No. _____

# In The
# Supreme Court of the United States

DAWN C. POLK,

*Petitioner,*

v.

AMTRAK NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Does the Railway Labor Act preempt, preclude or otherwise limit, and if so when and in what way, claims under anti-discrimination statutes, such as Title VII?

## PARTIES

The plaintiff is Dawn C. Polk. The defendants are the Amtrak National Railroad Passenger Corporation, Andrew Collins, Alton Lamontagne, Curtis Stencil, and Tracey Armstrong.

## RELATED PROCEEDINGS

*Polk v. Amtrak National Passenger Corporation*, Civil Action No. 21-cv-01740-LKG, District Court for the District of Maryland, judgment entered June 27, 2022.

*Polk v. Amtrak National Passenger Corporation*, No. 22-1912, United States Court of Appeals for the Fourth Circuit, judgment entered April 26, 2023.

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Petitioner Dawn C. Polk respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 26, 2023.

## OPINIONS BELOW

The April 26, 2023, opinion of the court of appeals, which is reported at 66 F.4th 500, is set out at pp.1a–19a of the Appendix. The June 27, 2022, Memorandum Opinion and Order of the district court, which is unofficially reported at 2022 WL 2304678, is set out at pp. 20a–40a of the Appendix.

## JURISDICTION

The decision of the court of appeals was entered on Aril 26, 2023. On July 24, 2023, the Chief Justice extended the time for filing the petition until September 8, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

## STATUTES INVOLVED

The statutes involved are set out in the Appendix.

## INTRODUCTION

The Railway Labor Act (RLA) provides that certain claims, commonly referred to as "minor disputes," can only be adjudicated by a Board established by the Act. The Fourth Circuit decision in this case deepens and further complicates an already well-established circuit conflict regarding whether, and if so when and in what way, the RLA preempts or precludes claims under anti-discrimination statutes.[1]

Three circuits hold that discrimination claims are not preempted or precluded by the RLA because the rights asserted by such claims are based on independent statutes, and are not created by a collective bargaining agreement (CBA). Two circuits hold that such claims are preempted or precluded when the outcome of a discrimination claim could be conclusively determined by the interpretation of a CBA. Four circuits hold that discrimination claims are preempted or precluded if the resolution of those claims would involve the interpretation of a CBA.

The circuits which hold that discrimination claims can be preempted or precluded by the RLA are in complete disagreement about what that limitation should be. In the instant case, for example, the Fourth Circuit holds that plaintiffs whose discrimination claims are minor disputes (under its standard) must seek determination of those claims by the Board. No

[1] The lower courts use the term "preempt" or "preclude," depending on whether the statute involved is a state or federal law.

other circuit holds that plaintiffs must, or even could, do so.

These interrelated conflicts derive to a significant degree from this Court's own RLA decisions. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), and the decisions which preceded it, set out three different standards. Although those differences did not matter in the cases before the Court, they are of great importance in other cases, particularly cases asserting claims under federal and state anti-discrimination statutes.

In most circumstances a holding that a discrimination claim is a minor dispute is fatal. For example, the Fourth Circuit's suggestion that those claims be litigated before the Board is meaningless. *Hawaiian Airlines* correctly held that the Board does not have jurisdiction over such statutory claims.

## STATEMENT OF THE CASE

### Legal Background

The Railway Labor Act establishes mechanisms for resolving certain disputes at unionized rail carriers. Disputes related to the formation of collective bargaining agreements, or efforts to secure them, are referred to as "major disputes." Disputes that "gro[w] out of grievances or out of the interpretation or application of [collective bargaining] agreements" are known as "minor disputes." 45 U.S.C. § 151a. "[M]ajor disputes seek to create contractual rights, minor disputes to

enforce them." *Consolidated Rail Corporation* (*Conrail*) *v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989). If a minor dispute cannot be resolved informally, the RLA creates a National Railroad Adjustment Board (NRAB) to adjudicate the dispute. 45 U.S.C. §§ 151 first (a), 151 first (i).[2] Similar carrier-specific adjustment boards may be created by employers and unions under the RLA.

If a claim constitutes a minor dispute under the RLA, it can only be adjudicated by the NRAB, or by a carrier-specific board agreed to by a carrier and the relevant union. For simplicity we (like some lower courts) refer to either simply as "the Board." A federal or state court may not adjudicate a minor dispute. If a lawsuit involves multiple claims, this limitation is applied separately to each claim. If the same facts give rise to several claims, only one of which is a minor dispute, a court can resolve the remaining claims. The jurisdiction of the Board, on the other hand, is defined and limited by statute to minor claims.

