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 *AMICI CURIAE* HISTORIANS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The *amici* are scholars of American labor and legal history, and thus have a professional interest in accurate and valid inferences from the historical record. They are James Gray Pope, Rutgers Law School; Imre Szalai, Loyola University New Orleans College of Law; and Paul Taillon, University of Auckland. Institutional affiliations are for identification purposes only. We submit this brief to help this Court answer the question presented in this case.

SUMMARY OF ARGUMENT

The Federal Arbitration Act ("FAA") exempts from its reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has concluded that in 1925, the 68th Congress enacted this FAA exemption to avoid unsettling then-established dispute-resolution schemes covering workers like "railroad employees" under Title III of the Transportation Act of 1920 and "seamen" under sections 25-26 of the Shipping Commissioners Act of 1872.

Those dispute-resolution schemes did *not* depend on whether a worker primarily loaded and

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

unloaded goods or personally crossed State or foreign borders. By 1925, the Railroad Labor Board had repeatedly decided disputes between carriers and many different types of workers, including workers who loaded and unloaded baggage or freight, as well as those whose work kept them at railroad terminals, repair shops, and other stationary facilities. This is unsurprising, because Title III's scope mirrored the Interstate Commerce Act's authority over railroad carriers with respect to any and all services connected to those carriers' transportation of passengers or property.

Similarly, shipping commissioner arbitration expressly covered "any question whatsoever between a master, consignee, agent or owner, and any of his crew" and required the post-dispute assent of both parties. By 1925, "seamen" who could assent to such arbitration included workers who in fact did not cross State or foreign borders.

Thus, by operation of the *ejusdem generis* canon, the FAA exemption's residual clause ("any other class of workers engaged in foreign or interstate commerce") includes workers who provide any service connected to the transportation of passengers or property in foreign or interstate commerce, even if such workers do not themselves cross State or foreign borders. Such workers include those who load and unload cargo as well as workers like respondent Saxon who supervise them. If the 68th Congress had intended the FAA to cover such workers, as Southwest argues, that would have disrupted the very dispute-resolution schemes for "railroad employees" and "seamen" that it had wanted to avoid unsettling.

ARGUMENT

I. Title III of the Transportation Act Covered Railroad Workers Regardless of Whether They Crossed State or Foreign Borders

This Court has inferred "that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City Stores v. Adams*, 532 U.S. 105, 121 (2001). Thus, when Congress enacted the FAA in 1925, it intended the FAA "railroad employees" exemption to prevent the FAA from disrupting the settled scope of the "grievance procedures" that then existed for railroad workers under Title III of the Transportation Act, 1920, ch. 91, §§ 300–316, 41 Stat. 456, 469-74. *Circuit City*, 532 U.S. at 121.

Accordingly, Title III's dispute resolution scheme is the contemporaneous statutory context from which to infer who the FAA's "railroad employees" exemption covered "at the time of the Act's adoption in 1925," *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *see Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (cleaned up), and thus, by operation of *ejusdem generis*, who falls within the FAA exemption's residual clause ("any other class of workers engaged in foreign or interstate commerce").

Title III's dispute-resolution scheme covered disputes between any "carrier" and its "employees" or "subordinate officials." Title III required "all carriers . . . to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the *carrier* and the *employees* or *subordinate officials* thereof." § 301, 41 Stat. at 469 (emphasis added). If railroads and workers could not resolve their disputes themselves by conference or by a board of adjustment, the Act authorized a nine-member Railroad Labor Board to hear and decide those disputes, §§ 304-307, 41 Stat. at 469-70. That Board had jurisdiction over disputes about grievances, rules, working conditions, and wages between a "carrier" and its "employees or subordinate officials." §§ 303, 307(a)-(b), 41 Stat. at 470-71.

Four features of Title III's dispute-resolution scheme indicate that the FAA's "railroad employees" exemption and, by *ejusdem generis*, the FAA exemption's residual clause, must at least cover workers who load and unload baggage or freight and their supervisors, regardless of whether those workers cross State or foreign borders.

First, the 66th Congress defined the term "carrier" in Title III to include "any carrier by railroad, subject to the Interstate Commerce Act." § 300, 41 Stat. at 469. In this way, Congress yoked Title III's coverage of carrier-worker disputes to the railroad carrier services subject to Interstate Commerce Act. At the time, that Act covered all such services connected to transporting passengers or property in

interstate or foreign commerce, including the handling of property transported.

Second, the historical record shows that the Railroad Labor Board repeatedly exercised its authority under Title III to decide disputes involving many types of railroad workers, including workers who handled baggage or freight, worked at railroad stations and other stationary facilities, and otherwise did not personally cross State or foreign borders.

Third, Title III's coverage of such workers accorded with its purpose of settling disputes to avoid strikes. Indeed, the FAA's exemption was drafted against the backdrop of the 1922 shopmen's strike and concerns that other railroad workers, such as freight-handlers, might strike as well.

Fourth, had the FAA's "railroad employees" exemption covered only railroad workers that crossed State or foreign borders, the FAA would have disrupted Title III's dispute-resolution scheme, given that Congress did not intend Railroad Labor Board decisions to be judicially enforceable.

