No. 21-956

IN THE

Supreme Court of the United States

SOJOURNER RUDISILL,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO CERTIORARI FOR RESPONDENT AMERICAN AIRLINES, INC.

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QUESTION PRESENTED

The Railway Labor Act (RLA) expressly permits district courts to review three types of challenges to decisions issued by RLA arbitration panels. *See* 45 U.S.C. § 153 First (q). None of those enumerated grounds of judicial review references due process challenges. The question presented is:

Whether the RLA permits district courts to review due process challenges to decisions issued by RLA arbitration panels, known as System Boards of Adjustment, established through private agreement by airlines and unions.

CORPORATE DISCLOSURE STATEMENT

Respondent US Airways, Inc. ceased to exist as a corporate entity effective December 30, 2015, when it merged with and into American Airlines, Inc. American Airlines, Inc. is wholly owned by American Airlines Group Inc., a publicly traded company (NASDAQ: AAL). No entity owns more than 10 percent of the stock of American Airlines Group Inc.

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INTRODUCTION

This case presents the question whether the Railway Labor Act (RLA) allows district courts to review due process challenges to decisions by System Boards of Adjustment—i.e., panels established by airlines and unions to arbitrate disputes requiring interpretation or application of an airline collective bargaining agreement—even though due process claims are not one of the enumerated bases for challenging such decisions. The Court should deny review because (i) the question presented does not implicate a circuit conflict warranting this Court's review, (ii) this petition is in any event an unsuitable vehicle for answering that question, and (iii) the decision below was correct.

Petitioner rests her request for certiorari on the existence of a circuit conflict over the question presented. But that conflict does not warrant this Court's review. As a threshold matter, the statutory provision at issue, 45 U.S.C. § 153 First (q), by its terms applies only to the railroad industry, not the airline industry, so the circuit conflict over that provision's scope is not implicated. And even if the provision does apply here, the question presented lacks practical significance—parties may seek judicial review when the system board violates the RLA, exceeds its jurisdiction, or engages in a fraudulent or corrupt process, and thus any plausible due process claim could already be brought under one of the RLA's enumerated grounds for judicial review. Indeed, the Court previously granted certiorari to resolve the question presented in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), but recognized there that it need not reach the

question because it could dispose of the case based on a properly raised statutory argument that overlapped entirely with the due process claim. It is difficult to imagine any case in which that would not be true. Thus, while the courts of appeals have disagreed in theory over whether due process challenges to RLA arbitrations can be raised in court, that disagreement makes no difference in the real world, and therefore does not warrant this Court's attention.

Moreover, the petition suffers from two substantial vehicle problems that each independently counsels against review. First, petitioner forfeited her due process challenge by failing to raise it before the system board. Because of that forfeiture, a court would not reach petitioner's due process challenge even if the RLA allowed it to do so. This forfeiture is itself a vehicle problem, but it is also another reason why the circuit conflict is not implicated here—even courts that allow review of due process claims hold that claims not raised before the system board cannot be raised in court. Second, the district court's holding on a different issue in this case would effectively resolve petitioner's due process claim against her if that court were required to address it. In rejecting petitioner's argument that "fraud or corruption" infected the system board's decision, the district court held that petitioner had alleged no board misconduct in this case. Rather, petitioner alleged only that respondents—a union and an airline—engaged in misconduct. Respondent here of course disputes that allegation, but the important point is that without alleged *board* misconduct, there can be no state action. And without state action, there can be no due process violation.

Because petitioner's due process claim will inevitably fail, her petition presents a purely academic question.

Finally, the decision below correctly interprets the RLA's judicial-review provision. The RLA's text does not authorize due process challenges to system-board arbitrations, and this Court's established precedent does not authorize courts to read into the statute a basis for review that Congress did not provide.

The petition should be denied.

STATEMENT

A. Legal Background

1. a. The RLA is designed to "safeguard the vital interests of the country" in uninterrupted railroad and airline service. *Texas & New Orleans R.R. Co. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 565 (1930); *see* 45 U.S.C. § 151a; 45 U.S.C. § 181 (extending most of the RLA to airlines). To that end, the RLA facilitates "the prompt and orderly settlement" of labor disputes, *id.* § 151a(4), by establishing a "mandatory, exclusive, and comprehensive system for resolving grievance[s]" between carriers and their employees, *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963).

This case arises from a "minor" dispute under the RLA. "Minor disputes involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994) (quotation omitted). When a minor dispute cannot be resolved through negotiation, Congress requires the

parties to submit to compulsory and binding arbitration. *See id.* at 252; *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 724-28 (1945).[1]

The arbitral forum differs for the railroad and airline industries. Congress established the National Railroad Adjustment Board (NRAB) to serve as arbitrators of railroad labor disputes. 45 U.S.C. § 153 First (i). The NRAB is an "expert body" consisting of 34 members, 17 selected by labor organizations and 17 selected by railroad carriers. *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 261 (1965); *see* 45 U.S.C. § 153 First (a). The NRAB is split between four divisions, each with jurisdiction over different classes of employees. *See id.* § 153 First (h).