Because of the numerous federal and state laws, and state common law claims, related to employment relations, there has been and continues to be a large volume of litigation in the lower courts regarding which claims are and are not minor disputes. This Court has addressed the definition of a minor dispute in a series of decisions. The Court summarized those

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[2] Airlines are subject to a similar regime, except minor disputes are resolved by adjustment boards organized at each carrier. 45 U.S.C. §184.

decisions, and set out standards derived from them, in *Hawaiian Airlines, Inc. v. Norris*.

Decisions beginning in 1931 established that claims to enforce rights created by statute, rather than to enforce rights arising under a CBA, are not limited by a CBA. In *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 258 (1931), the Court rejected out of hand an argument that the RLA limited the ability of a state to protect workers by regulating the number of employees required to operate certain equipment. *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), held that the RLA does not limit negligence claims under the Federal Employers Liability Act, because the FELA "provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement...." 480 U.S. at 565. The FELA, the Court explained, was not devised to provide remedies for CBA violations, but is an independent "statutory basis for the award of damages to employees injured through an employer's or co-worker's negligence." *Id*.

The 1989 decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n* (*Conrail*), 491 U.S. 299 (1989), put the standard somewhat differently, focusing on the degree to which a claim would be affected by the interpretation of a CBA. "[T]he line drawn ... looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute

may be conclusively resolved by interpreting the existing agreement." 491 U.S. at 305.

Finally, in 1989 a footnote in *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989), suggested a third standard. "Minor disputes are those involving the interpretation or application of existing contracts." 491 U.S. at 496 n.4. An earlier decision in *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972), had commented about the particular claim in that case, which asserted that the plaintiff had been fired in violation of a CBA, "[t]he existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective-bargaining agreement." 406 U.S. at 324.

In 1994 *Hawaiian Airlines* quoted and described three standards. First, it set out the *Norwood* independent-right standard. "[U]nder *Norwood*, substantive protections provided by state law, independent of whatever labor agreement might govern, are not preempted under the RLA." 512 U.S. at 257. "[W]e have held that the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." 512 U.S. at 256. "[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Buell*, 480 U.S. at 565 (quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981)). Second, *Hawaiian Airlines* quoted the conclusive-resolution standard

from *Conrail*. "The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]." 512 U.S. at 256 (quoting *Conrail*, 491 U.S. at 305); see 512 U.S. at 263 (quoting *Conrail* conclusive-resolution standard). Third, *Hawaiian Airlines* set out a CBA-interpretation standard, relying on *Railway Labor Executives* and *Andrews*. Those decisions, the Court stated, had "defined minor disputes as those involving the interpretation or application of existing labor agreements." 512 U.S. at 256; see *id*. at 256 ("[m]inor disputes are those involving the interpretation or application of existing contracts") (quoting *Railway Labor Executives Ass'n*, 491 U.S. at 501 n.4 (1989)), 263 ("a state-law claim is pre-empted where it 'depend[s] on the interpretation' of the CBA") (quoting *Andrews*, 406 U.S. at 324 (1972)).[3]

Further complicating the situation, *Hawaiian Airlines* held that the standard for determining what is a minor dispute under the RLA would (at least usually) be the same as the standard for determining preemption under section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. But the Court referred to two different standards under section 301. The Court described *Lingle v. Norge Div. of Magic Chef, Inc*., 486 U.S. 399 (1988), as holding "that where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is pre-empted." 512 U.S. at 261 (quoting

[3] This passage in *Andrews* actually referred only to a claim asserting a violation of a CBA, not to state-law claims generally. See 406 U.S. at 324.

486 U.S. at 405–06). That resembles the CBA-interpretation standard suggested based on *Railway Labor Executives* and *Andrews*. But *Hawaiian Airlines* also described *Lingle* as holding that "the existence of a potential CBA-based remedy did not deprive an employee of independent remedies available under state law." 512 U.S. at 261. And *Hawaiian Airlines* cited the holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), "that ... state-law rights, those that existed independent of the contract would not be ... pre-empted." 512 U.S. at 260. Those passages are similar to the independent-right standard in *Norwood* and *Buell*.

Because the various standards predating and summarized in *Hawaiian Airlines* are different, in the years since that decision litigants have argued over which standard should be applied, and each side has been able to cite or quote a passage in *Hawaiian Airlines* (or an earlier decision of this Court) favorable to its position. Lower courts, in turn, have had to choose among these standards, or to fashion some rule or procedure for reconciling the differences. That is what occurred in the instant case.

