No. 22-220

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Airlines for America ("A4A") is the nation's oldest and largest airline trade association, representing passenger and cargo airlines throughout the United States. Together, as of July 2022, A4A's members and their wholly owned subsidiaries directly employ more than 90% of the airline industry's 768,000 workers. In the first half of 2022, A4A's passenger carriers and their regional airline affiliates carried 291 million passengers—over 70% of the industry total—and A4A's all-cargo members together carried 70% of U.S. airlines' cargo traffic. Commercial aviation, moreover, drives 5% of U.S. gross domestic product and helps support more than 10 million U.S. jobs.

As part of its core mission, A4A works to foster a business and regulatory environment that ensures a safe, secure, and healthy U.S. air transportation industry—including stable, uniform, and predictable legal rules to govern it. Thus, throughout its seventy-five-plus year history, A4A has been actively involved in the development of the federal law applicable to commercial air transportation. That includes the Railway Labor Act ("RLA"), which originally applied only to railroads but was extended in 1936 to air carriers. To that end, A4A has participated as *amicus curiae* in some of this Court's landmark RLA

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief. All parties have consented to the filing of this brief.

cases. *See, e.g.*, Br. of Air Transport Ass'n of Am. as *Amicus Curiae* in Support of Pet. for Writ of Certiorari, *Hawaiian Airlines, Inc. v. Norris*, 1993 WL 13010921 (July 23, 1993) (No. 92-2058); Br. of Air Transport Ass'n of Am. as *Amicus Curiae* in Support of Pet. for Writ of Certiorari, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 1985 WL 669497 (Oct. 1, 1985) (No. 85-1140).[2]

The decision below threatens to disrupt and compromise A4A's mission by undermining one of the dispute-resolution mechanisms at the heart of the RLA. The RLA's mandatory arbitration provision was designed to ensure the fair and efficient resolution of disputes involving the interpretation or application of collective bargaining agreements ("CBAs")—"minor" disputes in the language of the RLA. Congress intended arbitration to be the *exclusive* vehicle for resolving these labor disputes, but the Fifth Circuit's decision below would grant union officials a means of opting out of the RLA's exclusive remedy whenever they can allege a colorable claim that a carrier acted out of "anti-union animus." For the reasons explained below, ensuring that the RLA's mandatory arbitral mechanism for minor disputes is, in fact, mandatory is vitally important to A4A's members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress enacted the RLA and later extended it to airlines to ensure stable labor-management rela-

[2] A4A was formerly known as the Air Transport Association of America.

tions in our nation's rail and air transportation industries and thereby to promote interstate commerce. Essential to those purposes is the RLA's mandatory arbitral mechanism for the resolution of "minor" disputes—i.e., disputes involving the interpretation or application of CBAs. To "minimiz[e] interruptions in the Nation's transportation services," Congress enacted in the RLA a mandatory arbitral scheme for the "prompt and orderly settlement" of these disputes. *Int'l Ass'n of Machinists v. Cent. Airlines, Inc.*, 372 U.S. 682, 687, 689 (1963). As this Court has emphasized, arbitral jurisdiction of minor disputes is "mandatory, exclusive, and comprehensive." *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963); *see also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972). Federal courts accordingly have no jurisdiction to resolve minor disputes. *Bhd. Of Locomotive Eng'rs*, 373 U.S. at 38-39.

The decision below applied an exception to the RLA's mandatory dispute-resolution process, under which a dispute that all agree involves the interpretation or application of a CBA is *not* subject to mandatory arbitration whenever a colorable claim of "anti-union animus" is alleged. That exception is found nowhere in the RLA. Instead, the court below purported to ground this unwritten exception in Section 2, Third and Fourth of the RLA, which protect employees' choice of representatives. 45 U.S.C. § 152, Third & Fourth. But even if a claim implicates those provisions, it is still subject to mandatory arbitration if it is a minor dispute—i.e., if it involves interpretation or application of a CBA. That should end the matter.