A. Congress Yoked Title III's Coverage to the Scope of Carrier Services Subject to the Interstate Commerce Act

Whether a railroad carrier was subject to Title III's dispute-resolution scheme depended on whether that carrier "engaged in" activities that qualified as "transportation" of passengers or property by railroad under the Interstate Commerce Act. In this way, Congress yoked Title III's scope to the Interstate

Commerce Act's broad definition of "transportation," which covered the loading and unloading of any property transported.

In Title III, the 66th Congress defined the term "carrier" to incorporate by reference the terms of the Interstate Commerce Act: "When used in this title--(1) The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, ..." § 300, 41 Stat. at 469. At the time, section 1 of the Interstate Commerce Act applied "to common carriers engaged in — (a) the transportation of passengers or property . . . by railroad" in interstate or foreign commerce. § 400, 41 Stat. at 474, codified at 49 U.S.C. § 1(1) (1925).

In turn, the Interstate Commerce Act defined the term "railroad" to include not only locomotives and railroad cars—items that can move across borders—but also many facilities that could not, including facilities for loading and unloading cargo:

> all *bridges*, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad . . . and also all *switches, spurs, tracks, terminals, and terminal facilities of every kind* used or necessary in the transportation of the persons or property designated herein, including *all freight depots, yards, and grounds*, used or necessary in the transportation or delivery of any such property.

49 U.S.C. § 1(3) (1925) (emphasis added).

More importantly, the Interstate Commerce Act also defined the term "transportation" as used therein to "include" not only "all instrumentalities and facilities of shipment or carriage," but also "*all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and *handling of property transported*." *Id.* (emphasis added). This "all services" clause extended but did not exhaust the scope of the term "transportation," as implied by Congress' use of the word "include" in the definition, *see Helverling v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934); *accord Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012).

This broad definition of "transportation" controlled, even if it covered more than what the word "transportation" ordinarily meant when Congress added the "all services" clause in 1906, *see* Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584, 584; or when Congress *reenacted* that definition without change in 1920 in Title IV of the Transportation Act, *see* § 400, 41 Stat. at 475. *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) (a court "must follow" a term's statutory definition "even if it varies from a term's ordinary meaning").

Congress amended the Act's definition of "transportation" in this way in 1906 to defeat any argument that some carrier services, such as warehousing goods, might be "separable from the carrier's service as carrier," and thus not covered by the Act. *Cleveland, Cincinnati, Chicago, & St. Louis Ry. Co. v. Dettlebach*, 239 U.S. 588, 594 (1916). To "prevent overcharges and discriminations from being

made under the pretext of performing such additional services," Congress amended the term "transportation" to cover "the entire body of such services." *Id.* As a result, all such services fell within the scope of the various duties of carriers subject to the Act, 49 U.S.C. § 1(4) (1925). Those duties included "just" and "reasonable" charges for "any service" in or "in connection with" the transportation of passengers or property, *id.* § 1(5); and no "unjust discrimination" in charging or receiving compensation for "any service . . . in the transportation of passengers or property" subject to the Act, *id.* § 2.

By 1925, carrier services subject to these duties clearly included loading and unloading by a carrier, as evinced by Interstate Commerce Commission ("ICC") decisions, *see, e.g.*, *Gerard Rangone & Son v. Director General*, 80 I.C.C. 491 (1923) (alleged overcharges for loading of paper stock, in bales, at carrier's pier station); *Chicago Live Stock Exchange v. Atchison, Topeka & Santa Fe Ry. Co.*, 52 I.C.C. 209 (1919) (livestock); *Swift & Co. v. New York, New Haven & Hartford R.R. Co.*, 44 I.C.C. 481 (1917) (chilled and frozen beef); see also *Dunnage Allowances*, 30 I.C.C. 538, 543 (1914) ("We have in several instances approved of tariff provisions for additional reasonable charges for loading and unloading when done by the carrier."), and ICC regulations, *see, e.g.*, Interstate Commerce Commission, *Supplement No. 1 to Regulations for the Transportation of Explosives and*

Other Dangerous Articles by Freight and Express and as Baggage 25 (1924).[2]

Thus, when the 66th Congress defined "carrier" in Title III by referring to a subset of the carriers "subject to the Interstate Commerce Act," § 300, 41 Stat. at 469, that Congress thereby extended Title III's reach to disputes between a "carrier" and its workers over "all services in connection with," among other things, "the handling of property transported." After all, services rendered *by* the carrier are actually performed by workers, *i.e.*, the "employees" and "subordinate officials" under Title III who work for or on behalf of that carrier.

Accordingly, in 1925, Title III's scope largely mirrored the ICC's authority over carrier services connected with transporting passengers and property. Although the Railroad Labor Board had not taken itself as "bound" by the ICC's statutory interpretations, the Board had declared that those interpretations deserved "careful thought" when "interpreting identical language." *Bhd. of Locomotive Eng'rs v. Spokane & E. Ry. & Power Co.*, 1 R.L.B. 53, 56 (1920) (construing exception to definition of "carrier" in Title III). The Board concluded that the 66th Congress had "clearly intended" the Board's wage-setting and the ICC's rate-setting to be

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[2] *See also* § 418, 41 Stat. at 486 ("[t]ransportation wholly by railroad of ordinary livestock in car-load lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route"), codified at 49 U.S.C. § 15(5) (1925).

