No. 21-309

In the Supreme Court of the United States

SOUTHWEST AIRLINES CO., PETITIONER

v.

LATRICE SAXON

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

REPLY BRIEF FOR PETITIONER

Melissa A. Siebert
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Dr., Ste. 4700
Chicago, IL 60606

Scott A. Chesin
SHOOK, HARDY & BACON L.L.P.
1325 Avenue of the Americas, 28th Floor
New York, NY 10019

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Kyser Blakely
Hanaa Khan
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Raza Rasheed
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Ave.
Los Angeles, CA 90071

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), held that only classes of workers engaged in foreign or interstate transportation are exempt from the Federal Arbitration Act (FAA) under 9 U.S.C. § 1. This case asks what it means to be a transportation worker falling under that exemption.

The FAA's text and structure provide the answer. Classes of workers are exempt from the FAA if, like seamen and railroad employees, they participate directly in moving goods or people through the channels of foreign or interstate commerce and across borders. In other words, workers who ride the waves or rails, or cruise the skies or interstates. That reading tracks the meaning of "engaged in foreign or interstate commerce." It reflects the contrast between § 2's breadth and § 1's narrowness. It gives meaning to "foreign or interstate," which parallels "seamen" and "railroad employees" given their typical border-crossing roles. And it furthers the FAA's proarbitration purposes.

In response, Saxon turns to Federal Employers' Liability Act (FELA) cases; says stevedores are "seamen"; and invokes the purpose of the Railway Labor Act (RLA). Those things, she says, show that § 1 exempts *everyone* who works for an employer in the transportation industry, no matter what work they do.

Saxon's arguments contravene the FAA's text. Section 1 exempts "class[es] of workers" based on *their* conduct, not their *employer's*. And to be "engaged in foreign or interstate commerce" means participating directly in commerce, not having some nebulous connection to it. *See United States v. American Bldg. Maint. Indus.*, 422 U.S. 271, 283-84 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 198 (1974).

The Court should not read into the FAA the "closely related" standard from FELA decisions. That standard elevated purpose over text. *Shanks v. Delaware, Lackawanna & W. R.R.*, 239 U.S. 556, 558 (1916). And *Gulf Oil*—which *Circuit City* endorsed for the FAA, 532 U.S. at 117-18—refused to adopt the broad FELA standard when interpreting "engaged in commerce." *Compare* 419 U.S. at 196-98 (majority) *with id.* at 209-10 (Douglas, J., dissenting).

Saxon also cannot turn stevedores into "seamen." Stevedores work on land. Seamen work on vessels. The seaman's essence is his relationship to a vessel. And a vessel's essence is its capability to transport people or goods across water. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 359-60 (1995); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 493 (2005). That focus on movement likewise shows that "railroad employees," as used in the § 1 exemption, means workers who rode the rails.

Purpose, too, cuts against Saxon. Southwest's reading promotes the FAA's proarbitration purposes in three ways. It ensures that most arbitration agreements are honored. It exempts the key workers who could immobilize commerce, and thus were subject to other federal dispute-resolution regimes: workers who move goods or people, especially across borders. And it avoids leaving countless workers subject to neither the FAA nor a federal dispute-resolution regime.

Saxon's test does the opposite. For example, while there's no federal dispute-resolution regime for the interstate trucking industry, Saxon would exempt everyone working in that industry, not just truckers. That could not have been the goal of the proarbitration FAA. To borrow then-Judge Barrett's words, Saxon's "interpretation would sweep in numerous categories

of workers whose occupations have nothing to do with interstate transport." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020). And it would create "significant problems of workability and fairness," undermining the FAA's proarbitration purposes. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 930 (9th Cir. 2020) (Bress, J., dissenting).

Saxon belongs to a class of workers supervising employees who load planes. That class doesn't transport anything or cross any borders. Saxon isn't exempt from the FAA.

ARGUMENT

I. Section 1 of the FAA exempts classes of workers that participate directly in the transportation of goods or people through the channels of foreign or interstate commerce.

A. Congress used "very particular" language in § 1 to exempt "narrow" categories of transportation workers from § 2's "expansive" coverage.

1. Text and structure show that the § 1 exemption is reserved for narrow classes of workers that transport goods or people through the channels of foreign or interstate commerce. Southwest Br. 15-16. While § 2 is "expansive," reaching all contracts "involving commerce," § 1 uses the phrase "engaged in commerce," a "term of art" with "limited reach." *Circuit City*, 532 U.S. at 113-15, 118. The words "seamen" and "railroad employees" further narrow the exemption, confining it to "transportation workers." *Id.* at 109, 114-16. And by placing "foreign or interstate" before "commerce" in § 1 (but not in § 2), thus repeating that "commerce" must be "foreign or interstate,"

Congress emphasized border crossing. Southwest Br. 16, 29-30.