**Factual Background**

Dawn Polk worked for 23 years as a conductor for Amtrak. In late 2018 she suffered an on-the-job injury that caused her to miss several months of work. When Polk indicated to Amtrak that she was able to return to work, Amtrak required her to pass a drug test, pursuant to a policy of requiring such tests of any worker

returning to the job after more than 30 days absence. Polk went to the drug testing site, but was unable to produce an adequate sample of urine during the allotted three-hour period. Polk telephoned the relevant Amtrak official, and asked to take the test again the next day. App. 3a, 23a.

Amtrak, however, rejected Polk's request, and summarily dismissed her. The company took the position that Polk's inability to provide a sufficient urine sample constituted a "failure" of the drug test. Amtrak fired Polk despite the fact that the plaintiff, at that point 51 years old, had taken random drug tests throughout her 23 years at Amtrak and had never actually failed a test. App. 3a, 23a.

In the ensuing weeks Polk sought to persuade Amtrak to permit her to return to work. In April, approximately three weeks after firing Polk, Amtrak agreed that Polk could take the drug test again and could return to work if she passed it, which she did. As a condition of regaining her job, Polk agreed to follow up drug testing during the next year of her employment, and to work with a drug counsellor. Polk took four random drug tests during the next year and passed them all. App. 3a, 23a–24a.

But after that one-year period had ended, Amtrak continued to subject Polk submit to repeated additional drug tests, totaling seven more such tests in the next year, all of which Polk passed. Polk objected that these frequent additional tests were highly embarrassing, and interfered with her medical appointments. In

early 2021 Polk complained to Amtrak about those excessive drug tests. Polk alleges that in response she received a call from an Amtrak representative explaining that the continued drug testing was a computer entry error. But the representative never called Polk back, and the drug tests continued. Polk finally retired from Amtrak in 2021 on disability benefits arising from her 2018 injury. App. 4a, 24a.

**Proceedings Below**

Polk, who is Black, submitted a complaint to the Equal Employment Opportunity Commission asserting that Amtrak had discriminated against her on the basis of race. After receiving a right to sue letter from EEOC, Polk filed a pro se complaint in federal district court. Her hand-written complaint alleged two discrimination claims. Polk asserted that she had been fired because of her race, and that because of her race she had been subjected to repeated unwarranted drug tests after the year in which she had taken and passed all the agreed-upon tests. Polk alleged that other Amtrak employees were not subject to such excessive testing. Polk indicated that she was asserting her discrimination claim under Title VII of the Civil Rights Act of 1964. App. 4a, 25a. The district court had jurisdiction under 28 U.S.C. § 1331.

Amtrak moved to dismiss Polk's complaint, arguing that her Title VII claim was precluded because the union of which Polk was a member had a collective bargaining agreement (CBA) with Amtrak. Polk's Title VII

claim, the motion argued, was a minor dispute under the RLA. The company explained that its defense would be based on the contention that its actions were "premised on the terms of the CBA," as well as on the defendant's Drug Testing Program and on the Federal Railway Administration regulations regarding drug use by railroad workers.[4] Citing this Court's decision in *Hawaiian Airlines*, Amtrak argued that "[a] claim is preempted/precluded by the RLA when a court will be required to interpret the terms of a CBA or industry norms ... in order to resolve it...."[5]

The district court dismissed the complaint, agreeing with the legal standard advanced by Amtrak. Citing this Court's opinion in *Hawaiian Airlines*, the district court held that "minor disputes ... include disputes involving the interpretation ... of a collective bargaining agreement and controversies regarding the meaning of a collective bargaining agreement. See *Hawaiian Airlines*...." App. 34a; see App. 31a (quoting *Hawaiian Airlines*, 512 U.S. at 252–53). The district court held that Polk's Title VII claim was precluded because her "Title VII claim involves the interpretation ... of the CBA at issue in this case...." App. 38a.

Polk was represented by counsel on appeal. In the court of appeals the parties advanced conflicting standards regarding what constitutes a minor dispute under the RLA. The appellate briefs on both sides relied on and quoted (different) portions of this Court's decision

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[4] Doc. 48, p. 7.

[5] *Id.* (citing 512 U.S. at 261–62).

in *Hawaiian Airlines*. Plaintiff contended that the district court had applied the wrong legal standard in determining whether the RLA barred her Title VII claim. She argued that *Hawaiian Airlines* held that claims asserting rights created by federal or state law are not preempted.