"interdependent." *Id.* at 57. Railroad carriers applying to the ICC for increases in freight rates would justify them by pointing to Board-ordered wage increases for their workers. *See*, *e.g.*, *Am. Train Dispatchers Ass'n v. Mississippi Cent. R.R. Co.*, 4 R.L.B. 35, 35 (1923). The 66th Congress had anticipated this interdependency in assigning the Railroad Labor Board's powers, *see* § 307, 41 Stat. at 471 (authorizing Board on its own to "suspend the operation of" its decision involving wage increase if it "will be likely to necessitate a substantial readjustment of the rates of any carrier"), among the other ways that Congress wrote Title III to facilitate coordination between the Board and the ICC, *see* §§ 300(5), 304(1)-(2), 307(c), 308(5), 41 Stat. at 469-72.

B. The Railroad Labor Board Regularly Decided Disputes Involving Workers Who Did Not Cross State or Foreign Borders

The Railroad Labor Board regularly read its Title III jurisdiction to decide disputes between carriers and their workers ("employees" or "subordinate officials") for all the railroad workers who provided services by or for the carrier, including those that primarily handled baggage or freight, supervised those who did, or otherwise did not cross State or foreign borders.

To illustrate, consider the Railroad Labor Board's *second* decision. There, the Board declared "just and reasonable" wage increases for the "employees" and "subordinate officials" who worked for various railroad carriers as well as "all Union

Depot and terminal companies" for which those railroad carriers owned majority stock. *Int'l Ass'n of Machinists v. Atchinson, Topeka & Santa Fe Ry.*, 1 R.L.B. 13, 14-22, 28 (1920) ("Decision No. 2").

The Board's wage increases varied by ten different worker categories and, within each category, different subclasses of workers. *Id.* at 22-27. By the Board's count, Decision No. 2 affected about "2,000,000 men, comprehended in more than 1,000 classifications." *Id.* at 16. These classifications included workers who handled baggage or freight or otherwise worked at railroad stations, *i.e.*, "[s]torekeepers, assistant storekeepers, chief clerks, foremen, subforemen, and other clerical supervisory forces;" "baggage and parcel room employees;" "[s]tation, platform, warehouse, transfer, dock, pier, storeroom, stock room, and team-track freight-handlers or truckers, or others similarly employed;" and "[s]towers and stevedores, callers or loaders, locators or coopers." *Id.* at 22-23. The Board also included a catch-all category ("Miscellaneous Employees") for "supervisors and employees practically impossible of specific classification" by providing them a wage increase for "analogous" service to another specific worker classification. *Id.* at 27.

The Railroad Labor Board thereafter extended Decision No. 2 to additional parties, *e.g.*, Addendum No. 6, 1 R.L.B. 73 (1920) (adding "Pullman Co. and the clerical and station forces thereof" as parties); issued interpretations of how that decision applied, *see e.g.*, Interpretation No. 2, 1 R.L.B. 79 (1920) (baggage and parcel room employees); and updated Decision No. 2

by declaring wage decreases for certain classes of workers, *see*, *e.g.*, *New York Cent. R.R. Co. v. Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees*, 2 R.L.B. 133 (1921); *Alabama & Vicksburg Ry. Co. v. United Bhd. of Maint. of Way Employees & Ry. Shop Laborers*, 3 R.L.B. 383 (1922).

The Board also decided many disputes where workers alleged that carriers violated Decision No. 2 and its progeny in particular cases, including disputes involving workers who handled baggage or freight or otherwise did not cross State or foreign borders. *See, e.g.*, *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Chicago Great W. R.R. Co.*, 3 R.L.B. 542 (1922) ("clerks, foremen, checkers, stowers, stevedores, and truckers now employed on the transfer platform in Olewein, Iowa, keeping records and handling excessive freight for the carrier"); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express and Station Employees v. Union Terminal Railroad Co.*, 3 R.L.B. 1075 (1922) (employees with job duties of "loading and unloading baggage and mail to and from trucks which are conveyed by tractors" were properly classified as "baggage and parcel room employees," not as "freight handlers" for purposes of Board decision applying wage decreases); *see also Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Kansas City Terminal Railway Co.*, 3 R.L.B. 237 (1922) (unauthorized wage reduction for "employees engaged in handling baggage and mail"); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. New York Cent. R.R. Co.*, 3 R.L.B. 311 (1922) (wage dispute over proper classification of "station helpers", whose duties varied and but included "receiving, delivering,

checking, and unloading of freight and handling bills of lading, delivery slips, etc., and other related work"); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Am. Ry. Express Co.*, 3 R.L.B. 76, 77 (1922) (denying employee challenge of unpaid ten-day suspension "for alleged neglect of duty in having failed to unload a shipment of freight from a car").

The Board also decided disputes where the workers involved had primarily supervisory duties, because such workers often counted as "subordinate officials" under Title III. The 66th Congress had directed the ICC to issue regulations to designate the workers that counted as "subordinate officials" under Title III. § 300(5), 41 Stat. at 469. By 1925, that regulation covered (1) "traveling auditors engaging in auditing station accounts, checking transportation and other papers;" (2) claims agents; (3) foremen, supervisors and roadmasters; (4) train dispatchers; (5) "civil, mechanical, electrical and other technical engineers;" (6) yardmasters; (7) storekeepers; and (8) supervisory station agents with "wholly supervisory" duties that excluded "routine office work," *i.e.*, "work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen, or similar routine duties." *Regulations Designating the Classes of Employees That Are to be Included within the Term "Subordinate Officials" Under Title III of the Transportation Act, 1920*, Ex Parte No. 72, 5 R.L.B. 947, 947-48 (1924). As this ICC regulation makes plain, "subordinate officials" under Title III covered classes of workers who did not typically cross State or foreign borders, including workers who primarily supervised others.