2. a. Saxon agrees that § 2 is broad and § 1 is narrow. Br. 12, 40. She nevertheless seeks to expand the exemption to cover *all* airline employees. Br. 9. She claims the question is whether a worker plays a "necessary role in the free flow of goods." *Id.* (quoting *Circuit City*, 532 U.S. at 121). Saxon is wrong.

First, § 1 exempts classes of workers based on *their* conduct, not their *employer's*. And it certainly doesn't blanket the *entire* transportation industry. The "class of workers" must be "engaged in foreign or interstate commerce." 9 U.S.C. § 1. Saxon's theory reads all those words out of the statute. Even the court of appeals rejected her reading as "inconsistent with the text." Pet. App. 8a.

Second, *Circuit City* did not adopt a "necessary role" test. The Court used that language about seamen and railroad employees only when reflecting on the potential reason for the exemption, which it had already construed. *Circuit City*'s analytical framework centers on the term of art "engaged in foreign or interstate commerce," informed by seamen's and railroad employees' vessel- and train-bound transportation roles. "[T]he inquiry is always focused on the worker's active engagement in the enterprise of moving goods across interstate lines. That is the inquiry that *Circuit City* demands." *Wallace*, 970 F.3d at 802 (Barrett, J.). If just being "necessary" were enough, § 1 would have included seamen *and* stevedores. *Infra* pp. 15-17.

Moreover, Saxon can't keep her theory straight. Sometimes she says § 1 covers *all* airline employees. Elsewhere she limits the exemption to workers "who play an essential role in accomplishing the airline's

transportation mission." Br. 18, 41. Saxon doesn't explain the inconsistency.

b. Saxon claims that the FAA equates "agreements relating to wharfage" with "foreign commerce." Br. 19 (citation omitted). That argument ignores the distinction Congress twice drew between "maritime transactions," on the on hand, and "commerce," on the other. In § 1, Congress separately defined "maritime transactions" and "commerce"; placed "agreements relating to wharfage" only in the definition of "maritime transactions"; and placed the § 1 exemption in the definition of "commerce." And in § 2, Congress again distinguished "maritime transaction[s]" from "contract[s] … involving commerce."

That distinction tracks Congress' separate powers to regulate commerce and to regulate maritime law—law "within admiralty jurisdiction." 9 U.S.C. § 1; *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917). And wharfage issues have long been understood as topics of admiralty and maritime jurisdiction. *See Ex parte Easton*, 95 U.S. 68, 72 (1877). Wharfage agreements do not inform the meaning of the § 1 exemption.

B. Being "engaged in foreign or interstate commerce" means moving goods or people through the channels of such commerce and across borders.

The residual clause covers only classes of transportation workers that are "engaged in foreign or interstate commerce." *Circuit City*, 532 U.S. at 109 (citation omitted). That narrowing phrase meant in 1925 what it means today: direct participation in the movement of goods or people through the channels of

commerce and across borders. Classes of workers that don't transport anything don't qualify. *See* Southwest Br. 16-21. Saxon fails to prove otherwise. She glosses over *Circuit City* and relies on an irrelevant statute and inapplicable cases.

1. Common usage favors Southwest.

a. *Circuit City* frames the inquiry: The residual clause must be read alongside "seamen" and "railroad employees," which restrict the exemption's scope to workers engaged in "transportation." 532 U.S. at 115, 118-19. So, when interpreting the residual clause, the only relevant type of commerce is "transportation."

In 1925, "engaged in interstate commerce" meant employment in transporting goods or people from state to state. *See* Southwest Br. 17. And the ordinary meaning of "transportation" requires movement from one place to another. *Id.* For example, nobody would say that Babe Ruth "transported" his bat from the Yankees' dugout to home plate. Saxon doesn't contend otherwise. Likewise, an ordinary person wouldn't describe taking luggage from the baggage cart and putting it on the plane as "transportation."

Common usage confirms that workers "engaged in" transportation move goods or people *through the channels* of commerce. And because interstate means state-to-state, workers "engaged in" interstate transportation cross borders.

b. Saxon doesn't rebut this common usage. She agrees that "the literal definition" of "engaged in foreign or interstate commerce" means country-to-country and state-to-state transportation. Saxon Br. 13. But she ignores the transportation lens through which *Circuit City* requires the exemption to be read. Contrary to Saxon's argument, "foreign or interstate

commerce" in § 1 doesn't mean *all* "trade or traffic," like "the purchase or sale of goods," because the only type of commerce relevant is *transportation*. Saxon Br. 13. The salesperson in *Circuit City* wasn't "engaged in foreign or interstate commerce" because he didn't transport anything. 532 U.S. at 109-10.