> The Court in *Hawaiian Airlines* ultimately ruled that public policy and whistleblower claims, as well as state law causes of actions involving rights independent of a collective bargaining agreement are not preempted by the Railway Labor Act. [512 U.S.] at 252. Title VII's protections against racial discrimination always exist independent of collective bargaining agreements. These rights are guaranteed to employees whether or not a collective bargaining agreement exists. As a result, the RLA does not preempt a Plaintiff's Title VII cause of action.[6]

Amtrak, on the other hand, cited *Hawaiian Airlines* for a different standard, arguing that any claim that might involve the interpretation of a CBA is a minor dispute "It is well-settled that the RLA precludes federal claims that require interpretation of a CBA. *Hawaiian Airlines*, 512 U.S. at 256."[7] Each side accused the other of misstating the holding in *Hawaiian Airlines*.[8]

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[6] Brief of Appellant, 9; see Reply Brief of Appellant, 8–9.

[7] Appellees' Brief, 12–13; see *id*. at 9–10 (quoting *Hawaiian Airlines*).

[8] Appellees' Brief, 8 n.5; Reply Brief of Appellant, 7.

The court of appeals adopted Amtrak's reading of *Hawaiian Airlines*. The Fourth Circuit held that the RLA could indeed limit claims asserting rights under Title VII or other federal statutes, and attributed that rule to decisions of this Court.

> The Supreme Court has indicated that federal claims, such as those arising under Title VII, can constitute minor disputes. On multiple occasions, the Court has explained that state causes of action can be minor disputes even though they can arise in the absence of a CBA. *Hawaiian Airlines*, 512 U.S. at 261–62.

App. 7a. The correct test, the court held, was whether resolution of a claim would involve interpretation of a CBA. "Congress understood minor disputes—that is, disagreements over the 'interpretation or application' of a CBA—to be destabilizing in and of themselves. *Hawaiian Airlines*, 512 U.S. at 252," App. 8a; see App. 13a (citing *Hawaiian Airlines* for an interpretation standard). The court of appeals anticipated that Polk, as a method of proving that Amtrak officials had acted with a discriminatory motive, would assert that those officials had violated the CBA. App. 14a–15a. "Since Polk's Title VII claim requires the interpretation of a CBA, it is a minor dispute." App. 13a. The Fourth Circuit expressly rejected Polk's argument that the RLA did not limit Title VII because the statute itself created the right against racial discrimination that Polk sought to enforce.

Under the court of appeals' opinion, however, the RLA did not extinguish Polk's Title VII claim. Unlike

the district court, which had held the RLA precluded Polk's claim, the court of appeals instead held that the RLA precluded Polk's Title VII suit. The court concluded that the RLA required Polk to litigate her Title VII claim before the Board. "[C]laims like Polk's ... go to arbitration. Polk ... can ultimately make her case to an adjustment board ... In addition, Amtrak has represented that Pol can raise her Title VII claim and obtain Title VII relief in the arbitral forum. Oral Arg. at 19:43." App. 12a; see App. 13a ("[p]reclusion of a Title VII suit need not be the end of the story. Employees can still hold their carrier accountable for discriminatory conduct. The RLA charts the path to do so through arbitration.").

## REASONS FOR GRANTING THE WRIT

### I. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER THE RLA PREEMPTS OR PRECLUDES DISCRIMINATION CLAIMS

The divergent standards set out in *Hawaiian Airlines* and earlier RLA opinions of this Court have given rise to a complex conflict. The Second, Ninth and Tenth Circuits hold that discrimination claims are not preempted or precluded by the RLA, citing and quoting *Hawaiian Airlines* and earlier decisions by this Court. The Fifth and Seventh Circuits hold that the conclusive-limitation standard, where applicable, precludes or preempts discrimination claims, citing and quoting *Hawaiian Airlines* and earlier cases by this Court. The Fourth, Sixth, Seventh and Eighth Circuits hold that

the CBA-interpretation standard can preempt or preclude discrimination claims, also citing and quoting for that different rule *Hawaiian Airlines* and earlier cases by this Court.

The courts of appeals that hold the RLA can preempt or preclude discrimination claims, moreover, are in complete disagreement about the consequences of holding that the RLA applies to such a claim. The Fourth Circuit holds that the claimant must raise the discrimination claim before the Board. The Sixth Circuit holds that a claimant must go to the Board before he or she can pursue a discrimination lawsuit. The Seventh Circuit holds that a plaintiff can file a discrimination lawsuit that might be conclusively resolved by the Board, but will stay the litigation pending action by the Board. In the First and Eighth Circuits, if a discrimination claim involves the interpretation of a CBA, the RLA extinguishes that claim.