In any event, Congress did not create a private right of action to enforce Section 2, Third and Fourth. Instead, the court below implied a right of action on the theory that federal-court jurisdiction is proper where there otherwise "would be no remedy to enforce the statutory commands which Congress has written into the Railway Labor Act." Pet. App. 12a (quoting *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 300 (1943)). Even if this outdated mode of statutory interpretation were permissible today, the Fifth Circuit's unwritten anti-union animus exception to the RLA's mandatory arbitration procedure is clearly wrong. Arbitrators under the RLA *are* competent to address claims of anti-union animus, so there is no warrant to imply a private right of action. Indeed, in RLA Section 2, Eighth, Congress required that Section 2, Third and Fourth be made a part of all carrier CBAs by operation of law, which necessarily means that Congress intended these latter provisions to be applied in arbitration by neutral labor arbitrators. Congress' choice of one remedy should have precluded the court below from implying another.

Congress had good reason to channel these disputes into mandatory arbitration. Not only is arbitration generally faster and cheaper than federal court litigation—and not only are RLA arbitrators more expert in this area than federal judges—but Congress knew from experience that mandatory arbitration of minor disputes was necessary to secure labor peace and avoid interruptions to national transportation services. In the modern world, interruption of air transportation in particular would have calamitous consequences for the nation's econ-

omy. The Fifth Circuit's implication of a private right of action for claims of anti-union animus thus threatens the very harms that Congress sought to avoid when it created a "mandatory, exclusive, and comprehensive" system of arbitration for minor disputes.

The decision below does not merely crack the courthouse door ajar. The Fifth Circuit held that a union can invoke the machinery of the federal courts whenever it alleges a "colorable" claim of anti-union animus directed toward *any* union "representative." In the Fifth Circuit, the "offices or duties" of the "representative" are irrelevant. That rule conflicts with decisions by both the Sixth and Second Circuits. Those courts interpret the term "representative" in Section 2, Third narrowly. Both hold that the term speaks to core representational functions under the RLA—i.e., collective bargaining. In those circuits, only union representatives with a role in bargaining—and no others—can trigger federal jurisdiction for anti-union animus claims. Even if there were an animus exception to mandatory minor-dispute arbitration, there is a massive difference between a narrow exception, as in the Sixth and Second Circuits, and the gaping exception created by the Fifth Circuit in the decision below. The Court should grant review to resolve this conflict and, ultimately, to hold that no animus exception exists at all.

The petition should be granted and the decision below reversed.

ARGUMENT

In the RLA, Congress created a mandatory and

exclusive arbitral mechanism for the adjudication of minor disputes. Congress mandated arbitration instead of federal court litigation because experience showed that mandatory arbitration was necessary to secure labor peace and to avoid disruptions in critical national industries. The dispute-resolution framework that Congress enacted admits of no exceptions. Yet the court below applied an unwritten exception for claims of anti-union animus. The Fifth Circuit's decision is wrong, and it threatens to create the very harms that Congress sought to avoid—including substantial disruption in the nation's air and rail commerce.

I. THE FIFTH CIRCUIT'S "ANTI-UNION ANIMUS" EXCEPTION TO MANDATORY ARBITRATION WILL RESULT IN THE VERY DISRUPTION TO AIR TRANSPORTATION THAT CONGRESS SOUGHT TO AVOID

A. The RLA's "Mandatory" And "Exclusive" Arbitral Mechanism Is Necessary To Secure Labor Peace And Prevent Disruptions To Crucial National Industries

Congress enacted the RLA and extended it to air transportation "to promote stability in labor-management relations" in two exceedingly "important national industr[ies]." *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). Congress recognized that stable labor relations have "special importance in the rail and air industries, where failure to resolve labor disputes in a prompt and orderly manner may ... adversely affect the public interest in traveling and shipping." *Air Line Pilots Ass'n, Int'l v. US Airways Grp., Inc.*, 609 F.3d 338, 341 (4th Cir.