By contrast, "Congress itself did not set up an adjustment board process for the airline industry." *Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989). While Congress generally extended the RLA's provisions to the airline industry, it "except[ed] section 153"—the RLA's dispute-resolution provision—from that extension. 45 U.S.C. § 181. Congress instead directed airlines and unions "by agreement" "to establish a board of adjustment of jurisdiction not exceeding" the NRAB's jurisdiction. 45 U.S.C. § 184.

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[1] By contrast, "major" disputes "relate to the formation of collective [bargaining] agreements or efforts to secure them," *Hawaiian Airlines*, 512 U.S. at 252 (quotation and alterations omitted), and require a more extensive bargaining and mediation process, *see Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 302-03 (1989). Everyone agrees that this case involves a minor dispute.

Under this regime, "different airlines may use different contracts, and any one may have different agreements for different crafts." *Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 692 n.16 (1963).

Arbitration proceedings under the RLA are subject to rigorous procedural requirements. When an employer and employee cannot resolve a grievance themselves, "disputes may be referred by petition of the parties or by either party to an appropriate [system board] … with a full statement of the facts and supporting data bearing upon the disputes." 45 U.S.C. § 184; *see id.* § 153 First (i). The board must give the parties "due notice of all hearings." *Id.* § 153 First (j). "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect." *Id.* And arbitration awards "shall be stated in writing." *Id.* § 153 First (m).

b. A party who loses in arbitration may obtain judicial review in only limited circumstances. The RLA states that, as a general rule, "the findings and order of the [board] shall be conclusive on the parties." *Id.* § 153 First (q). It then sets forth three specific grounds on which an arbitration order "may be set aside":

> (1) "the failure of the [board] to comply with the requirements of this chapter";
>
> (2) "failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction"; or
>
> (3) "fraud or corruption by a member of the [board] making the order."

Id.

This Court has called the RLA's judicial-review provision "among the narrowest known to the law." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987) (quotation omitted). That narrow scope is intentional: "to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers"—and thus to ensure smooth operation of railroads and airlines—Congress "considered it essential to keep … 'minor' disputes within the [board] and out of the courts." *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978).

B. Factual Background

1. Petitioner worked as a fleet service agent at respondent American Airlines, Inc. (American) from 1999 until April 24, 2013.[2] *See* Court of Appeals Appendix, Dkt. 11, No. 21-1093 (3d Cir.) (C.A.) 39, 42. On August 7, 2012, petitioner entered into a Last Chance Agreement (LCA) with American stating "that any violation of company policy or procedure would be just cause for [her] immediate termination." *Id.* at 39-40; *see* Pet. App. 20. On April 11, 2013, American notified petitioner that it "believed she was in violation of the LCA due to her failure to complete … training," C.A. 41, and on April 24, 2013, American

[2] US Airways, Inc. employed petitioner. But US Airways ceased to exist as a corporate entity effective December 30, 2015, when it merged with and into American. American is therefore the real party in interest, and this brief will refer to respondent as American.

terminated petitioner's employment, *id.* at 42; *see* Pet. App. 20.

Petitioner's union, the International Association of Machinists and Aerospace Workers (IAM or the union), filed a grievance on petitioner's behalf challenging her termination. C.A. 42-43. Under the collective-bargaining agreement between IAM and American, this grievance triggered arbitration proceedings before the System Board of Adjustment established by American and the union. Pet. App. 20. The system board panel consisted of a member selected by American, a member selected by the union, and a neutral member selected by both American and the union. *Id.* at 21. The union retained counsel to present petitioner's case to the system board. *See id.* Petitioner also retained her own private counsel. *Id.*

The system board convened an evidentiary hearing concerning petitioner's grievance. Petitioner alleges that at the outset of this hearing, the union's attorney (appearing on petitioner's behalf) and American's attorney objected to the presence of petitioner's private counsel. *Id.* The union's attorney allegedly "indicated that the hearing was a contractual proceeding between [American and the union] and … Plaintiff's outside counsel had no right to be there and that the neutral member of the System Board was in agreement." *Id.* Petitioner has not alleged that any system board member commented on the union attorney's objection to the presence of petitioner's private counsel. *See id.* Petitioner's private counsel then left the hearing, and petitioner never raised with the board the issue of whether her counsel could participate—even though the neutral board member serving

as chairperson asked all parties if they had any questions before the hearing began. *See* Court of Appeals Supplemental Appendix, Dkt. 20, No. 21-1093 (3d Cir.) ("C.A. Supp App'x") 49. Petitioner alleges that material aspects of her case were then not presented to the system board. Pet. App. 21. She further alleges that without private counsel, she could not direct the questioning of relevant witnesses. *Id.*

During the hearing, the parties presented evidence and arguments. *See* C.A. Supp App'x 31-206. The union attorney presented petitioner's own testimony, the testimony of a supporting witness, and an exhibit. *See id.* at 57-66, 159-206. American presented 11 exhibits and two witnesses, both of whom the union attorney cross-examined. *See id.* at 66-158. After the hearing, both parties submitted briefs to the system board. *Id.* at 6. Petitioner never raised any due process challenge before the board.