### A. Three Circuits Hold That The RLA Does Not Preempt or Preclude Discrimination Claims

The Second Circuit holds that the RLA does not preempt or preclude claims under the Rehabilitation Act of 1973. 29 U.S.C. § 794; *Bates v. Long Island Railroad Co*., 997 F.2d 1028 (2d Cir.1993), *cert. denied*, 510 U.S. 992 (1993). The court of appeals expressly rejected a CBA-interpretation standard.

> [The defendant] contends that because appellants' claims require interpretation of the applicable collective bargaining agreement, they are "minor disputes" under the RLA.... While it is true that a [plaintiffs'] discriminatory discharge claims may implicate those portions of their collective bargaining agreements that provide for physical disqualification from employment, it is not true that their exclusive remedy for their allegedly wrongful discharges is arbitration.

997 F.2d at 1034. The Second Circuit relied in part on *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), a decision which the Fourth Circuit in the instant case insisted is bad law. *Compare* 997 F.2d at 1034–35 *with* App. 11a. Although *Bates* was decided prior to *Hawaiian Airlines*, it remains controlling precedent in the Second Circuit. *Urena v. American Airlines, Inc.*, 152 Fed.Appx. 63, 65 (2d Cir.2005) (citing *Bates* to distinguish between "statutory civil rights" and "claims grounded in the collective bargaining agreement"); *Goss v. Long Island R. Co.*, 1998 WL 538026, at *3 (2d Cir. March 16, 1998) (same); *Prokopiou v. The Long Island Railroad Co*., 2007 WL 1098696, at *4 (S.D.N.Y. April 9, 2007) (citing *Bates* as establishing that a Title VII or other federal civil rights claim is not a minor dispute); *Adams v. N.J. Transit Rail Operations*, 2000 WL 224107, at *9 (S.D.N.Y. Feb. 28, 2000) (citing *Bates* as holding that federal statutory claims such as those under Title VII are not minor disputes).[9]

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[9] Similarly, in *Coppinger v. Metro-North Commuter Railroad Co*., 861 F.2d 33, 36 (2d Cir.1988), the Second Circuit held that a

*Saridakis v. United Airlines*, 166 F.3d 1272 (9th Cir.1999), is one of several Ninth Circuit decisions holding that the RLA does not preclude or preempt discrimination claims arising under federal or state law. *Saridakis* quoted the holding in *Hawaiian Airlines* that a minor dispute is one that "does not involve rights that exist independently of the [collective bargaining agreement]." 166 F.3d at 1276 (quoting 512 U.S. at 265). "As with Title VII rights, the rights emanating from the ADA exist independently of any employment rights granted by a CBA.... [A] dispute under the ADA is not minor...." 166 F.3d at 1277. *Saridakis* rejected the employer's argument that ADA claims are transformed into minor disputes if an employer asserts a defense related to the CBA, again quoting *Hawaiian Airlines*.

> United contends that because its defense to Saridakis's charge of disability discrimination is based on a contractual right to terminate him, the CBA is inextricably implicated and the dispute is minor. In *Hawaiian Airlines*, however, the Supreme Court explicitly rejected this argument. It stated that whether the termination is "arguably justified" by the CBA's provisions ... says "nothing about the threshold question whether the dispute was subject to the RLA in the first place." 512

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section 1983 constitutional claim is not a minor dispute, because it asserts a claim that has a "legally independent origin[ ]," citing *Gardner-Denver*. Although *Coppinger* is a pre-*Hawaiian Airlines* decision, it continues to be applied in the Second Circuit. See, e.g., *Pothul v. Consolidated Rail Corp.*, 94 F.Supp.2d 269, 272–73 (N.D.N.Y. 2000).

> U.S. at 265–66. Here, the issue is whether Saridakis's disability claims under the ADA and [state anti-discrimination law] are, in the first instance, subject to the RLA. In addressing this threshold question, United's justification for terminating Saridakis is of no import. Our inquiry is strictly limited to determining if the rights under the ADA and [state law] are derived from sources independent of the CBA. We are satisfied they are.