2010) (quotations omitted). Congress thus designed the RLA both to "encourage collective bargaining" and to prevent "wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148 (1969); *see also* 45 U.S.C. § 151a.

This case concerns the mandatory-arbitration procedure Congress established for so-called "minor disputes"—i.e., disputes involving the interpretation or application of a CBA. In the air transportation industry, the RLA imposes a "duty" on "every carrier and … its employees, acting through their representatives, … to establish a board of adjustment." 45 U.S.C. § 184.[3] "Such boards," the RLA further provides, "may be established by agreement between employees and carriers." 45 U.S.C. § 184. Having established a duty to create adjustment boards, the RLA requires that disputes "growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" that cannot be resolved through the normal grievance mechanism must be resolved by "an appropriate adjustment board." *Id.*

As this Court has recognized, the RLA's dispute-resolution procedures are at the very "heart" of the

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[3] These boards of adjustment are called "system boards," denoting an individual air carrier's entire nationwide system. For rail carriers, the RLA itself creates the National Railroad Adjustment Board, which has jurisdiction over minor disputes in that industry, *see* 45 U.S.C. § 153, and also authorizes rail carriers and unions to create by mutual agreement other arbitral tribunals for the resolution of minor disputes. For purposes of the questions presented, there is no relevant difference between the system Congress created for rail and air carriers.

statute. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969). Mandatory arbitration, Congress "found from ... experience," was key to "minimizing interruptions in the Nation's transportation services." *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 40 (1957); *see Cent. Airlines*, 372 U.S. at 687. Congress accordingly deemed it "essential" that minor disputes be kept "out of the courts." *Sheehan*, 439 U.S. at 94; *see Hawaiian Airlines v. Norris*, 512 U.S. 246, 252-53 (1994).[4]

To that end, this Court repeatedly has emphasized that the RLA's arbitral mechanism forms a "mandatory, exclusive, and comprehensive system" for the resolution of minor disputes. *Bhd. of Locomotive Eng'rs*, 373 U.S at 38; *see Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n* ("*Conrail*"), 491 U.S. 299, 304 (1989) (confirming RLA arbitrators' "exclusive jurisdiction over minor disputes"); *Andrews*, 406 U.S. at 322 ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law."); *see also* Pet. 17. The Court has also held that the RLA's mandatory arbitration procedures are triggered so long as the carrier's "right to take the contested action," even if alleged by a union to constitute a violation of RLA Section 2, Seventh, is "arguably justified by the

[4] A "major" dispute, in contrast, would "arise where there is no ... agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy." *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945).

terms of the parties' collective bargaining agreement." *Conrail*, 491 U.S. at 307.

Congress has thus sharply limited the role of the federal courts in the RLA's comprehensive scheme. Courts can "determin[e] where the 'arguably justified' line is to be drawn" to distinguish major from minor disputes, but it is the arbitrator who must decide the merits of those disputes. *Id.* at 318-19 ("[U]nder the RLA, it is not the role of the courts to decide the merits of the parties' [minor] dispute.").

B. The Fifth Circuit's Unwritten "Anti-Union Animus" Exception Upends Congress' Design In A Manner That Threatens Substantial Disruption To The Nation's Air Commerce

This case involves a judge-made "anti-union animus" exception to mandatory minor-dispute arbitration. The RLA itself admits of no such exception. But in the Fifth Circuit's view, claims asserting anti-union animus "may be litigated in federal court because they cannot be conclusively resolved by interpreting or applying a CBA." Pet. App. 12a (quotations omitted). And not only that, disciplinary action against *any* union employee who acts in a "representative" capacity can lead to an animus claim in federal court. Pet. App. 16a-17a.

The Fifth Circuit is wrong as a legal matter, and its decision warrants this Court's review because it conflicts with the decisions of this Court and other courts of appeals. And by cutting a gaping hole in the RLA's mandatory arbitration regime for minor disputes, the Fifth Circuit's decision also threatens substantial real-world harm to the nation's air

transportation and interstate commerce.