In fact, Saxon reinforces the common understanding of "transportation." Citing *Erie Railroad v. Shuart*, 250 U.S. 465, 468 (1919), she claims that "'the work of unloading' cargo by a carrier [is] transportation." Br. 21. But *Shuart*, a contract-interpretation case, relied on an "enlarged [statutory] definition of 'transportation'" reaching "all services in connection with the receipt [and] delivery … of property transported." 250 U.S. at 467. Common usage doesn't embrace that "enlarged" definition.

2. Precedent proves that, in the transportation context, "engaged in foreign or interstate commerce" requires direct participation in the *movement* of goods or people *through the channels* of commerce.

a. Under longstanding precedent, "direct participation" in commerce qualifies as engagement in commerce, but being "closely connected" to commerce does not. In the FAA's transportation context, "direct participation" means moving goods or people through channels of commerce.

Gulf Oil and *American Building Maintenance*—two decisions *Circuit City* relied on—illustrate the "plain meaning of the words 'engaged in commerce.'" *Circuit City*, 532 U.S. at 117-18. Those decisions held that "engaged in commerce" means "direct participation in … the interstate flow of goods or services."

American Bldg. Maint., 422 U.S. at 283-84. The Court made clear that the phrase does not include activities "connected to … instrumentalities" in the "flow of commerce" because such a "nebulous" standard "has no logical endpoint." *Gulf Oil*, 419 U.S. at 198.

"Direct participation" has long been the standard. In *Hopkins v. United States*, 171 U.S. 578, 590-91 (1898)—which Saxon ignores—the Court held that just being "connected" to "articles of interstate commerce," like selling imported cows, is not equivalent to being "engaged in interstate commerce." The Court required "direct participation," classifying anything less as an insufficient "aid or facility to commerce." *Id.* at 587. *Hopkins* underscores that "direct participation" turns on the worker's conduct, not the good's itinerary. Southwest Br. 19.

b. Saxon cannot show that cargo loaders, let alone their supervisors, participate directly in the movement of goods or people through the channels of commerce.

i. Saxon discounts the direct-participation test because, in her view, "engaged in commerce" did not become a "term of art" until "after the FAA was passed." Br. 23, 36. But *Circuit City* rejected that notion: "engaged in commerce" has a "plain meaning" no matter the statute's "date of adoption." 532 U.S. at 117-18. Besides, *Gulf Oil* and *American Building Maintenance* interpreted the 1914 Clayton Act and 1936 Robinson-Patman Acts—FAA contemporaries. *See Gulf Oil*, 419 U.S. at 193 n.9.

ii. Saxon invokes FELA, the only statute supposedly showing that workers are "engaged in interstate transportation" whenever they do work "closely related" to it. Br. 22 (quoting *Shanks*, 239 U.S. at 558).

She claims FELA is relevant because it "used 'almost exactly the same phraseology'" as § 1 of the FAA. Br. 21 (citation omitted). But FELA's broad, purposive test contravenes the FAA's text, structure, and purpose. Southwest Br. 39-40.

For starters, Saxon doesn't address the four key textual differences between the statutes. Southwest Br. 37. What's more, FELA's "closely related" test is indistinguishable from the nebulous "connection" test that *Gulf Oil* rejected as incompatible with the Clayton and Robinson-Patman Acts' "engaged in commerce" language. In fact, the dissenters in *Gulf Oil* wanted the Court to adopt the broad test used for FELA and Fair Labor Standards Act (FLSA) cases. 419 U.S. at 209-10 (Douglas, J., dissenting). The Court refused, calling the FLSA and the Clayton and Robinson-Patman Acts "significantly different statutes" and hewing to the antitrust laws' "statutory language, read in light of its purposes." *Id.* at 196-97 (majority).