166 F.3d at 1277. "Although United may be able to introduce and rely upon the CBA ... as a part of its defense, under the Supreme Court's recent ruling that would not be enough to render the dispute minor and therefore subject to the RLA's dispute resolution mechanism." *Id*. *Saridakis* pointed out that decisions in other circuits had "found ADA rights independent of the RLA and therefore beyond the scope of what is deemed a minor dispute." 166 F.3d at 1277 n.6.

The Tenth Circuit has held that the RLA does not preempt or preclude discrimination claims, applying an independent-rights standard. "Under the RLA, while the courts have no jurisdiction to hear airline employee claims based solely upon the contract, the courts do have jurisdiction over claims based upon federal statutes." *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1254 (10th Cir.1988). "The RLA does not preclude the court's subject matter jurisdiction over an independent cause of action under ... 42 U.S.C. § 1981." 851 F.2d at 1255. The Tenth Circuit reiterated that rule after *Hawaiian Airlines*.

> Under *Hawaiian Airlines*, the RLA does not preempt causes of action to enforce rights that are "independent of" the CBA.... [M]ost of the cases addressing whether the RLA preempts claims under federal anti-discrimination statutes have held that there is no preemption.... Several factors persuade us that the RLA similarly does not preempt [the plaintiff's] Title VII claim. We list these factors without deciding which is most important or dispositive to the issue. First, a cause of action under Title VII emanates from a source independent of the CBA. Second, in proving the elements of her Title VII claim, it is not necessary that Adams first establish a breach of the CBA. Third, a plaintiff's choice of evidence will not ordinarily drive the issue of preemption, particularly where, as is the case here, the evidence relating to the CBA goes to disprove the defendant's justification rather than to prove an element of the plaintiff's case.

*Adams v. American Airlines, Inc.*, 2000 WL 14399, at *7 (10th Cir. Jan. 10, 2000) (quoting 512 U.S. at 256) (Title VII claim not barred).

### B. Two Circuits Apply The Conclusive-Resolution Standard to Preempt or Preclude Discrimination Claims

The Seventh Circuit applies a conclusive-resolution standard. *Carlson v. CSX Transportation, Inc.*, 758 F.3d 819, 832–34 (7th Cir.2014) (citing *Hawaiian Airlines* and *Conrail*); *Brown v. Illinois Central Railroad*

*Co.*, 254 F.3d 654, 658 (7th Cir.2001) (citing *Hawaiian Airlines* and *Conrail*; holding ADA claim precluded), *cert. denied*, 534 U.S. 1041 (2001). *Carlson* makes clear that this standard is not satisfied merely by a showing that reliance on or interpretation of a CBA may occur in the course of the resolution of a claim; there must be showing that the CBA would necessarily be conclusive. The defendant in *Carlson* asserted (like the defendant in this case) that it would argue that it had taken the actions in question "pursuant to a collective bargaining agreement rather than for a discriminatory ... reasons." 758 F.3d at 832. The Seventh Circuit held that was insufficient to show that the CBA would be conclusive.

> CSX argues that Carlson's claims could be conclusively resolved by an arbitral ruling that she was not qualified [for the position in question].... [But] [e]ven if Carlson did not have the qualifications specified in the collective bargaining agreement, she would still have viable Title VII claims if, as she alleges, the same potentially disqualifying attributes have been overlooked for men or for others who have not complained about discrimination.... As we were careful to clarify in *Brown*, a claim is not barred simply because "the action challenged by the plaintiff is 'arguably justified' by the terms of the CBA."... An "employer cannot ensure the preclusion of a plaintiff's claim merely by asserting certain CBA-based defenses to what is essentially a non-CBA-based claim."... And the fact that a collective bargaining agreement might be

> consulted in resolving a plaintiff's claims is insufficient to trigger RLA preclusion.

758 F.3d at 833 (quoting *Brown*, 254 F.3d at 668) (quoting *Hawaiian Airlines*, 512 U.S. at 265–55). *Brown* similarly stressed that the need to interpret that CBA would not be a bar if the correct interpretation was only "relevant but not dispositive...." 254 F.3d at 668. On the other hand, *Brown* also rejected the contention—advanced in that case by the EEOC, as it was in the court below by Polk—that RLA does not affect claims brought to enforce "federal statues which create rights for individual workers are not precluded by the RLA, simply because they seek to enforce rights which exist independently of the CBA." 254 F.3d at 667.