The system board eventually issued a 24-page decision and award, finding (among other things) that American had "abided by its obligations under the … LCA," petitioner had "failed to abide by her obligations under the [LCA], and [American] had abided by its obligations under the LCA in terminating [petitioner's] employment." *Id.* at 25; *see id.* at 4-26. The union-appointed member of the system board dissented from the decision. *Id.* at 29.

2. Petitioner filed a *pro se* complaint against American and the union in federal district court, seeking to vacate the arbitration decision because her private counsel was allegedly barred from participating in the evidentiary hearing. Pet. App. 21. As relevant here, petitioner asserted that (1) her due process rights

were violated and (2) the system board engaged in "fraud or corruption." *Id.* at 24, 26.

The district court granted American's motion to dismiss both claims.[3] First, the court dismissed petitioner's due process claim with prejudice, holding that "deprivation of due process does not fall within the three narrow categories permitting judicial review of an arbitration decision under" the RLA. *Id.* at 25. Second, the district court dismissed petitioner's "fraud or corruption" claim without prejudice. *Id.* at 26-27. The court explained that to plausibly state such a claim, petitioner would need to allege that the system board itself engaged in improper conduct. *Id.* Because petitioner's complaint focused only on the conduct of attorneys for the union and American—not "conduct of the System Board"—she failed to state a claim. *Id.* at 27.

After petitioner amended her complaint to re-allege her "fraud or corruption" claim, the district court dismissed the amended complaint with prejudice. *Id.* at 16. "Plaintiff fail[ed] again to allege," the court explained, "any specific conduct directly perpetrated by the System Review Board." *Id.* at 14. Nor can "the conduct of the IAM representative and counsel for American Airlines, even taken as true, … be imputed to the Board." *Id.* These deficiencies, the court held, were "fatal to Plaintiff's 'fraud or corruption' claim under the RLA." *Id.*

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[3] The district court held that the union was not a proper party to petitioner's claims seeking to vacate the system board's decision. *Id.* at 28 n.4.

3. Petitioner appealed only her due process claim to the Third Circuit. The Third Circuit affirmed the district court's dismissal in a non-precedential decision, holding that because "[d]ue process claims do not fall within th[e] narrow categories for review" under the RLA, "the District Court did not err in dismissing [petitioner's] due process claim." *Id.* at 6.

The petition for certiorari followed.

REASONS FOR DENYING THE PETITION

The petition alleges the existence of a circuit conflict, but that conflict is not implicated and lacks practical significance, and thus does not warrant this Court's review. The petition is also an unsuitable vehicle for answering the question presented because of petitioner's forfeiture of her due process claim and failure to allege state action. What's more, the decision below is correct. This Court should deny the petition.

A. The Circuit Conflict Identified In The Petition Does Not Warrant This Court's Review

Petitioner claims a circuit split on the question presented. Pet. 7-8. But while it is true that the circuits have disagreed over whether the RLA permits courts to review due process challenges to arbitration decisions as a general matter, that disagreement is not implicated here and is of no practical import. The dispute is over whether RLA section 153 First (q) allows courts to review due process challenges to arbitration awards, even though that provision does not enumerate due process challenges as one of the three specific bases for judicial review. But that dispute is

not implicated here because, by its terms, section 153 First (q) applies only to the railroad industry and not the airline industry. And even assuming that section 153 First (q) does apply here, petitioner's alleged circuit conflict lacks practical significance because every plausible due process challenge could be pleaded under one of the grounds that the RLA *does* enumerate. Indeed, the Court previously granted certiorari to resolve the longstanding circuit conflict petitioner identifies in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), but it concluded that it did not need to reach the question presented to decide the case precisely because the due process claim overlapped with a claim for which the RLA provides judicial review. The Court's decision in *Union Pacific* and ensuing developments illustrate why granting certiorari on this question again is unnecessary.

1. Petitioner alleges a circuit split over whether "due process review is categorically prohibited under § 153 First (q)." Pet. 8. But by its terms, section 153 First (q) only governs judicial review of NRAB decisions. 45 U.S.C. § 153 First (q). And when Congress "extended" the RLA to the airline industry, it "except[ed] section 153" from that extension. *Id.* § 181. As the Fourth Circuit has explained (albeit in a different context), section 153 First "applies only to the railroad industry," and "there is no comparable provision" for the airline industry. *Air Line Pilots Ass'n Int'l v. U.S. Airways Grp., Inc.*, 609 F.3d 338, 345 (4th Cir. 2010). Section 184—not section 153 First—governs dispute resolution in the airline industry, and

that provision says nothing about judicial review at all. *See* 45 U.S.C. § 184.

Because the alleged circuit split turns on an interpretation of section 153 First (q), and that provision does not by its terms apply to the airline industry, the alleged split is not implicated here. While the courts of appeals have assumed that section 153 First (q)'s standard for judicial review also applies to review of airline system board decisions, they have done so with hardly any analysis. *See, e.g.*, *Shafii v. PLC British Airways*, 22 F.3d 59, 62 (2d Cir. 1994). To the extent the Court wishes to address whether section 153 First (q) permits judicial review of due process challenges, it should await a case arising from the railroad industry—where it would not need to confront the difficult and under-theorized issue of whether that provision applies to the airline industry at all.