Moreover, FELA's "closely related" test is not "black-letter law," as Saxon claims. Br. 38. The Court interpreted FELA "not in a technical legal sense, but in a practical one better suited" to its remedial purpose. *Shanks*, 239 U.S. at 558. That's why FELA was "so broad that it cover[ed] a vast field about which there [could] be no discussion." *New York Cent. & Hudson River R.R. v. Carr*, 238 U.S. 260, 262 (1915). For example, the Court held that a "mess cook" "for a gang of bridge carpenters" "was engaged in interstate commerce within the meaning of [FELA]" because he "was assisting" their work "by keeping their bed and board" and "cooking" their meals. *Philadelphia, Balt. & Wash. R.R. v. Smith*, 250 U.S. 101, 102-04 (1919). But that's no more "direct participation" in interstate

commerce than selling asphaltic concrete for interstate highways. *See Gulf Oil*, 419 U.S. at 195-98.

iii. Saxon next claims that cargo is in commerce from the moment it's delivered to a carrier until the moment it's delivered to the recipient. Br. 23-24. By touching cargo during its transit, she reasons, cargo loaders must be "engaged in commerce." Br. 24. But as then-Judge Barrett explained, § 1 focuses not on the goods, but on whether the workers "themselves" are "engaged *in the channels* of foreign or interstate commerce." *Wallace*, 970 F.3d at 802 (citation omitted). "[T]he workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Id.* After all, goods aren't "engaged in" anything.

iv. Saxon cites a boatload of decisions that, in her view, show cargo loaders are "engaged in foreign or interstate commerce." Br. 20-24. But other than mistaken stevedoring cases, *infra* pp. 16-17, only one decision says that, and it's an inapplicable FELA case. *See Baltimore & Ohio Sw. R.R. v. Burtch*, 263 U.S. 540, 544 (1924). The rest of Saxon's cases do not interpret a statutory term of art and do not hold that cargo loaders participate directly in the transportation of goods or people through the channels of commerce.

Several of Saxon's cases don't even mention cargo loaders. For instance, *Foster v. Davenport*, 63 U.S. 244 (1859), contains no holding about cargo loading. *Foster* simply explained that state law didn't apply to a steamboat "lightering" goods and "towing" vessels "in aid of" foreign commerce. *Id.* at 246. Lightering and towing, by the way, require *movement across water*. *See also, e.g.*, *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 309 (1923) (intermediate delivery didn't end New

York-to-Nebraska shipment); *Browning v. City of Waycross*, 233 U.S. 16, 19-20 (1914) (states can't tax interstate shipment, including delivery, of goods); *Old Dominion S.S. v. Virginia*, 198 U.S. 299, 302, 309 (1905) (Virginia could tax vessels "engaged in interstate commerce," including a tug that "dock[ed] the large ocean-going steamers" and "transferr[ed] from different points in those waters freight from connecting lines destined to points outside of Virginia"); *Hays v. Pacific Mail S.S.*, 58 U.S. 596, 598-600 (1855) (steamships transporting goods between New York and San Francisco were "engaged in the business and commerce of the country").

Other dormant Commerce Clause cases say only that states cannot tax foreign or interstate transportation, meaning they also can't regulate the "landing and receiving" that make such transportation possible. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885); *see Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290-93 (1921); *City of Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333, 340-41 (1914); *Crutcher v. Kentucky*, 141 U.S. 47, 57-62 (1891). But just because loading cargo is necessary for transportation doesn't mean that cargo loaders are "engaged in foreign or interstate" transportation. None of those decisions says that.

Likewise, Saxon's railroad cases don't say that employees who load trains are themselves "engaged in foreign or interstate commerce." *See St. Louis, S.F. & Tex. Ry. v. Seale*, 229 U.S. 156, 161 (1913) (FELA case stating that breaking up and moving railcars was "part of the interstate transportation"); *United States v. Union Stock Yard & Transit Co. of Chi.*, 226 U.S. 286, 303-06 (1912) (interpreting expansive statutory definition of "transportation," holding that companies

were "engage[d] in transportation" because they "[took] freight delivered at the stock yards, load[ed] it upon cars and transport[ed] it for a substantial distance"); *Shuart*, 250 U.S. at 467 (contract-interpretation case relying on the "enlarged definition of 'transportation'" at issue in *Union Stock Yard*); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 527 (1911) (company became "part of the railway" once goods were "delivered to [the railway] for transportation to their foreign destination"); *Rhodes v. Iowa*, 170 U.S. 412, 419 (1898) (Congress' commerce power reaches undelivered goods); *Covington Stock-Yards Co. v. Keith*, 139 U.S. 128, 133-36 (1891) (railroad had to provide livestock loading facilities at no extra cost).