*Brown* held that the RLA precludes or preempts a claim if an interpretation of the CBA could conclusively refute the claim at issue, the argument advanced by the defendant in that case.[10] However, unlike any other circuit, the Seventh Circuit holds that if a complaint seeks to enforce a federal or state law right which might be conclusively resolved by an interpretation of the CBA, the federal court is not to dismiss the complaint, but rather should stay proceedings until the Board has resolved the interpretation issue. *Tice v. American Airlines, Inc*., 288 F.3d 313, 317–18 (7th Cir.2002) (staying proceedings in a case asserting rights under the Age Discrimination in Employment

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[10] This is broader than the standard in *Conrail*, which is limited to a situation in which the interpretation of the CBA at issue will conclusively resolve the case by either establishing, or refuting, the plaintiff's claim. 491 U.S. at 305.

Act); *Van Slyck v. GoJet Airlines, LLC*, 323 F.R.D. 266, 277 (N.D.Ill. 2018) (staying proceedings regarding claims under the Americans with Disabilities Act and the Family and Medical Leave Act).

The Fifth Circuit also applies a version of the conclusive-resolution standard. Quoting *Conrail*, that circuit holds that "[t]he 'distinguishing feature' of a minor dispute 'is that the dispute may be conclusively resolved by interpreting the [collective bargaining] agreement.'" *Carmona v. Southwest Airlines, Co*., 536 F.3d 344, 348 (5th Cir.2008). The Fifth Circuit rejected the defendant's suggestion that the RLA precluded a plaintiff's claims whenever interpretation of a CBA would be involved.

> As provisions of the CBA are relevant to, but *not* dispositive of, the resolution of [the plaintiff's] claims, his claims do not constitute a minor dispute under the RLA ... [C]onsideration of the CBA *as applied to Title VII and the ADA*—not interpretation of the CBA itself—is what is required to resolve [the plaintiff's] claims.

536 F.3d at 349–50 (emphasis in original) (footnote omitted). The court of appeals recognized that other circuits had held that ADA and Title VII claims create independent statutory rights and thus are not minor disputes, but the Circuit stopped short of adopting that rule. 536 F.3d at 350–51; see *Carter v. Transportation Workers Union of America Local 556*, 353 F.Supp.3d 556, 566–68 (N.D.Tex. 2019) (applying conclusive-resolution standard to hold that RLA did not bar claim

under Title VII; citing *Conrail* and *Carmona*); *Hannawacker v. Kansas City Southern Ry. Co*., 2008 WL 4500320, at *3–*4 (W.D.La. Oct. 6, 2008) (applying conclusive-resolution standard to hold that RLA did not bar claims under Title VII and the ADA) (citing *Carmona* and *Hawaiian Airlines*). But in the Fifth Circuit, unlike the Seventh, a discrimination claim that could be conclusively resolved through arbitration is dismissed, not stayed.

### C. Four Circuits Apply The CBA-Interpretation Standard to Preempt or Preclude Discrimination Claims

The Sixth Circuit applies both the independent-right and CBA-interpretation standards. A claim is a "minor dispute" if it either seeks to enforce a right created by the collective bargaining agreement, or if resolution of the claim (even though asserting a right created by federal or state law) would involve interpretation of a CBA. The court of appeals attributes the CBA-interpretation part of its standard to this Court's decision in *Hawaiian Airlines*.

> This Circuit's two-step test for preemption requires a determination as to: (1) whether proof of the state law claim would require interpretation of the CBA; and (2) whether the right claimed by plaintiff is created by the collective bargaining agreement or by state law.... Likewise, in [*Hawaiian Airlines*], 512 U.S. at 261, the Supreme Court held that the RLA preempts state-law claims when "the

> resolution of a state-law claim depends on an interpretation of the CBA."

*Emswiller v. CSX Transportation, Inc.*, 691 F.3d 782, 792 (6th Cir.2012).[11] But under *Emswiler*, a federal or state law discrimination claim is not completely extinguished if it involves the interpretation of a CBA. Rather, the Sixth Circuit holds, the RLA only imposes an exhaustion requirement; a plaintiff asserting such a claim must first seek relief under the RLA arbitral process before going to court. "If [the plaintiff's disability discrimination claim is preempted by the RLA, then he is required to pursue the RLA-mandated arbitral process *before* bringing his claim to court, and his failure to do so precludes consideration of the merits." 691 F.3d at 792 (emphasis added); see *id*. at 785 ("[o]ur discussion of Emswiler's claim ... focuses on his failure to bring his claim to the NRAB before coming to court"), 789 (disputes barred if they "have not first been brought through the RLA arbitral process"), 793 (plaintiff "was required to exhaust the RLA-mandated arbitral processes before coming to court").