2. Even assuming that section 153 First (q) applies in this case, the alleged circuit split over that provision's scope lacks practical significance. In *Union Pacific*, this Court granted certiorari on the question "whether a reviewing court may set aside NRAB orders for failure to comply with due process notwithstanding the limited grounds for review specified in § 153 First (q)." 558 U.S. at 79. But the Court never answered that question because the due process claim there overlapped precisely with a "statutory ground for relief" that the plaintiff had raised—namely, that the NRAB had "failed to conform, or confine itself, to matters within the scope of [its] jurisdiction." *Id.* at 80 (citing 45 U.S.C. § 153 First (q)). Recognizing that statutory claims take priority over constitutional ones, the Court resolved the case on the statutory

ground alone and never reached the due process claim. *See id.* at 81-86.

In so doing, the Court explained why cases presenting a genuine due process claim will be "uncommon." *Id.* at 81 n.7. As in that case, "many of the cases [involving] ostensibly extra-statutory due process objections [can be] accommodated within the statutory framework." *Id.* (quotation omitted). That is because "[t]he statutory review provisions are plainly generous enough to permit litigants to raise all of the simple, common, easily adjudicated, and likely to be meritorious claims that sail under the flag of due process." *Id.* (quotation omitted).

As noted, the RLA expressly permits judicial review over challenges alleging: (1) failure of an arbitration panel to comply with the RLA's requirements; (2) failure of a panel "to conform, or confine, itself to matters within the scope of [its] jurisdiction"; and (3) "fraud or corruption" by a member of the arbitration panel. 45 U.S.C. § 153 First (q). Many ostensible due-process claims—like the one in *Union Pacific*—will rest on the argument that an arbitration panel exceeded its jurisdiction, and thus can be raised as a statutory claim. *See* 558 U.S. at 80. Others will allege that the panel "failed to comply with the requirements of the [RLA]," and can likewise be raised as a statutory claim. *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 261-62 (6th Cir. 1984) (although plaintiff "characterize[d] [an] error as constituting a due process violation," "[t]he gravamen" of his complaint was that the panel "fail[ed] to comply with the

requirements of the [RLA]").[4] And still others will assert that an arbitrator operated under a conflict of interest or engaged in some other misconduct—again, an argument that can be raised as a statutory claim. *See United Steelworkers of Am. v. Union R.R. Co.*, 648 F.2d 905, 913 (3d Cir. 1981) ("A claim that personal conflicts affected the work of a board member … might justify setting aside a board's findings if the conflicts caused the board member to act fraudulently or corruptly.").[5]

As a result, even the circuits that review due process challenges generally treat "the RLA provisions governing Board hearings" as defining what "due process requires." *Goff v. Dakota, Minn. & E. R.R. Corp.*, 276 F.3d 992, 997 (8th Cir. 2002); *see English v. Burlington N. R.R. Co.*, 18 F.3d 741, 744 (9th Cir. 1994) ("the RLA provisions governing Board hearings" define what "due process requires"); *Burlington N. Inc. v. Am. Ry. Supervisors Ass'n*, 527 F.2d 216, 220 (7th Cir. 1975) ("statutory requirement of notice incorporates th[e] notion of due process"). Due process challenges in these circuits could therefore frequently be

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[4] *See also Radin v. United States*, 699 F.2d 681, 687 (4th Cir. 1983) (due process claim alleging "procedural irregularities" in board decision could have been brought under "the statutory apparatus").

[5] *See also Pac. & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991) ("fraud" under the RLA may "embrace[] a situation in which the supposedly neutral arbitrator exhibits a complete unwillingness to respond, and indifference, to any evidence or argument in support of one of the parties' positions").

asserted as statutory claims instead. *See, e.g.*, *Edelman*, 892 F.2d at 847 ("effectively denied a hearing"); *Shafii*, 22 F.3d at 60 ("arbitrator … denied [plaintiff's] request to present one witness and several documents during the proceeding").

In fact, petitioner here could have brought her whole case under permissible statutory grounds, rather than asserting a due process claim. Petitioner bases her case entirely on the allegation that her attorney was improperly barred from attending an evidentiary hearing. *See supra* at 8-10. Petitioner sought judicial review of this issue under the statutory "fraud or corruption" ground, and the district court rejected her argument on the merits. Pet. App. 14-15. But petitioner could have also raised the issue under another statutory ground, by arguing that the arbitration panel failed "to comply with the [RLA's] requirements." *See* 45 U.S.C. § 153 First (q). In particular, the RLA provides that parties "may be heard … by counsel, or other representatives, as they may respectively elect." *Id.* § 153 First (j). Petitioner could have claimed that this rule went unheeded when her private attorney was allegedly precluded from representing her at the hearing.[6] Such a claim would not have succeeded on the merits, *see infra* at 19-22 & n. 10, but it would have fallen within a statutory basis for review. Petitioner instead chose to assert a due

[6] Petitioner also could have filed a timely claim against IAM alleging that the union violated its duty of fair representation by allegedly excluding petitioner's counsel from the hearing. *See English*, 18 F.3d at 745. While petitioner added such a claim to her amended complaint, the district court found it time-barred. *See* Pet. App. 17.

process claim, even though Third Circuit precedent plainly forecloses review of that claim. *See United Steelworkers*, 648 F.2d at 911.