In enacting the RLA, Congress determined that a critically important way to promote labor peace and prevent interruptions to the nation's commerce was to channel minor disputes into arbitration. *Supra* at 6-8. Minor disputes, Congress determined, should be kept "out of the courts." *Sheehan*, 439 U.S. at 94. The decision below turns Congress' design on its head and threatens to bring with it all the harms that Congress sought to avoid.

Most obviously, the decision below threatens to upset labor relations and cause disruptions to interstate commerce, including air commerce. Congress "found from ... experience," *Chi. River*, 353 U.S. at 40, that mandatory arbitration for minor disputes was key to "minimizing interruptions in the Nation's transportation services," *Cent. Airlines*, 372 U.S. at 687. But in the Fifth Circuit, arbitration is no longer mandatory. Instead of "prompt and orderly settlement" of minor disputes by neutral arbitrators, *id.* at 689 (quotations omitted), unions in the Fifth Circuit are free to litigate garden-variety discipline and discharge claims in federal court so long as they claim the carrier was really motivated by anti-union animus.

Disruptions to air commerce were intolerable to Congress when it extended the RLA to air carriers in 1936. Today, air commerce is orders of magnitude more important to the nation's economy. Commercial aviation drives $1.7 trillion in U.S. economic activity annually and helps support more than 10 million U.S. jobs. It is thus crucial that courts enforce Congress' dispute-resolution procedures *as written* to

avoid such disruptions, which would have a massive impact not just on airlines, but on the nation's economy more broadly.

Yet the court below not only implied an exception, but it set the bar for triggering that exception absurdly low. The Fifth Circuit held that would-be federal plaintiffs "need only allege a colorable claim over which there is federal jurisdiction." Pet. App. 14a n.7 (quotations omitted). And it allowed any adverse action against *any* union-affiliated employee who in some sense represents someone else to justify a union's animus claim in federal court, no matter the employee's role in collective bargaining or even the employee's "particular offices or duties." Pet. App. 16a-17a. That standard will usher in a flood of federal court litigation that otherwise would be resolved through mandatory arbitration. After all, a union will almost always be able to *allege* that discipline was pretextual, and under the Fifth Circuit's rule, that allegation will unlock the courthouse doors for employees with even the most minimal union responsibilities, *see infra* Part II.A. There is no indication that Congress wanted to vest federal courts with jurisdiction to hear *any* minor disputes, let alone all minor disputes implicating an allegation of anti-union animus.

Indeed, the number of union employees who can now have their union litigate their minor disputes in federal court is mind boggling. Even using a conservative estimate that 2% of the nation's 768,000 airline workers act in some capacity as representatives—e.g., shop stewards, union committee members, officers, and volunteers—that would translate to the possibility of more than 15,000 federal-court

lawsuits.

Nor is there any reason to believe that federal court litigation will lead to more accurate outcomes. On the contrary, neutral arbitrators selected by the parties who are familiar with the industry are better situated to resolve claims of anti-union animus than federal judges. *Infra* at 19.

Congress channeled minor disputes into arbitration to avoid precisely these harms. The Court should grant the petition and reverse to restore the system Congress designed.

II. THE DECISION BELOW CONFLICTS WITH PRECEDENTS OF THIS COURT, THE DECISIONS OF OTHER CIRCUITS, AND THE RLA ITSELF

A. The Fifth Circuit's Construction Of The Term "Representative" Is Not Only Incorrect, But Creates An Intolerable Circuit Conflict In An Area Of Law That Requires Uniformity

As explained below, Congress did not create *any* animus exception to mandatory arbitration for minor disputes. But if the Court were to conclude that such an exception exists, it must be tightly circumscribed. The Fifth Circuit, however, gave the anti-union animus exception as broad a reach as possible. Not only did the court below hold that a "colorable" claim of animus would suffice, but it held that adverse action against any employee who could claim to be a union "representative" in any capacity would support federal-court jurisdiction. It did so by grounding the animus exception in Section 2, Third and Fourth, and adopting an interpretation of the

term "representative" in those provisions that sweeps in "any member of any committee ever set up by a collective bargaining agreement." *Int'l Bhd. of Teamsters v. United Parcel Serv. Co.* ("*UPS*"), 447 F.3d 491, 501-02 (6th Cir. 2006). That interpretation conflicts directly with decisions from the Sixth and Second Circuits, both of which read the term "representative" far more narrowly. At a minimum, the Court should resolve this circuit conflict over the interpretation of this important federal statute.