In turn, the Railroad Labor Board routinely decided disputes between carriers and their "subordinate officials." *See*, *e.g.*, *Alabama & Vicksburg Ry. Co. v. Am. Train Dispatchers Ass'n*, 3 R.L.B. 121 (1922); *Baltimore & Ohio Chicago Terminal R.R. Co. v. R.R. Yardmasters of Am.*, 3 R.L.B. 765 (1922). For example, in setting wage rates, the Board explained that it had intended the words "'foremen,' 'supervisor,' etc." in its worker classifications to apply to the set of workers designated as "subordinate officials" by the ICC. *Int'l Ass'n of Machinists*, 1 R.L.B. at 28. This also included a wage dispute that turned on whether a ferry company's baggage-room foremen—who *supervised* employees handling baggage to and from the baggage room—should be treated like "baggage and parcel employees" or like "foremen, subforemen, or other clerical supervisory forces" for purposes of Board decisions on wage rates. *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. S. Pac. Co. (Pac. Sys.)*, 3 R.L.B. 1081 (1922).

The point here is simple. While the Board often decided how to apply its work classifications for purposes of deciding wage and other disputes, these workers fell within the Board's authority to decide disputes under Title III's dispute-resolution scheme between carriers and their "employees" or "subordinate officials," even if their work, like loading and unloading baggage and freight, did not require crossing State or foreign borders.

C. Title III Covered Many Types of Railroad Workers to Advance its Purpose of Avoiding Strikes

Title III's dispute-resolution scheme covered many types of railroad workers in order to advance its purpose: to "prevent the interruption of interstate commerce by labor disputes and strikes" by encouraging "settlement without strikes." *Pennsylvania R. Co. v. U.S. R.R. Labor Bd.*, 261 U.S. 72, 79 (1923). Had the FAA's "railroad employees" exemption covered only workers crossing State or foreign borders, the FAA would have undermined that purpose.

For example, preventing strikes was partly why the Railroad Labor Board read its jurisdiction to include disputes involving workers who were nominally employed by a third-party contractor. *Ry. Employees' Dep't, A.F. of L v. Indiana Harbor Belt R.R. Co.*, No. 982, 3 R.L.B. 332, 334 (1922) ("Decision No. 982") (contracts for car-repair work). There, the Board explained that if a carrier could use third-party contractors to escape the Board's jurisdiction, it would "null[ify]" the Transportation Act's purpose, because "each and every railroad employee" could be "given like treatment. *One class of employment lends itself as readily to this method as another*." *Id.* at 337 (emphasis added). That mattered, because "[a] strike by the employees of a contractor or contractor-agent of a carrier would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier." *Id.* at 337-38. The workers in that case were railroad shopmen. They repaired and

maintained locomotives and railroad cars. They did not typically cross State or foreign borders.

As the Board's reasoning implies, the railroad workers of third-party contractors, if not covered by Title III, implicated possible strikes not just by railroad shopmen, but all types of railroad workers. Accordingly, the Board later applied or extended Decision No. 982 to declare that various workers (including freight-handlers and others who did not cross State borders), though nominally working for a third-party contractor, counted as the railroad carrier's "employees" under the Transportation Act. *See*, *e.g.*, *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 3 R.L.B. 594, 596 (1922) (handling freight); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. N.Y. Cent. R.R. Co.*, 3 R.L.B. 665, 666 (1922) (clerical and station employees at freight terminal and passenger station); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Erie R.R. Co.*, 3 R.L.B. 667, 668 (1922) (freight handling, janitor work, messenger services, mailroom and station employees, train and engine-crew callers, yard-office clerks, baggage-room employees); *Amer. Fed'n R.R. Workers v. N.Y. Cent. R.R. Co.*, 3 R.L.B. 687, 688 (1922) (handling baggage and mail in connection with Union Depot in Toledo); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. N.Y. Cent. R.R. Co.*, 3 R.L.B. 705, 706-07 (1922) (freight handling); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. N.Y. Cent. R.R.*, 5 R.L.B. 405, 406 (1924) (handling baggage and mail at Union Passenger

Station in Cleveland); *Amer. Fed'n R.R. Workers v. N.Y. Cent. R.R. Co.*, 5 R.L.B. 409, 410 (1924) (handling baggage and mail at Toledo Union Station); *see also Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Delaware, Lackawanna & W. R.R. Co.*, 6 R.L.B. 1248, 1249-50 (1925) (freight house).

These Board decisions cannot have escaped Congress's notice, because the railroads' contracting-out practices was a main reason for the national railroad shopmen's strike of 1922. Colin J. Davis, *Power at Odds: The 1922 National Railroad Shopmen's Strike* 57-59 (1997); Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 1, 16 (Dec. 1922). In that strike (July – October 1922), over 250,000 shopmen walked off the job. *See* Davis, *supra* at 67-68. Violent clashes followed, *see id.* at 83-100, as did railroad service interruptions that led to serious shortages in grain, coal, and steel, among other costs to the national economy, *see id.* at 163.