This case thus perfectly illustrates why the question presented here will almost never have meaningful legal or practical consequences. Plaintiffs objecting to an RLA arbitration decision can generally fit their objection into a permissible statutory ground for review. And they can obtain the same relief—vacatur of the arbitration decision—under a statutory claim as under a due process claim. *See* 45 U.S.C. § 153 First (q) (allowing courts to "set aside" arbitration awards). The question presented arose in this case only because petitioner eschewed a statutory ground for review, in favor of a prohibited due process ground. There is no basis for granting review on an immaterial question in an anomalous case.

3. Unsurprisingly, due process challenges to RLA arbitration decisions have rarely succeeded in the circuits that review such challenges. That was true even before this Court's decision in *Union Pacific*. American has identified only six decisions finding due process violations in the nearly 85 years between the RLA's enactment and the Court's decision in *Union Pacific*.[7] One of those was the Seventh Circuit's decision in *Union Pacific*, which this Court abrogated by

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[7] *See Bhd. of Locomotive Eng'rs v. Union Pac. R.R. Co.*, 522 F.3d 746 (7th Cir. 2008); *Int'l Ass'n of Machinists & Aerospace Workers v. Metro-N. Commuter R.R.*, 24 F.3d 369 (2d Cir. 1994); *Hall v. E. Air Lines, Inc.*, 511 F.2d 663 (5th Cir. 1975); *Chi., Rock Island & Pac. R.R. Co. v. Wells*, 498 F.2d 913 (7th Cir. 1974); *Sys. Fed. No. 30, Ry. Emps. Dep't v. Braidwood*, 284 F. Supp. 611

resolving the case exclusively on statutory grounds. *See* 558 U.S. at 80-81.

And since *Union Pacific* clarified in 2009 that "ostensibl[e] extra-statutory due process objections" can usually be "accommodated within the statutory framework," 558 U.S. at 81 n.7 (quotation omitted), the landscape is even more stark. While plaintiffs may still tack due process claims onto statutory claims in the circuits that allow them, American has not identified a single case in which such a claim has succeeded since *Union Pacific*. That is because lower courts have heeded this Court's admonition that due process claims add next to nothing beyond the statutory grounds themselves.[8]

There is yet another reason why plaintiffs' attempts to assert due process claims have been fruitless: the RLA "itself provides for process sufficient to meet constitutional requirements." *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 662 n.3 (10th Cir. 2004). The essential requirements of procedural due process are "notice and opportunity for hearing appropriate to the

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(N.D. Ill. 1968); *Mo.-Kan.-Tex. R.R. Co. v. Nat'l R.R. Adjustment Bd.*, 128 F. Supp 331 (E.D. Ill. 1954).

[8] *See, e.g.*, *Hogroe v. Burlington N. Santa Fe Ry. Co.*, 2016 WL 6442182, at *3 (N.D. Ill. Nov. 1, 2016) (plaintiff's attempt to "translate his [statutory] claim into due process terms does not help his cause"); *Tate v. Spirit Airlines, Inc.*, 957 F. Supp. 2d 1359, 1377 (S.D. Fla. 2013) ("the Court construes [plaintiff's] due-process complaints as concerns that the Board exceeded its jurisdiction when it heard and considered [certain] evidence"); *Smith v. Union Pac. R.R. Co.*, 805 F. Supp. 2d 528, 535 (N.D. Ill. 2011) (plaintiff's "due-process challenge … is instead another form of [his statutory] argument").

nature of the case." *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). And the RLA expressly confers "[r]ights of notice, hearing, and participation or representation" in arbitration proceedings. *Elgin*, 325 U.S. at 727. The RLA's many specific procedural requirements—from unbiased panels, to notice of hearings, to a written decision—are spelled out above. *See supra* at 5. And parties may obtain judicial review on the basis that an arbitration panel failed to follow those requirements. 45 U.S.C. § 153 First (q). It is difficult to see how the Constitution could require more process than the RLA (including its judicial-review provision) already provides.

In short, this Court should not expend its scarce resources to answer an artificial legal question that generally makes no difference in actual cases. Even if the obscurity of the question presented here were not fully clear in 2009 when the Court granted certiorari in *Union Pacific*, this Court's decision in that case and the 13 subsequent years have made it so.

B. This Case Is An Unsuitable Vehicle For Resolving the Question Presented

The petition suffers from two serious vehicle problems, both of which make the case a poor candidate for certiorari. First, petitioner forfeited her due process claim by failing to raise it before the system board. Second, the district court's decision on petitioner's "fraud or corruption" claim confirms that petitioner has alleged no state action—a defect that would inevitably doom her due process claim as well.