Some dormant Commerce Clause cases struck state laws as applied to agents "seeking interstate … business" for transportation companies. *See Texas Transp. & Terminal Co. v. City of New Orleans*, 264 U.S. 150, 153 (1924) (discussing *McCall v. California*, 136 U.S. 104, 109 (1890)). But those decisions shed no light on what "engaged in foreign or interstate commerce" means as a statutory term of art; they didn't even address cargo loaders. And with other cases, it's unclear what Saxon hopes to show. *See, e.g.*, *Swift & Co. v. Hocking Valley Ry.*, 243 U.S. 281, 283, 290 (1917) (noting that under Interstate Commerce Commission rules, "cars are in railroad service from the time they are placed by the carrier for loading").

v. Finally, the Harter Act undermines Saxon's position. *See* Saxon Br. 21. It doesn't address cargo loaders or say "engaged in commerce." But it does reinforce the ordinary meaning of transportation, referring to "vessel[s] transporting merchandise or property from or between ports." 27 Stat. 445-46 (1893).

3. Border crossing is a key part of foreign or interstate transportation.

a. Classes of workers are not exempt from the FAA unless they transport *something*. The FAA's text and structure show that border crossing matters too. Southwest Br. 20-21.

The residual clause specifies "foreign or interstate commerce" right after defining "commerce" as such. 9 U.S.C. § 1; *see* Southwest Br. 16, 29-30. By repeating "foreign or interstate," Congress emphasized border crossing. And it did so again by putting "foreign" before "interstate," matching the order of "seamen" (who paradigmatically voyage internationally) and "railroad employees" (who typically travel interstate). *Infra* pp. 15-20.

Precedent supports the border-crossing rationale. Southwest Br. 20-21. For example, the Court has held that transportation "wholly within a State" is not "interstate transportation" even though, for the passenger, the intrastate transportation was "simply one element in a continuous interstate transportation." *New York ex rel. Pa. R.R. v. Knight*, 192 U.S. 21, 26-27 (1904). In *Knight*, as in *Gulf Oil* and *Hopkins*, the Court rejected a "close relation to interstate commerce" test because it lacked any objective limits. *Id.* at 28; *see* Southwest Br. 21, 33; Amazon Br. 27-30.

b. Saxon first chooses to ignore the words of § 1. Rather than explain why Congress put "foreign" before "interstate," she excises "foreign or interstate" altogether. *See* Br. 4 n.1.

Saxon then says Congress had to repeat "foreign or interstate" because the FAA defines commerce to "include[] commerce 'in any Territory of the United States or in the District of Columbia.'" Br. 39 (quoting

9 U.S.C. § 1). That's *Southwest's* point: Congress didn't want to exempt classes of workers that transported goods or people exclusively within federal territories and thus crossed no borders.

Saxon relies on *McElroy v. United States*, 455 U.S. 642 (1982). Br. 35-36. But *Circuit City* prohibits using *McElroy*'s reasoning to construe the FAA. *McElroy* interpreted a criminal law targeting "transport[ation] in interstate or foreign commerce." 455 U.S. at 648 (citation omitted). *McElroy* said that "Congress intended the statutory phrase to be as broad as this Court had used that phrase in Commerce Clause decisions before 1919." *Id.* at 653. But *Circuit City* rejected using "the scope of the Commerce Clause, as then elaborated by the Court," to interpret the FAA, holding instead that "engaged in foreign or interstate commerce" must be given its "plain meaning." 532 U.S. at 116-18. *McElroy* also relied on that statute's purpose—reaching criminals that states couldn't. *See* 455 U.S. at 654. But the FAA's purpose is to require arbitration.

Finally, Saxon's discussion of *Knight* doesn't fly. *See* Saxon Br. 37-38; Amazon Br. 28-30. *Knight* cautions against assessing "engaged in commerce" based on the "standpoint" of the goods being transported. 192 U.S. at 26. *Knight* also echoes *Gulf Oil*'s reason for rejecting a "connection" standard: if some "local" conduct has a sufficiently "close relation to interstate commerce," where will courts draw the line? *Id.* at 28. Saxon can't say.

* * *

The § 1 exemption covers classes of workers that participate directly in the transportation of goods or people through the channels of foreign or interstate commerce and across borders. Southwest Br. 19-20.

That reading, which mirrors then-Judge Barrett's, is faithful to statutory text and precedent. It's also easily administrable, unlike Saxon's "closely related" standard, which is "nebulous in the extreme." *Gulf Oil*, 419 U.S. at 198.

C. The typical activities of seamen and railroad employees show that a "class of workers engaged in foreign or interstate commerce" participates directly in foreign or interstate transportation.