With the shopmen's strike came the risk that other railroad workers would join that strike in solidarity or on their own, thereby increasing interruptions to commerce. This worry applied no less to the members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees — the union for workers at train stations, fright-handlers, and others who also did not move across State or foreign borders. Indeed, some railroad clerks and freight handlers actually joined shopmen in striking against the Chesapeake & Ohio and Norfolk & Western railroads. "N. & W. and C. & O. Clerical Forces on Strike," *The Railway Clerk*, vol.

21, Aug. 1, 1922, at 383; "C. & O. and N. & W. Ranks A Gibraltar of Strength," *The Railway Clerk*, vol. 21, Sept. 1, 1922, at 433; "Strike Continues on C. & O. and N. & W.," vol. 21, *The Railway Clerk*, Oct. 1, 1922, at 469.

Thus, in late June 1922, when railroad workers were submitting strike ballots to their respective labor unions — including the Brotherhood of Railway and Steamship Clerks — as to whether to strike on July 1, the Railroad Labor Board began an inquiry and ordered carrier and labor representatives to appear, citing in part the worry that "a strike by *any or all* of said classes of employees threatens an interruption of traffic." Resolution, 3 R.L.B. 1137 (1922) (emphasis added). Later, in October 1922, the Board extended Decision No. 982 to cases in which the railroad had contracted out its workers to third-party contractors, and then those workers had left the contractor to go on strike. *Ry. Employees' Dep't, A. F. of L., v. W. Maryland Ry. Co.*, 3 R.L.B. 934, 938-39 (1922) (railroad shops).

A few months after the shopmen's strike ended, the FAA's reference to "railroad employees" appeared as part of bills introduced into the 67th Congress in December 1922, *see* 64 Cong. Rec. 797 (1922) (H.R. 13522); 64 Cong. Rec. 732 (1922) (S. 4214). Commerce Secretary Herbert Hoover, who months earlier had met with railroad executives and their financiers to resolve the shopmen's strike, *see* Davis, *supra* at 107-09, wrote to the Senate Judiciary subcommittee then holding hearings on the Senate bill (S. 4214) to express support and suggest an exemption: "If objection appears to the inclusion of workers'

contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *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 S. Comm. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923) (reprinting letter) (hereinafter "Hearing on S. 4213").[3]

Although these FAA bills died in committee, new versions of them, now with Hoover's proposed exemption, were filed in the 68th Congress, and Hoover endorsed those bills. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S.*

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[3] In that hearing, South Dakota Senator Sterling referred to a letter "from a constituent of mine, Mr. C.O. Bailey, a lawyer at Sioux Falls." *Hearing on S. 4213*, *supra* at 9. Bailey was a prominent South Dakota lawyer and his firm, Bailey & Voorhees, had some large railroads as clients. *See* Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* 133 (2013). Before the hearing, Senator Sterling had sent Bailey's letter to Charles Bernheimer, President of the New York State Chamber of Commerce's Arbitration Committee, and the FAA's principal booster. *Id.* In turn, Bernheimer asked Chamber counsel Julius Cohen to respond to Bailey's concerns, which included how the proposed FAA would apply to workers engaged in interstate commerce. *Id.* at 133-34. Following Bailey's suggestion, Cohen proposed an FAA exemption identical to Hoover's proposed "workers' contracts" exemption, which Bernheimer then forwarded to Senator Sterling. *Id.* at 135. Bernheimer later suggested that he had solicited or encouraged Hoover's letter to the Senate subcommittee. *See id.* at 145.

1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary, 68th Cong., 1st Sess. 20 (1924).

Thus, when Congress enacted the FAA in February 1925, it must have intended the FAA's exemption for "railroad employees" to cover even railroad workers not crossing State or foreign borders, not only because the Railroad Labor Board had repeatedly decided disputes between carriers and such workers, but also because Title III covered such workers to advance its purpose of avoiding labor strikes.

D. If the FAA Had Applied to Railroad Workers Not Crossing State or Foreign Borders, It Would Have Disrupted Title III's Dispute Resolution Scheme

Had the FAA's "railroad employees" exemption failed to cover railroad workers who loaded and unloaded baggage or freight or otherwise did not cross State or foreign borders, the FAA would have disrupted the Title III's dispute-resolution scheme.

To illustrate, suppose that contracts to work as freight-handlers subject to the Board's Decision No. 2 included pre-dispute arbitration clauses. If so, under Southwest's reading, the railroad could have used the FAA, 9 U.S.C. § 4, to have a court compel arbitration of those workers' disputes *outside* Title III's dispute-resolution scheme, because those workers loaded and unloaded freight or otherwise did not cross State or foreign borders. At the same time, the Railroad Labor Board could still decide those disputes, because those workers were the railroad carrier's "employees" or

"subordinate officials" under Title III, and because the Board did not need both parties' assent to assert its jurisdiction, *see* § 307(a)(1)-(3), (b)(1)-(3), 41 Stat. at 470-71.

Thus, the same dispute could lead to both an arbitral award and a Railroad Labor Board decision. The problem: the FAA made the arbitral award judicially enforceable, 9 U.S.C. § 9, while a Railroad Labor Board decision was *not* judicially enforceable under the Transportation Act, *see Pennsylvania R. Co.*, 261 U.S. at 79, nor subject to judicial review on the "correctness" of the Board's conclusions, *id.* at 85.