1. This case is a poor vehicle for review because petitioner forfeited her due process claim by failing to

raise it before the system board. At the arbitration hearing, petitioner never claimed that she was entitled to her own private counsel, as opposed to being represented by the union's counsel. *See* C.A. Supp. App'x 31-206 (transcript of arbitration hearing). She did not, for instance, voice an objection to the system board after her counsel had allegedly been excluded from the hearing, even though the board asked whether the parties had any questions before the hearing began. *See id.* at 49. And the board had no duty to raise the issue *sua sponte*. *See United Steelworkers*, 648 F.2d at 912 ("failure [by the board] to secure an express waiver of the right to counsel is not a violation of the [RLA]"). Because petitioner forfeited the objection underlying her due process claim by failing to raise it before the system board, a court would not reach her claim even if the RLA permitted it to. *See Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 840 (7th Cir. 1999) (plaintiff "had an obligation to raise the issue" underlying her due process claim "with the Board in a timely manner" and failed to, so she "forfeited the opportunity" to raise it in court).

That is a vehicle problem on its own, but it also provides another reason why the petition does not implicate the alleged circuit conflict: even circuits that would allow review of due process claims in theory do not allow review when the plaintiff has forfeited the objection underlying her due process challenge by failing to raise it before the system board. *See id.* at 840 ("We need not reach the merits" of plaintiff's "procedural due process" claim because she "waived her contention" by failing "to raise the issue with the Board"); *Goff*, 276 F.3d at 998 (plaintiff waived due process

claim by failing to "raise[] his procedural objection while the Board had an opportunity to act on it"); *cf. Sokolowski v. Metro. Transp. Auth.*, 723 F.3d 187, 192 (2d Cir. 2013) ("declin[ing] to consider [plaintiff's] waived … challenge" to board decision).

The same is true where, as here, the plaintiff challenges only conduct of her employer or union, rather than conduct of the board itself. *See, e.g.*, *English*, 18 F.3d at 744 ("Cases allowing judicial review of board awards on due process grounds restrict the review to the actions of the board."); *Hunt v. Nw. Airlines*, 600 F.2d 176, 179 (8th Cir. 1979) ("[Plaintiff's] due process allegation is directed toward his employer, not toward any conduct of the system board; therefore, judicial review is foreclosed."); *Edwards v. St. Louis-San Francisco R.R. Co.*, 361 F.2d 946, 953 (7th Cir. 1966) (requiring that plaintiff challenge "conduct of the [NRAB]" as opposed to employer conduct "during the initial hearing on railroad property").

Thus, no court of appeals would review the merits of petitioner's due process claim. The fact that petitioner's claim would be unreviewable in every circuit renders the petition an especially unsuitable vehicle to resolve the circuit conflict it identifies.

2. The petition also suffers from another vehicle problem. As explained above, petitioner bases her due process claim entirely on the allegation that attorneys for the union and American prevented her private attorney from attending an evidentiary hearing. *See supra* at 8-10. That claim cannot plausibly establish a due process violation because it involves no state action. *See Mathews v. Eldridge*, 424 U.S.

319, 332 (1976) ("Procedural due process imposes constraints on *governmental* decisions" (emphasis added)).

Perhaps more important, the district court has effectively held as much, and has thus foreordained the result of petitioner's due process claim even if the courts below allowed her to press it. Recall that petitioner based her "fraud or corruption" claim on exactly the same conduct—the alleged exclusion of her private attorney—as her due process claim. *See supra* at 8-9. And in rejecting petitioner's "fraud or corruption" claim, the district court held that "the conduct of the [union] representative and counsel for American Airlines, even taken as true, cannot be imputed to the Board," and petitioner "fails … to allege any specific conduct directly perpetrated by the System Review Board." Pet. App. 14. These deficiencies, the court concluded, were "fatal to Plaintiff's 'fraud or corruption' claim." *Id.*

These defects would also be fatal to petitioner's due process claim. Due process claims, of course, require state action. *See Mathews*, 424 U.S. at 332. To the extent the conduct of an airline system board could ever count as state action,[9] the district court already held that petitioner failed to allege any action

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[9] As explained above, *see supra* at 4-5, whereas Congress "established an expert body"—the NRAB—to arbitrate grievances "in the railroad industry," *Gunther*, 382 U.S. at 261, it did not take the same approach in the airline industry. Rather, it directed airlines and unions to *themselves* "establish a board of adjustment" to arbitrate employee grievances. 45 U.S.C. § 184. Because system boards in the airline industry involve private ac-

by the board here. That means that if this Court were to grant certiorari, reverse, and remand the case for adjudication of petitioner's due process claim, that claim would immediately fail based on the district court's conclusion that petitioner failed to allege any board action, which is the unappealed law of the case.[10] The Court should not grant review in a case that is foreordained to fail regardless of how the question presented is resolved.

C. The Decision Below Is Correct

The court of appeals held that "[d]ue process claims do not fall within th[e] narrow categories for review" under the RLA. Pet. App. 6 (citing *United Steelworkers*, 648 F.2d at 910). That decision accords

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tors and stem from private agreement as opposed to congressional enactment, there is a serious question about whether their decisions constitute state action under current doctrine, *see, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50-51 (1999), though a 1963 decision from this Court suggests that they do, *see Int'l Ass'n of Machinists*, 372 U.S. at 694-95. Avoiding the difficult question of whether airline system boards are state actors is yet another reason why the Court should only resolve the question presented (if at all) in the context of a challenge to an NRAB decision.