The activities of "seamen" and "railroad employees" confirm that § 1 exempts classes of workers that participate directly in cross-border transportation. Under *ejusdem generis*, general words following a list of specific words include only the specific words' common attributes. Southwest Br. 22-23. Here, "seamen" are a class of workers exemplifying direct participation in the transportation of goods or people through the channels of commerce and across borders. And "railroad employees" share those attributes, as Congress underscored by placing the term between "seamen" and "foreign or interstate." Saxon's counterarguments fail. She repeats her atextual employer-based test, fights the well-established definition of "seamen," and reads "railroad employees" in isolation.

Seamen. Seamen work on vessels at sea, moving through water and crossing borders. Those attributes inform the scope of the exemption. If performing a "necessary role" were the test, as Saxon contends, then land-based cargo loaders would be exempt, making "seamen" surplusage. Southwest Br. 24-26, 42-44.

a. When Congress enacted the FAA, "general maritime law" defined "seamen" as "sea-based" crewmembers. *McDermott Int'l, Inc. v. Wilander*, 498 U.S.

337, 348 (1991). Seaman status turned on being "a member of the vessel" and having a "relationship as such to the vessel and its operation in navigable waters." *Chandris*, 515 U.S. at 359-60. Only crewmembers who worked a significant "portion of their time … at sea" could be seaman. *Id.* at 364. Both the Shipping Commissioners Act of 1872, 17 Stat. 262, and the Jones Act, 41 Stat. 988, 1007, § 33 (1920), adopted that understanding of "seamen." Southwest Br. 24-25.

Land-based workers, including stevedores, were (and are) not seamen. *Wilander*, 498 U.S. at 348. The point is not that stevedores' duties are unimportant, but that stevedores are not crewmembers who serve on a waterborne vessel. *Chandris*, 515 U.S. at 370.

b. Saxon's counterarguments don't hold water.

i. Saxon says "seamen" meant "all those who did the work of the ship," Br. 9; "stevedores were seamen," Br. 33; and "seamen" are all those "'necessary to the free flow of goods' by sea," Br. 12 (citation omitted). Saxon is wrong at each turn.

First, just doing the ship's work didn't make anyone a seaman. Only crewmembers could be seamen. *Chandris*, 515 U.S. at 359-60. And crewmembers had to "be employed *on board a vessel* in furtherance of its purpose." *Wilander*, 498 U.S. at 346 (emphasis added). That's why "shipboard surgeons" were seamen even though a physician's work was "his and not the ship owner's." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 & n.10 (2019).

Second, stevedores weren't seamen. Saxon relies on *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). But *Chandris* and *Wilander* made clear

that *Haverty*—which came *after* the FAA—was wrongly decided. Southwest Br. 42-43.

Finally, the need to load vessels doesn't make cargo loaders seamen. The law draws a "fundamental distinction between land-based and sea-based maritime employees." *Chandris*, 515 U.S. at 359. Unlike longshoremen, seamen travel on vessels, which "transport people, freight, or cargo from place to place." *Stewart*, 543 U.S. at 493. Saxon's cases (at 16-17) all confirm that seamen work on vessels. So seamen participate directly in transportation in ways stevedores do not. That's why *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), another dormant Commerce Clause case, doesn't help Saxon. *See* Saxon Br. 34. *Puget Sound* relied not only on *Haverty*'s mistake about seamen, *see* Southwest Br. 43, but also on *Burtch*, an inapplicable FELA case, *see supra* p. 10. Stevedores can't bootstrap themselves into seamen just because some seamen load cargo.

ii. Saxon also argues that "seamen" include workers on "a watercraft that goes almost nowhere." Br. 31. She ignores the test: vessels must be "'used, or capable of being used,' for maritime transportation." *Stewart*, 543 U.S. at 496. Movement across water is key. *See Lozman v. City of Riviera Beach*, 568 U.S. 115, 123-31 (2013). The dredge in *Stewart* was a vessel because it "carried machinery, equipment, and crew over water." 543 U.S. at 492. More importantly, the "traditional" vessel is "seagoing." *Lozman*, 568 U.S. at 123 (citation omitted). That's why *Chandris* called a seaman assigned to "a lengthy voyage on the high seas" the "paradigmatic maritime worker." 515 U.S. at 372. Transportation over water is a key feature of the seaman class. The same cannot be said for stevedores.

iii. Finally, Saxon complains that some seamen didn't cross borders. Br. 31-33 & n.9. But the question is what characterized "seamen" as a "class of workers." 9 U.S.C. § 1. The answer is long voyages at sea. *See Chandris*, 515 U.S. at 372. Indeed, in Founding-era England, seamen "man[ned] the merchant vessels that were sailing to far parts of the globe." Martin J. Norris, *The Seaman as Ward of the Admiralty*, 52 Mich. L. Rev. 479, 483 (1954). The Shipping Commissioners Act reflected a similar view, applying to seamen on foreign and coast-to-coast voyages. Southwest Br. 24.