Accordingly, if the arbitrator and the Railroad Labor Board disagreed, the FAA, by making the arbitrator's award judicially enforceable, would in effect let the arbitral award supplant the (judicially unenforceable) Board's decision.

This would have completely unsettled Title III's dispute resolution scheme. Congress predicated that scheme on using the force of public opinion, not judicial enforceability, to motivate compliance with Board decisions. *See id.* at 79 (Board decision's "only sanction" is "the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding."); *id.* at 84 ("Under the act there is no constraint upon [the parties] to do what the Board decides they should do except the moral constraint . . . of publication of its decision.").

The union representing train station workers and freight handlers put it more bluntly: Labor unions would "fight to the last ditch" to keep Board decisions judicially unenforceable; if not, it would "be tantamount to denying workers the right to strike." Editorial, "Compulsion Means Slavery", *The Railway Clerk*, vol. 22, July 1, 1923, at 376. If carriers could not enforce Board decisions in court, workers kept hold of their right to strike as a way to compel carriers to obey Board decisions "favoring the workers" while the carriers already had enough power "to command the respect of the workers for every just and reasonable" Board decision favoring carriers. *Id.*

Thus, although the 68th Congress excluded "railroad employees" from the FAA to avoid unsettling Title III's dispute-resolution scheme, *Circuit City*, 532 U.S. at 121, Southwest's reading of the FAA exemption would have done just that. Therefore, by *ejusdem generis*, the FAA exemption's residual clause ("any other class of workers engaged in foreign or interstate commerce") should cover workers like respondent Saxon even if they do not cross State or foreign borders.

Southwest, however, largely ignores Title III and points mostly to the Hours of Services Act, *see* Act of March 4, 1907, ch. 2939, 34 Stat. 1415. Pet. Br. at 26, 28, 41. That Act is inapposite. In it, the 59th Congress banned railroad carriers from keeping their "employees" on duty for more than sixteen consecutive hours, § 2, 34 Stat. at 1416, but limited that ban's reach by defining "employees" therein "to mean persons actually engaged in or connected with the movement of any train." § 1, 34 Stat. at 1416. Over a

decade later, the 66th Congress did not define "employees" in this way in Title III. And the 68th Congress cannot have exempted "railroad employees" from the FAA to avoid unsettling a dispute-resolution scheme under the Hours of Services Act. That Act had no such scheme; it was enforced by the ICC and suits in federal court by U.S. district attorneys. §§ 3-4, 34 Stat. at 1416-17.

At best, Southwest suggests Title III does not matter, because in 1925, carriers and unions were dissatisfied with Title III and wanted to replace it. Pet. Br. at 46. This makes no sense, for two reasons.

First, the task here is to infer from contemporaneous statutory context who the FAA's "railroad employees" exemption covered "at the time of the Act's adoption in 1925," *New Prime*, 139 S. Ct. at 539, and what that implies, given the *ejusdem generis* canon, about the scope of FAA exemption's residual clause. In 1925, Title III was the dispute-resolution scheme that covered railroad workers. It does not matter whether many in 1925 wanted but had failed to get something else to replace it.

Second, when the 68th Congress enacted the FAA in February 1925, Title III's eventual replacement — the Railway Labor Act — was not inevitable. The Howell-Barkley bill, introduced a year earlier, had already failed to pass, largely because of strong opposition from railroad executives, the Coolidge administration, and House Republicans. *See* Jon R. Huibregtse, *American Railroad Labor and the Genesis of the New Deal, 1919-1935*, at 54-56 (2010); Robert H. Zieger, *Republicans and Labor, 1919-1929*, at 198-202 (1969). Carrier-union negotiations to

replace the Transportation Act were stalled and would remain so until shortly after March 1925. *See* Huibregtse, *supra*, at 70-72. When finally introduced, almost a year later, the bill that became the Railway Labor Act, *see* H.R. 9463, 69th Cong. (Feb. 1926), though ultimately successful, faced serious opposition in Congress, *see* Zieger, *supra*, at 207-10. Thus, although this Court described the Railway Labor Act's passage as then "imminent", *Circuit City*, 532 U.S. at 121, the 68th Congress never had such hindsight.

II. Shipping Commissioner Arbitration Covered Seamen Even If They Had Not Crossed State or Foreign Borders

Congress excluded "contracts of employment of seamen" from the FAA to avoid unsettling the then-established statutory dispute-resolution scheme for seamen's disputes under the Shipping Commissioners Act of 1872, ch. 322, §§ 25-26, 17 Stat. 262, 267.[4] *Circuit City*, 532 U.S. at 121 (citing this scheme). If the FAA exemption for "seamen" had covered only workers who in fact crossed State or foreign borders, as Southwest argues, the FAA would have disrupted that scheme. Therefore, by *ejusdem generis*, the FAA exemption's residual clause should cover workers even if they do not cross State or foreign borders.

In the Shipping Commissioners Act of 1872, Congress authorized "shipping commissioners" at seaports to oversee and enforce certain statutory requirements concerning the engagement, discharge, and wages of seamen. §§ 1, 12-24, 17 Stat. at 262, 264-67. Shipping commissioner duties included enforcing the requirement, in place since 1790, that masters of certain kinds of vessels make written agreements ("shipping articles") with every seaman to be on board that vessel that followed a prescribed form and set forth certain terms, *see* Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, codified as amended, 46 U.S.C. § 564

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[4] In 1979, Congress ended the use of shipping commissioners. Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, 93 Stat. 1023, 1024 (1979).