[10] Even if petitioner had alleged board action, her due process claim would still fail. *See, e.g.*, *Muscarella v. Brown*, 1989 WL 87592, at *3 (W.D.N.Y. July 28, 1989) (there is no "constitutional right which affords a petitioner the right to be represented by counsel at hearings before the Board"); *D'Elia v. N.Y., New Haven & Hartford R.R.*, 230 F. Supp. 912, 916 (D. Conn. 1964) ("[N]either plaintiff nor the Court can find any authority for the proposition that it is a denial of petitioner's constitutional rights to deprive him of counsel at a hearing of a dispute before the NRAB.").

with the RLA's text and context, as well as this Court's precedent. Petitioner's counterarguments are misconceived.

1. "[W]hen [a] statute's language is plain, the sole function of the courts … is to enforce it according to its terms." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (quotation omitted). The RLA declares that, as a general rule, arbitration decisions are "final and binding upon both parties." 45 U.S.C. § 153 First (m). It then provides three enumerated grounds upon which a court may set aside an arbitration decision: (1) "failure of the [board] to comply with the requirements of this chapter"; (2) "failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction"; or (3) "fraud or corruption by a member of the [board]." *Id.* § 153 First (q). None of the enumerated grounds of judicial review mentions due process. Where, as here, "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quotation omitted).

The statutory context and history confirm that Congress intended to enact what this Court has deemed "among the narrowest [judicial-review provisions] known to the law." *Buell*, 480 U.S. at 563 (quotation omitted). Congress enacted the judicial-review provision at issue here in 1966. Before 1966, employees who lost in arbitration received no judicial review at all. *See* Pub. L. No. 73-442, 48 Stat. 1185, 1191 (1934) ("[A]wards shall be final and binding upon both

parties to the dispute, except insofar as they shall contain a money award."). Railroads and airlines, on the other hand, could obtain *de novo* judicial review if they refused to pay a monetary award, and the prevailing employee brought an enforcement action. *See id.* at 1192. To address this asymmetry, some courts of appeals crafted an extra-statutory avenue for employees to raise due process challenges in court. *See Ellerd v. S. Pac. R.R. Co.*, 241 F.2d 541, 545 (7th Cir. 1957).

But instead of codifying that due process ground for review, Congress took a different approach to correcting the inequitable treatment of employees. It made judicial review equally available to *both* carriers and employees—but limited that review to three enumerated grounds. 45 U.S.C. § 153 First (q); *see* S. Rep. No. 89-1201, at 1337 (1966) (1966 amendment designed "to provide equal opportunity for limited judicial review … to employees and employers"). Those enumerated grounds would allow employees to raise many of the same types of challenges that were previously raised under the banner of due process. *See supra* at 12-16. But Congress specifically rejected a proposal that would have expanded judicial review to reach arbitration awards that were "contrary to constitutional right, power, privilege, or immunity." *Amend the Railway Labor Act: Hearing on H.R. 706*, 89th Cong., at 123-32 (1966).

Congress's targeted judicial-review approach makes sense given the RLA's broader objectives. The RLA states that one of its "purposes" is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation

or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). As this Court has explained, "Congress intended minor grievances of railroad [and airline] workers to be decided *finally* by" system board panels, *Gunther*, 382 U.S. at 263 (emphasis added), and thus to be kept "out of the courts," *Sheehan*, 439 U.S. at 94. Sometimes "finality will work to the benefit of the worker" by "spar[ing] [him] the expense and effort of time-consuming appeals which he may be less able to bear than the railroad" or airline. *Id.* And sometimes "the principle of finality happens to cut the other way." *Id.* But manufacturing an amorphous due process ground for judicial review would contravene Congress's finality aims by allowing plaintiffs to attack the merits of arbitration decisions simply by framing their objections in due process terms. Years-long merits litigation under the guise of due process is antithetical to "the prompt and orderly settlement of all disputes." 45 U.S.C. § 151a(5).

Finally, this Court's precedent cements what the statutory text and context already establish. In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), the Tenth Circuit had set aside an adjustment board decision on the ground that the board's rejection of the plaintiff's "equitable tolling argument" "deprived [the plaintiff] of an opportunity to be heard in violation of his right to due process." *Id.* at 91-93 (quoting 576 F.2d 854, 857 (10th Cir. 1978)). This Court held that the Tenth Circuit had "exceeded the scope of its jurisdiction to review decisions of the Adjustment Board." *Id.* at 93. "The dispositive ques-

tion," the Court explained, "is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the [RLA]." *Id.* Contrary to the Tenth Circuit's decision, "[c]haracterizing the issue presented as one of law … does not alter the availability or scope of judicial review." *Id.* Because the plaintiff had "failed to demonstrate the existence of any of the grounds for review set forth in § 153 First (q)," the Court concluded that he could not obtain judicial review of the board's decision. *Id.*

Sheehan's logic applies fully here. Petitioner's due process claim does not "fall within any of the three limited categories of review provided for in the [RLA]." *Id.* And because "[j]udicial review of … Board orders is limited to [those] three specific grounds," petitioner cannot obtain review of her due process claim. *Id.*

2. Petitioner advances two arguments in support of her claimed entitlement to due process judicial review, but both arguments lack merit.

a. Petitioner first argues that this Court recognized "the availability of due process review" in *Union Pacific R.R. Co. v. Price*, 360 U.S. 601 (1959), and that Congress effectively ratified that practice in the 1966 RLA amendment. Pet. 8. The inference that petitioner asks this Court to adopt is wrong.