The paradigmatic seaman explains why courts described seamen as being exposed to the "perils of the sea." *Chandris*, 515 U.S. at 354 (citation omitted). True, not every seaman sailed the globe. But even short legs crossed borders, like transporting goods from Wilmington to Philadelphia or participating "in the lake-going trade touching at foreign ports … or in the trade between the United States and the British North American possessions," Act of June 9, 1874, ch. 260, 18 Stat. 64. And non-border-crossing seamen don't eliminate the defining feature of the class, just as dull knives don't disprove the point that knives, as a class, are sharp. *Rittmann*, 971 F.3d at 928 (Bress, J., dissenting).

Railroad employees. Read in context, the term "railroad employees" is best understood as a class of workers participating directly in the movement of trains. *See* Southwest Br. 26-28.

a. "Railroad employees" is not a term of art. Although Congress has used the term broadly, *see New Prime*, 139 S. Ct. at 543, it has also used the term narrowly: "persons actually engaged in or connected with

the movement of any train." Hours of Service Act, 34 Stat. 1415, 1416, § 1 (1907); Boiler Inspection Act, 36 Stat. 913, 913, § 1 (1911). That narrow definition covered individuals working interstate shifts, but excluded workers who broke up railcars and moved them around the yard. Southwest Br. 26-27.

The narrow understanding is the better fit here. The § 1 exemption focuses on what the workers do, not whom they work for. So mere employment by a railroad cannot be enough. The § 1 exemption also leads with "seamen." Since seaman worked on vessels, pairing "seamen" with "railroad employees" is a good sign that Congress meant the class of "railroad employees" working on trains. *See* Southwest Br. 27. Indeed, seamen and railroad employees "typically moved goods across long distances and state or national borders." Chamber Br. 12-13. And § 1's narrowness, set against § 2's breadth, further disfavors reading "railroad employees" broadly. *Id.*

b. Saxon's counterarguments are off-track.

First, Saxon says "railroad employees" include everyone "who do[es] the work of the railroad." Br. 14. But § 1 focuses on "class[es] of workers," not employers. *Supra* p. 4. Moreover, Saxon ignores the term's association with "seamen" (rather than, for instance, "maritime employees"). She provides no reason to construe "railroad employees" to reach beyond those who rode the rails.

Second, Saxon invokes the Erdman Act of 1898. Br. 4. But the Erdman Act and the Newlands Act of 1913 show that railroad employees served *on railcars*: "all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars *upon or in which they are*

employed may be held and operated by the carrier under lease." 30 Stat. 424, 424; 38 Stat. 103, 104 (emphasis added).

Finally, Saxon says the Hours of Service Act didn't apply only to workers who crossed borders because it also reached "employees who transmitted 'orders pertaining to or affecting train movements.'" Br. 30 (quoting 34 Stat. at 1416, § 2). But those workers were directly "engaged in or connected with"—indeed, they directed—"the movement" of trains. 34 Stat. at 1416, § 1. Cargo loaders are different. Moreover, by associating "railroad employees" with "seamen"—whose main attribute was time spent on a vessel—Congress focused on a class defined by time spent on the rails.

D. The FAA's purpose confirms that § 1 should be narrowly construed.

Southwest's construction advances the FAA's pro-arbitration purposes. Southwest Br. 30-33. Saxon's does not.

1. Congress designed the FAA to promote arbitration over litigation. *Circuit City*, 532 U.S. at 111, 122-23. Why exempt certain transportation workers? Only, "it seems," to protect dispute-resolution regimes "already" in place. *New Prime*, 139 S. Ct. at 537.

Congress created dispute-resolution regimes to stop economy-crippling labor strikes. *See Pennsylvania R.R. v. United States R.R. Lab. Bd.*, 261 U.S. 72, 79 (1923). So it makes sense that those regimes targeted, while the FAA exempted, key workers whose strikes could immobilize commerce: workers who transported goods, especially across borders. During World War I, for example, preventing seamen's "strikes and lockouts was imperative" because vessels "carried ore essential to the munition and

shipbuilding industries and wheat necessary to feed … overseas forces." Arthur Emil Albrecht, *International Seamen's Union of America: A Study of its History and Problems* 62 (1923). Similarly, "the firemen on the freight engines of the Baltimore and Ohio Railroad" started the Great Railway Strikes of 1877. *See Trouble on the Baltimore & Ohio*, Baltimore American (July 17, 1877), tinyurl.com/26n47s4y.