(1925), unless exempted from doing so, *see*, *e.g.*, *id.* § 566.

More importantly, the 1872 Act also authorized shipping commissioners to "hear and decide any question whatsoever between a master, consignee, agent or owner, and any of his crew, which both parties agree in writing to submit to him." § 25, 17 Stat. at 267. In this scheme, the shipping commissioner's award bound "both parties, and shall, in any legal proceedings which may be taken in the matter, before any court of justice, be deemed to be conclusive as to the rights of parties." *Id.* In any such "proceeding relating to the wages, claims, or discharge of a seaman," the shipping commissioner could "call upon the owner, or his agent, or upon the master, or any mate, or any other member of the crew" to produce themselves or any documents they had for examination. § 26, 17 Stat. at 267.

In 1874, Congress provided that "[n]one of the provisions of" the Shipping Commissioners Act of 1872 applied, *inter alia*, to "sail or steam vessels engaged in the coastwide trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade." Act of June 9, 1874, ch. 260, 18 Stat. 64, 64-65, codified at 46 U.S.C. § 544 (1925); *see Inter-Island Steam Nav. Co. v. Byrne*, 239 U.S. 459, 462-63 (1915); *United States v. The Grace Lothrop*, 95 U.S. 527, 532 (1877).

Thereafter, Congress added to seamen's legal protections, *see*, *e.g.*, Act of March 4, 1915, ch. 153, 38 Stat. 1164; Merchant Marine Act, 1920, ch. 250, § 33, 41 Stat. 988, 1007, including separate shipping-

articles requirements for when, at a master or shipowner's request, a shipping commissioner ships a "crew . . . for any American vessel in the coastwide trade," Act of Feb. 18, 1895, ch. 97, 28 Stat. 667, codified as amended, 46 U.S.C. § 563 (1925). Congress also changed how shipping commissioners were appointed, supervised, and paid. *See* Lloyd M. Short, *The Bureau of Navigation: Its History, Activities and Organization* 85-88 (1923). Shipping-commissioner arbitration, however, remained unchanged: "any question whatsoever between a master, consignee, agent or owner, and any of his crew," if "both parties" agree "in writing" to submit that issue to the shipping commissioner. 46 U.S.C. § 651 (1925).

In denoting the parties to such arbitration, *see id.* ("master, consignee, agent or owner, and any of his crew"); *id.* § 652 ("seaman"), Congress used maritime terms of art with well-settled meanings, such as "seaman". *See id.* § 713 (taking as "seaman" "every person (apprentices excluded) who shall be employed or engaged to serve in *any* capacity on board the [vessel]") (emphasis added); *see also McDermott Int'l v. Wilander*, 498 U.S. 337, 346 (1991) ("settled" by 1920 that "seaman" need only be a person "employed on board a vessel in furtherance of its purpose"). Similarly, a vessel's "crew" typically covered any of its seamen and inferior officers, unless a statute excluded those officers "by enumerating them, as contradistinguished from the rest of the crew." *United States v. Winn*, 28 F. Cas. 733, 735 (C.C.D. Mass. 1838) (Story, J.). *E.g.*, *The Marie*, 49 F. 286, 287 (D. Or. 1892) (cook was "one of the crew"); "Seaman's Claim Arbitrated," *The Seamen's Journal*, April 23, 1919, at 1-2 (reprinting arbitral opinion of U.S.

Shipping Commissioner, New York, awarding wages to seaman shipped as waiter).

If the FAA's "seamen" exemption covered only those who in fact crossed State or foreign borders, the FAA would have disrupted how Congress had calibrated shipping-commissioner arbitration and in ways contrary to what "seaman" meant at the time.

Unlike the FAA, a shipping commissioner's arbitral authority triggered only if "both parties agree in writing to submit [the disputed question] to him," 46 U.S.C. § 651 (1925), *i.e.*, *after* the dispute arose, *see The W.F. Babcock*, 85 F. 978, 982-93 (2d Cir. 1898); *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925); *The Donna Lane*, 299 F. 977, 982 (W.D. Wash. 1924).

This is partly why, in January 1923, International Seamen's Union of America President Andrew Furuseth objected to the FAA (then proposed without any workers exemption). His worry: Shipowners would add *pre*-dispute arbitration clauses when engaging a seaman. Then, when a dispute arose, they would use the FAA to *compel* that seaman to submit that dispute to shipping-commissioner arbitration, even though that seaman, if choosing *post*-dispute, would have rather gone to court. *See* Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention Which Was Adopted, in *Proceedings of the Twenty-Sixth Annual*

Convention of the International Seamen's Union of America 204 (1923).[5]

Had the FAA "seamen" exemption been as limited as Southwest reads it, the FAA would have disrupted shipping commissioner arbitration in just the way Furuseth warned, because such arbitration covered disputes that did *not* turn on whether the seaman had in fact crossed State or foreign borders.