In *Price*, the Court noted in passing that some courts of appeals had reviewed RLA arbitration "award[s] claimed to result from a denial of due process." 360 U.S. at 616 (citing *Ellerd*, 241 F.2d 541; *Barnett v. Pa.-Reading Seashore Lines*, 245 F.2d 579,

582 (3d Cir. 1957)). But the Court did not exercise judicial review over a due process claim in that case—no such claim was even at issue. *See id.* at 617 (declining to review employee's "common-law action for damages after [he] fail[ed] to sustain his grievance before the Board"). So there was no due process holding from *this Court* for Congress to ratify.

Nor did Congress ratify the court of appeals decisions that had exercised extra-statutory due process review. As noted, courts reached those decisions to soften the RLA's complete denial of judicial review to employees, even while the statute afforded carriers *de novo* review. *See supra* at 23-24. In 1966, Congress recognized this asymmetry, but remedied it in a different way than the courts of appeals: by equally extending three enumerated grounds for judicial review to employees and carriers alike. *See supra* at 24. As the Fourth Circuit has explained, the cases that "arose before the 1966 amendments in § 153 First (q) that provide for full and direct judicial review … are no longer persuasive." *Radin*, 699 F.2d at 687 n.14. If Congress had wanted to codify the approach of the courts of appeals, it would have expressly enumerated due process challenges as a ground for judicial review. But Congress did not do so.

Thus, far from ratifying due process review, Congress displaced it. That conclusion is consistent with the general rule that where Congress enacts an "integrated scheme of administrative and judicial review," it forecloses prior forms of "nonstatutory review." *United States v. Fausto*, 484 U.S. 439, 444-45 (1988).

b. Petitioner next argues that Congress must speak clearly before it may foreclose judicial review of

due process claims, and that it did not do so in the RLA. Pet. 8-9. That argument is flawed in multiple respects.

As an initial matter, even if a clear-statement rule applied in this context, the RLA would satisfy it. As this Court has emphasized, the RLA "*unequivocally* states that [board decisions] may be set aside only for the three reasons specified therein." *Sheehan*, 439 U.S. at 93 (emphasis added). By expressly enumerating three grounds for judicial review—none of which references due process—Congress unambiguously foreclosed judicial review of due process claims. The "statutory language means just what it says." *Id.*

Petitioner (at 9) cites *Webster v. Doe*, 486 U.S. 592 (1988), but *Webster* bears no resemblance to this case. There, the statute did not directly address judicial review, but instead stated that the CIA director "may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. § 403(c). The Court held that Congress's indirect language did not "preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section." *Webster*, 486 U.S. at 603-04. By contrast, the RLA does squarely address judicial review—first by stating that board decisions are "final and binding" and then by enumerating three statutory grounds for judicial review. *See* 45 U.S.C. § 153 First (m), (q). Unlike in *Webster*, then, Congress's "inten[t] to preclude judicial review of constitutional claims [here is] clear." 486 U.S. at 603.

But petitioner's reliance on *Webster*'s clear-statement rule also fails at a more fundamental level. *Webster* and other cases applying presumptions favoring judicial review involve government agencies deploying regulatory power against individuals. *See, e.g.*, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The airline industry's system boards, however, more closely resemble a private arbitration panel. *See Hawaiian Airlines*, 512 U.S. at 248 (describing system board as a "mandatory arbitral mechanism"). After all, airlines and unions establish the panels themselves, and the panels consist of private, nongovernmental actors. *See supra* at 4-5. And when it comes to judicial review of private arbitration decisions, the presumption flips: "courts play only a limited role when asked to review the decision of an arbitrator." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987). Accordingly, there is no basis for applying *Webster*'s clear-statement rule in this context.

That conclusion also follows for a final reason. The Court requires a clear statement before construing a statute "to deny any judicial forum for a *colorable* constitutional claim." *Webster*, 489 U.S. at 603 (emphasis added). But as explained above, almost every colorable due process challenge to a system board action—*e.g.*, an alleged denial of notice, an opportunity to be heard, or an unbiased decisionmaker—can be "accommodated within the [RLA's] statutory framework." *Union Pac.*, 558 U.S. at 81 n.7 (quotation omitted). The only due process claims that could not be so accommodated will be novel and unlikely to succeed. For that reason, the Court should simply interpret the

RLA's text as written, without any presumptions or clear-statement rules. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) ("*Webster*'s standard does not apply where Congress simply channels judicial review of a constitutional claim" into a particular forum). And the RLA's text plainly forecloses judicial review of due process claims like petitioner's.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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