Southwest's construction respects those other dispute-resolution regimes while advancing the FAA's primary, proarbitration purposes. It reads § 1 to exempt those key workers, ensuring that Congress' other regimes apply. At the same time, it avoids creating a large gap in coverage leaving countless workers subject to neither a federal dispute-resolution regime nor the FAA.

Saxon's construction threatens such a gap. Take interstate trucking, which has been "essential" since World War I. *See* Richard F. Weingroff, *Moving the Goods: As the Interstate Era Begins* (Sept. 8, 2017), https://www.fhwa.dot.gov/interstate/freight.cfm. Although there's no federal dispute-resolution regime for trucking, Saxon's test would seem to exempt everyone in the industry, not just truckers. Why would Congress have intended to exempt that entire industry from any kind of arbitration under federal law?

2. Saxon says the § 1 exemption must reach *all* airline and railroad employees because any narrower construction would disrupt the RLA's dispute-resolution procedures. Br. 25-27. That's wrong twice over.

First, Saxon assumes that when Congress enacted the FAA, it achieved a perfect fit between workers exempted by § 1 and workers covered by the not-yet-

enacted and not-yet-amended RLA. That's implausible. Southwest Br. 45.

What's more, Saxon's broad construction of § 1 would exacerbate the tailoring problem, leaving countless workers subject to *no* alternative dispute-resolution regime under federal law.

Second, requiring workers to arbitrate under the FAA would not unsettle the RLA. The RLA's dispute-resolution procedures apply only to "major" and "minor" disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994). Major disputes are the primary cause of strikes. *See Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). But the FAA doesn't cover major disputes because private arbitration agreements don't contemplate efforts to create or modify collective bargaining agreements (CBAs). Southwest Br. 47.

Minor disputes pose no double-coverage problems, either. Minor disputes are disagreements about existing CBAs. *Norris*, 512 U.S. at 252-54. So for employees who, like Saxon, have no CBA, the RLA does nothing. And Saxon hasn't explained why employees with CBAs would agree to arbitrate minor disputes under procedures inconsistent with the RLA (or why the RLA, as the more specific provision, wouldn't govern). All said, Saxon makes no effort to explain why double coverage is an issue.

Saxon's amici claim RLA–FAA conflict where a non-CBA employee is fired for trying to unionize other non-CBA employees. *See* Nat'l Acad. of Arbs. Br. 27. That hypothetical doesn't involve double coverage. The employer might have violated the RLA, allowing a civil or criminal suit in federal court. *See* 45 U.S.C. § 152, Fourth, Tenth; *Lindsay v. Association of Pro.*

Flight Attendants, 581 F.3d 47, 51-52 (2d Cir. 2009). But there's no "minor" dispute, so the RLA's dispute-resolution procedures don't apply.

3. Saxon claims she has the more administrable test. Br. 41-42. But she doesn't explain "which of the industry's myriad workers," Airlines for Am. Br. 17-18, "play an essential role in accomplishing the airline's transportation mission," Saxon Br. 41-42. That connection-to-flow-of-transportation test would create the same vexing line-drawing problems that plagued the Court's FELA and Commerce Clause decisions. *Supra* pp. 8-10, 14; Southwest Br. 32-33; Amazon Br. 28-30; *Pedersen v. Delaware, Lackawanna & W. R.R.*, 229 U.S. 146, 154-55 (1913) (Lamar, J., dissenting). Saxon doesn't explain, for example, whether her test would reach valets, curbside skycaps, travel agents, or airline caterers. The correct test, which comes from the text, is simpler and more administrable: direct participation in the foreign or interstate transportation of goods or people. Pilots, flight attendants, and interstate truckers. Not stevedores, ramp agents, or other cargo loaders. *See* Southwest Br. 32-33.

II. Ramp-agent supervisors are not exempt from the FAA.

Ramp-agent supervisors, like Saxon, do not participate directly in transporting goods or people across borders. They don't transport anything. Instead, they mainly supervise, and sometimes assist, workers who load bags onto a plane. Southwest Br. 34. That work might be an aid to transportation, but it isn't transportation itself. Because Saxon is not "engaged in foreign or interstate commerce," she must arbitrate.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

Melissa A. Siebert
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Dr., Ste. 4700
Chicago, IL 60606

Scott A. Chesin
SHOOK, HARDY & BACON L.L.P.
1325 Avenue of the Americas, 28th Floor
New York, NY 10019

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Kyser Blakely
Hanaa Khan
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Raza Rasheed
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Ave.
Los Angeles, CA 90071

Counsel for Petitioner

March 17, 2022