses and workers can invoke arbitration agreements will turn on state law and vary state by state. And the overall result will be that more disputes are resolved in court rather than in arbitration, because the FAA's protection against state-law rules that disfavor arbitration will no longer apply.

This Court has repeatedly recognized the "real benefits" of "enforcement of arbitration provisions," *Circuit City*, 532 U.S. at 122-23, which include "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes,'" *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)); accord *Allied-Bruce*, 513 U.S. at 280 (one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted); *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

These advantages extend to agreements between businesses and workers. The Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 123. To the contrary, this Court has emphasized that the lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often

involves smaller sums of money than disputes concerning commercial contracts." *Ibid.*

Empirical research confirms these observations. Scholars and researchers agree, for example, that the average employment dispute is resolved up to twice as quickly in arbitration as in court. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights,* 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998) (average resolution time for employment arbitration was 8.6 months—approximately half the average resolution time in court); see also, *e.g.*, Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration,* NDP Analytics 5, 11-12 (2019), https://bit.ly/3GMVyxV (reporting that average resolution for arbitration was approximately 100 days faster than litigation); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?,* 58 Disp. Resol. J. 56, 58 (Nov. 2003–Jan. 2004) (reporting findings that arbitration was 33% faster than analogous litigation); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research,* 57 Stanford L. Rev. 1557, 1573 (2005) (collecting studies reaching similar conclusions).

Further, "there is no evidence that plaintiffs fare significantly better in litigation." Sherwyn, 57 Stanford L. Rev. at 1578. A 2019 study released by the Chamber's Institute for Legal Reform found that employees were *three times* more likely to win in arbitration than in court. Pham, at 5-7 (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018). The same study found that employees

who prevailed in arbitration "won approximately double the monetary award that employees received in cases won in court." *Id.* at 5-6, 9-10; see also Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?,* 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (arbitration is "favorable to employees as compared with court litigation").

Earlier scholarship likewise reports a higher employee-win rate in arbitration than in court. See Sherwyn, 57 Stanford L. Rev. at 1568-69 (observing that, once dispositive motions are taken into account, the actual employee-win rate in court is "only 12% [to] 15%") (citing Maltby, 30 Colum. Hum. Rts. L. Rev. at 47) (of dispositive motions granted in court, 98% are granted for the employer); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), https://bit.ly/3IVddnP (concluding that employees were 19% more likely to win in arbitration than in court).

Thus, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]." St. Antoine, 32 Ohio St. J. on Disp. Resol. at 16 (quotation marks omitted; alterations in original). Rather, arbitration is generally "favorable to employees as compared with court litigation." *Ibid.*; see also Maltby, 30 Colum. Hum. Rts. L. Rev. at 46.

In sum, the Seventh Circuit's overbroad reading of Section 1 would impose real costs on businesses. Not only is litigation more expensive than arbitration for businesses and workers alike, but the uncertainty stemming from the lower court's approach would engender additional expensive disputes over the enforceability of arbitration agreements with workers. And these increased litigation costs would not be borne by

businesses alone. Businesses would, in turn, pass on these litigation expenses to consumers (in the form of higher prices) and to workers (in the form of lower compensation).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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