1. As the petition demonstrates, the courts of appeals are divided over the meaning of the term "representative" in Section 2, Third, of the RLA. *See* Pet. 11-13. It is imperative that this Court resolve the conflict.

a. The Fifth Circuit gives the term "representative" an unlimited construction. According to the decision below, a "representative" is any unionized employee who can be said to represent someone else. Pet. App. 16a-17a. The "particular offices or duties" of the employee are irrelevant. *Ibid.* It follows that any union-affiliated employee with a union role can assert an animus claim—in the Fifth Circuit, carrier discipline of every such employee can be deemed to interfere with the employees' "choice of representatives." 45 U.S.C. § 152, Third.

That is not the rule in the Sixth or Second Circuit. The Sixth Circuit reads the term "representative" to mean collective bargaining representative—i.e., those employees involved in negotiating a CBA or otherwise responsible for interacting with a carrier "before the parties enter into (or re-negotiate) a collective bargaining agreement." *UPS*, 447 F.3d at

501. The term does not encompass "any member of any committee ever set up by a collective bargaining agreement, whether called a 'representative' or not." *Id.* Thus, in the Sixth Circuit (unlike in the Fifth), animus claims cannot be based on adverse action experienced by "representatives for any purposes the union chooses to use them." *UPS*, 447 F.3d at 501.

The Second Circuit reads the term "representative" even more narrowly. "Looking … to the whole statutory text," the Second Circuit has held "that the term 'representative' refers to the *union* or other *organization* designated to represent an employee." *United Transp. Union v. Nat'l R.R. Passenger Corp.*, 588 F.3d 805, 812 (2d Cir. 2009). Under this interpretation, animus claims can be brought in federal court only where the carrier's conduct threatens the union's ability to function as a union—principally, to negotiate or re-negotiate a CBA.

That even the Sixth and Second Circuits differ on the meaning of the term "representative" to some degree underscores the need for this Court's review. But both share the same bottom line: unlike in the Fifth Circuit, federal courts in the Sixth and Second Circuits do not have jurisdiction over animus claims asserted on behalf of everyone the union decides to call a "representative."

b. Decisional conflicts over important questions of federal law are generally intolerable, but a decisional conflict over the scope of the RLA is especially so. As this Court has recognized, air transportation is "in [its] nature national," and "imperatively demand[s] a single uniform rule, operating equally [throughout] the United States." *City of Burbank v.*

Lockheed Air Terminal, Inc., 411 U.S. 624, 625 (1973) (quotations omitted). Congress has thus repeatedly recognized the importance of national uniformity in air carrier regulation. This principle applies fully to the RLA's dispute-resolution mechanisms. *Cf. Cent. Airlines*, 372 U.S. at 691 n.15.

Yet disuniformity is the necessary result of the decision below. Identical claims in different states will be heard in different forums. In the Sixth and Second Circuits, anti-union animus claims will be decided in arbitration by boards of adjustment (as Congress intended) unless the union can show that the carrier's conduct threatens to impede the collective bargaining process—a showing that, in all likelihood, will very rarely be made. In the Fifth Circuit, in contrast, all animus claims involving any union "representatives" will be decided by courts.