To illustrate, suppose a vessel set to voyage from the port of San Francisco to the port of Philadelphia by way of the Panama Canal. If a "seaman signed an agreement" to work on that vessel and then was unjustifiably fired "*before* the commencement of th[at] voyage," that seaman had the right to receive one month's wages. 46 U.S.C. § 594 (1925) (emphasis added). If the master and the seaman assent, a shipping commissioner could decide any dispute over this right in San Francisco; the seaman was no less a "seaman" by not having crossed a State or foreign border.

Similarly, if that seaman had joined the crew in San Francisco but was discharged when the vessel made an intermediate stop in the port of Los Angeles,

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[5] The FAA's drafters referred to Furuseth's opposition when suggesting what became the FAA's workers exemption. *See Report of the Committee on Commerce, Trade and Commercial Law*, 46 Ann. Rep. A.B.A. 284, 287 (1923); *Hearing on S. 4213*, *supra* at 9. Although this Court gave no weight to Furuseth's opposition to *any* employment arbitration, *see Circuit City*, 532 U.S. at 119-20, his worry shows *how* the FAA could have affected shipping-commissioner arbitration, and thus why Congress had reason to exempt seamen from the FAA, *see id.* at 121.

the vessel's master or owner had to pay that seaman's wages within a specified time absent "sufficient cause." *Id.* § 596. Or if that seaman had been "shipped" contrary to "any act of Congress," that seaman could "leave the service at any time" and recover certain wages. *Id.* § 578. A shipping commissioner could decide disputes arising from these rights in Los Angeles if the master and the seaman assent, even though that seaman had not crossed any State or foreign border.

If the FAA had exempted only seamen who in fact had crossed State or foreign borders, shipowners could have used pre-dispute arbitration clauses and the FAA to force putatively non-exempt seamen into shipping-commissioner arbitration, thus undermining Congress's decision to predicate such arbitration on the *post-dispute* assent of both parties. Moreover, that scheme's coverage would have turned on a question—whether the seaman had crossed State or foreign borders—that otherwise did not matter to the merits of many disputes.

Similarly, Southwest's reading of the FAA "seamen" exemption runs contrary to the status of maritime pilots as seamen. Maritime pilots are "trained and skilful [sic] seamen" hired to navigate vessels into and out of ports. *The China*, 74 U.S. 53, 67 (1868); *see Pac. Mail S.S. Co. v. Joliffe*, 69 U.S. 450, 456 (1864) (pilotage statute as aiming "to create a body of hardy and skilful [sic] seamen . . . to pilot vessels seeking to enter or depart from the port"). Such pilots were treated as part of a vessel's crew. *E.g.*, 46 U.S.C. § 221 (1925) (requiring "all the officers

of vessels of the United States who shall have charge of a watch, including pilots" to be U.S. citizens).

By 1925, Congress had long let States regulate the employment and licensing of some maritime pilots. *See* 46 U.S.C. §§ 211-215 (1925); *Anderson v. P. Coast S.S. Co.*, 225 U.S. 187, 195-198 (1912). In turn, some States required vessel masters or owners to hire a licensed pilot to navigate certain ports and waterways within the State's boundaries. *E.g.*, *China*, 74 U.S. at 60-61. Pilots charged fees for such piloting services at various ports, *see* Florence E. Parker, *Development and Operation of Pilots' Associations at Representative Ports*, 19 Monthly Lab. Rev. 16, 22-34 (1924), for which a vessel's master, owner, and consignee were usually liable.[6]

A pilot's status as a "seaman" – and thus whether shipping-commissioner arbitration could cover pilot fee disputes – did *not* turn on whether that pilot had in fact crossed State or foreign borders. To the contrary, pilots typically stayed at a particular port and joined a vessel's crew only so long as to navigate it into or out of that port. *See id.* at 18. Pilots' associations at each port owned the pilot-boats that

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[6] *E.g.*, Ala. Political Code § 2506 (1923); Calif. Political Code § 2432 (Deering 1924); Ga. Code Ann. § 1905 (Park 1914); N.J. Comp. Stat. vol. 3, § 32, at 3955-56 (1911); Or. Laws § 7730 (1920); Digest of Pa. Stat. Law 1920 §§ 21699-21706, 21716 (West 1921); S.C. Civil Code tit. 11, ch. 38, § 21 (1922); Tex. Rev. Civil. Stat. art. 8255, 8256 (1925); Va. Code § 3635 (1924); Wash. Comp. Stat. Ann. § 9872 (Remington 1922). Pilots could bring admiralty actions to recover fees owed under such State laws. *E.g.*, *Reardon v. Ankell*, 59 F. 624 (S.D.N.Y. 1894).

brought pilots to the vessels they would then navigate into port. *See id.* at 17, 20.

Thus, while a vessel may have voyaged from, say, Philadelphia to San Francisco, a pilot who joined its crew just outside the port of San Francisco would not cross any State border to bring that vessel in. *See id.* at 21 ("In the ports studied the length of the pilotage varies from 8 miles (from some parts of New York harbor) to 150 miles (from the port of Baltimore."); *cf. Cooley v. Board of Wardens*, 53 U.S. 299, 316 (1852) (Commerce Clause power to regulate navigation includes regulating pilots even though "the pilot is on board only during a part of the voyage between ports of different states"). The example of maritime pilots alone shows how the FAA's "seamen" exemption and, by *ejusdem generis*, the FAA exemption's residual clause, cannot be limited to workers who cross State or foreign borders.

CONCLUSION

This Court should decide the question presented in the respondent's favor.

Respectfully submitted,

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