This differential treatment is problematic in its own right, but it is especially problematic when one considers that boards of adjustment are more expert than judges in resolving disputes under the nationwide CBAs applicable to air carriers. The circuit split, in other words, means that experts and non-experts alike will be interpreting the same contract provisions, leading inevitably to inconsistent interpretations of the same CBAs. Differential treatment of similarly situated employees is certain to cause labor discord—one of the key harms Congress sought to avoid when it mandated minor-dispute arbitration in the first place.

2. The Fifth Circuit's interpretation is also clearly wrong. The extent of its textual analysis was its observation that in Section 2, Third, "there is no

mention of particular offices or duties … representatives must have." Pet. App. 16a-17a. But context matters too. And as both the Sixth and Second Circuits correctly recognized, the context here forecloses the Fifth Circuit's capacious definition. To start, Section 2, Third, "twice states that it applies to representatives 'for the purposes of this Act,' not to representatives for any purposes the union chooses to use them." *UPS*, 447 F.3d at 501. And the foundational purpose of the RLA is to facilitate "the collective-bargaining process" between employees and carriers. *Id*. The term "representative" also appears repeatedly throughout the RLA, and elsewhere refers to certified collective bargaining representatives. *See Nat'l R.R.*, 588 F.3d at 812 (citing 45 U.S.C. § 152, Ninth). When "Congress uses a term in multiple places within a single statute," courts presume that "the term bears a consistent meaning throughout." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Thus, it is not surprising that "the Court has observed that § 2, Third and Fourth, as amended in 1934, address 'primarily the precertification rights and freedoms of unorganized employees.'" *UPS*, 447 F.3d at 501 (quoting *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants* ("*TWA*"), 489 U.S. 426, 440 (1989)); *see also Nat'l R.R.*, 588 F.3d at 812.

B. The "Anti-Union Animus" Exception To Mandatory Minor-Dispute Arbitration Conflicts With The RLA And This Court's Precedents

It is bad enough that the Fifth Circuit's "anti-union animus" exception will undermine the RLA's efforts to maintain labor peace in the airline indus-

try. But that decision is also flatly inconsistent with this Court's precedents.

The RLA provides that minor disputes that cannot be resolved through the CBA's grievance mechanisms must be resolved by system boards of adjustment "established by agreement between employees and carriers." 45 U.S.C. § 184; *see also id.* § 153 (rail); *supra* n.3. By its plain text, the RLA's arbitral mechanism admits of no exceptions. This Court's cases are in accord—arbitral jurisdiction over minor disputes under the RLA is "mandatory, exclusive, and comprehensive." *Bhd of Locomotive Eng'rs*, 373 U.S at 38; *see also supra* at 8.

The Fifth Circuit nonetheless applied an unwritten exception to this "mandatory" and "exclusive" jurisdiction for minor disputes accompanied by claims of anti-union animus. It rationalized that exception in its belief that "[a]nimus claims like the one at bar may be litigated in federal court because they cannot be conclusively resolved by interpreting or applying a CBA." Pet. App. 12a (quotations omitted). The court below was badly mistaken.

1. As an initial matter, arbitrators can—and do—resolve questions of anti-union animus when adjudicating minor disputes. *See, e.g.*, *Ass'n of Flight Attendants-CWA, AFL-CIO v. United Airlines, Inc.*, 583 F. Supp. 3d 162, 174 (D.D.C. 2022); *see also Am. Airlines, Inc. - Allied Pilots Ass'n Sys. Bd. of Adjustment*, 106 AAR 156, 106 AA 0038, at *1, *16 (Nov. 22, 2005) (affirming suspension of pilot for posting derogatory messages about fellow pilot, and rejecting claim that discipline "was motivated by a Company desire to retaliate against him for his protected un-

ion activity"); *Nw. Airlines, Inc. – Int'l Ass'n of Machinists, Dist. 143 Sys. Bd. of Adjustment*, 104 AAR 39, at *25-26, 36 (Apr. 9, 2003) (ordering reduction of penalty issued to General Chairman of union for threats issued while conducting union business). That is because a claim that a carrier acted out of anti-union animus is effectively a claim that the carrier's actions were not justified by the terms of the CBA. The adjustment boards are unquestionably competent to decide that question—i.e., whether the carrier's actions were justified by the CBA or instead were mere pretext for anti-union animus.

Consider, for example, a dispute involving an employee discharge. The union may claim that the employee was terminated out of anti-union animus, and the carrier will respond that it terminated the employee for "just cause" within the meaning of the CBA. The arbitrator will resolve the employee's claim of animus in deciding whether the employer had "just cause."

Nor is there any reason to doubt the adequacy of the arbitration procedure. System boards of adjustment are "established by agreement between employees and carriers," 45 U.S.C. § 184, and include neutral arbitrators who favor neither side. Congress intended these system boards of adjustment in the airline industry to be "creatures of contract," permitting carriers and unions "to hash out the specifics through negotiation," including the number of arbitrators and their identities. *US Airways Grp.*, 609 F.3d at 343; *see* Jonathan A. Cohen, *Grievance Resolution and the System Board of Adjustment*, *in* ALI CLE Course of Study Materials, CY016 ALI-ABA 297 (Apr. 2017) (noting that "[c]overed employers

and unions have taken advantage of the flexibility afforded by Section 204 to negotiate provisions" to carry the RLA's arbitration mandate into effect, granting system boards varied forms of authority, permitting four- or five-member boards on the assumption that four partisan members might gridlock, or permitting the selection of a single neutral arbitrator from a previously-negotiated panel of candidates*); see also Wells v. S. Airways, Inc.*, 616 F.2d 107, 110 (5th Cir. 1980) (noting that, even with respect to partisan arbitrators, RLA imposes a duty on individual arbitrators "to adjudicate particular cases fairly without regard to their institutional predilections"); *cf.* 45 U.S.C. § 153 (detailing composition of National Railroad Adjustment Board).

Arbitrators have available to them a full complement of remedies—in the discharge example above, the arbitrator can award reinstatement and backpay if she concludes that the carrier lacked "just cause" but instead it acted out of anti-union animus. And, if anything, "arbitrators who are experts in the common law of the particular industry," *Conrail*, 491 U.S. at 310-11, are more competent to resolve animus questions than federal courts. *See also United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960) (resolution of CBA disputes "may assume proportions of which judges are ignorant").

2. The result is no different if one conceives of an anti-union animus claim as a "statutory" claim arising under RLA Section 2, Third and Fourth, as the Fifth Circuit did in the decision below. *See* Pet. App. 12a. Those sections prohibit carriers from "interfer[ing] with, influenc[ing], or coerc[ing]" their employees in their "choice of representatives," 45 U.S.C.

§ 152, Third, and provide that "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing," *id.* § 152, Fourth. *See also id.* § 181 (extending all provisions of the RLA to air carriers except the specific arbitral mechanism provided in 45 U.S.C. § 153). But Congress did not create a private right of action to enforce these provisions. Instead, this Court has held that federal "judicial intervention in RLA procedures [is] limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'" *TWA*, 489 U.S. at 441 (quoting *Switchmen's*, 320 U.S. at 300). In other words, this Court has implied a private right of action only where federal-court jurisdiction is strictly necessary to enforce the requirements of the RLA.

That will not be the case for anti-union animus claims under Section 2, Third and Fourth as long as the parties have in place a CBA, because the system boards created by CBAs will provide, in all but the most extraordinary of circumstances, "effective and efficient remedies for the resolution" of such claims. *Sheehan*, 439 U.S. at 94. For one, boards of adjustment can decide in the course of adjudicating a minor dispute whether the carrier justifiably disciplined or discharged an employee or instead acted out of a desire to interfere with employees' choice of representatives. *Supra* at 17-19.

For another, Congress itself concluded that Section 2, Third and Fourth *should be adjudicated by boards of adjustment in arbitration.* Specifically, in Section 2, Eighth, Congress provided that "the provi-

sions" of Section 2, Third and Fourth "are made part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties." 45 U.S.C. § 152, Eighth. Thus, whether the carrier violated Section 2, Third or Fourth *is* a contractual question, and a "board therefore acts within its jurisdiction by interpreting and applying [Section 2,] Third as if it were part of the collective bargaining agreement between the carrier and the employee." *Nat'l R.R.*, 588 F.3d at 814; *see also* Pet. 20-21 n.1.

For both these reasons, there is an existing "remedy to enforce the statutory commands" in Section 2, Third and Fourth, *TWA*, 489 U.S. at 441 (quoting *Switchmen's*, 320 U.S. at 300), and the Fifth Circuit's implication of a private right of action to enforce those provisions is unjustified. Put differently, Congress' "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," as does its detailed "remedial scheme[,]" *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)—i.e., mandatory arbitration before boards of adjustment. *See also Switchmen's*, 320 U.S. at 301 ("[I]t is for Congress to determine how the rights which it creates shall be enforced," and "the specification of one remedy normally excludes the other.").

Of course, "[t]he effectiveness of these private dispute resolution procedures depends on the initial assurance that the employees' putative representative is not subject to control by the employer." *TWA*, 489 U.S. at 441. Thus, this Court recognized in *TWA* that Section 2, Third and Fourth are addressed "primarily [to] the precertification rights and free-

doms of unorganized employees." *Ibid.* Where a union has not been certified or there is not yet a CBA in place, a private right of action may indeed be necessary to vindicate Section 2, Third and Fourth. In those circumstances, by definition, there will be no CBA, and thus no system boards or even minor disputes subject to mandatory arbitration. *See* 45 U.S.C. § 184. But in the post-certification context, where there is a CBA, Congress has decided that claims implicating the CBA's terms *must* be arbitrated by boards of adjustment. In that circumstance, federal-court jurisdiction is not only unnecessary because system boards can decide questions of anti-union animus, but entirely improper because Congress has expressly provided an alternative, nonjudicial remedy.

It is thus no surprise that, since *TWA*, no court of appeals has found federal-court jurisdiction over a minor dispute implicating a claim of anti-union animus where there was a CBA in place.[5] The court below was the first. That decision is wrong and it threatens serious harm to Congress' design and the nation's transportation sector.

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[5] The decision below cited various cases in which the courts of appeals supposedly recognized the "vitality" of the animus exception after *TWA*. Pet. App. 10a. But none of those cases applied the exception in circumstances resembling those here. Indeed, in nearly all of them, the courts *declined* to exercise jurisdiction or find anti-union animus. *See Stewart v. Spirit Airlines, Inc.*, 503 F. App'x 814, 820-21 (11th Cir. 2013) (affirming dismissal); *Nat'l R.R.*, 588 F.3d at 813 (affirming adjustment board jurisdiction); *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 234 (1st Cir. 1996) (holding that "the District Court correctly declined to intervene in this post-certification matter"); *Bhd. of Locomotive Eng'rs v. Kan. City S.*

CONCLUSION

For these reasons, as well as those presented in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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Ry. Co., 26 F.3d 787, 795-96 (8th Cir. 1994) (affirming grant of summary judgment); *Bhd. of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry. Co.*, 894 F.2d 1463, 1468-69 & n.10 (5th Cir. 1990) (finding minor dispute). Neither of the remaining cases, *Fennessy v. Southwest Airlines*, 91 F.3d 1359 (9th Cir. 1996) and *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), is on-point. *Fennessy* involved an employee's effort to establish a new union and thus was effectively a pre-certification dispute. *See Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 905-06 (9th Cir. 2002) (limiting *Fennessy* to its "exceptional circumstances" because it "actually involved a de facto precertification dispute" wherein "Fennessy sought to replace the existing union with a new one"); *Stewart*, 503 F. App'x at 821 ("*Fennessy* involved a major pre-certification dispute"). *Davies* similarly involved an employee who was engaged in an effort to establish a new union. 971 F.2d at 464.