The Fourth Circuit utilizes a CBA-interpretation standard, insisting that *Hawaiian Airlines* mandated that test. App. 7a–13a. That court of appeals also

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[11] Applying that standard, the Sixth Circuit in *Emswiller* held that a state law discrimination claim was a minor dispute, because it would involve interpretation of a CBA. 691 F.3d at 792–93; see *Stanley v. ExpressJet Airlines, Inc.*, 808 Fed.Appx. 351, 356 (6th Cir2020), *cert. denied*, 141 S.Ct. 1058 (2021) (claims under Title VII and state anti-discrimination statutes deemed "minor disputes").

insists that the independent-right standard is not the proper test. "The RLA's rationale has little to do with whether a minor dispute arises from a contractual claim or some other cause of action under state or federal law." App. 9a. The Fourth Circuit maintains that applying an independent-right standard to prevent preemption or preclusion of statutes such as anti-discrimination laws would nullify the RLA. "[I]f Title VII claims are never minor disputes, workers will be able to 'cavalierly bypass' the regular grievance process and arbitration and head straight to federal court merely by adding allegations of discrimination to a complaint." App. 12a (quoting *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1367 (4th Cir.1980)). But unlike every other circuit rejecting the independent-right standard, the Fourth Circuit holds that the consequence of applying the RLA to a discrimination claim is that the claim must be brought before the National Railroad Adjustment Board or another board established under the RLA. App. 12a, 13a.

Two other circuits hold that the RLA bars entirely any discrimination claim the resolution of which would involve the interpretation of a CBA. In those circuits that application of the RLA extinguishes the discrimination claim at issue. That was the consequence of RLA applicability urged in this Court by the defendant in *Hawaiian Airlines*.[12]

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[12] Oral Argument, *Hawaiian Airlines, Inc. v. Norris*, 1994 WL 665082, at 8 ("the State law does not exist in the situation where there's a dispute between the employer and the employee covered by the[] mandatory adjustment board ... "), 13, 16

In *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 3 (1st Cir.1992), the First Circuit held that the RLA preempts state anti-discrimination law in any case which would involve interpretation of a collective bargaining agreement. "[Plaintiff's anti-discrimination] claim is barred because the resolution of his claim would require interpretation of the collective bargaining agreement." 972 F.2d at 5; see 972 F.3d at 5 (citing CBA-interpretation standard in *Lingle*, 486 U.S. at 409 n.8). The court of appeals rejected the independent-right standard. "[T]he mere fact that [a plaintiff's] cause of action under [state law] is 'independent' of the RLA says nothing about whether such action is preempted by the RLA." 972 F.3d at 3.[13] More recently the First Circuit held that "[w]hile *Lingle* articulated the CBA interpretation test for preemption pursuant to the Labor Management Relations Act, ... *Hawaiian Airlines* adopted the test for application to RLA cases raising the same issue. 512 U.S. at 263." *Adames v. Executive Airlines, Inc.*, 258 F.3d 7, 12 n.3 (1st Cir.2001) (claims under Puerto Rico labor statutes preempted). "State law claims requiring ... actual interpretation [are] extinguished." *Adames*, 258 F.3d at 12. The First Circuit in *Adames* found the plaintiff's Puerto-Rico

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("QUESTION: So then, the State law must be virtually nonexistent. It must be entirely preemptive. MR. HIPP: Well, in the context of a dispute between an employer and an employee, that is absolutely correct.").

[13] See *Nuzzo v. Northwest Airlines, Inc.*, 887 F.Supp. 28, 32 (D.Mass. 1995) (state anti-discrimination law claim preempted by RLA, citing *O'Brien*): *Downey v. American Airlines, Inc.*, 1992 WL 333969, at *3–*5 (D.Mass. Nov. 2, 1992) (same).

law claims barred by the RLA even though the plaintiffs, at the insistence of the district court, had actually attempted to bring those claims to the Board, only to have the Board hold that it had no jurisdiction to hear those claims. 258 F.3d at 10–11.

The Eighth Circuit standard, and its reading of *Hawaiian Airlines*, have changed completely over the years since *Hawaiian Airlines* was decided. In decisions between 1994 and 2006, the Eighth Circuit applied the independent-right standard. *Taggart v. Trans World Airlines, Inc*., 40 F.3d 264, 273–74 (8th Cir1994) (quoting *Hawaiian Airlines*); *Benson v. Northwest Airlines, Inc*., 62 F.3d 1108, 1115 (8th Cir.1995); *Pittari v. American Eagle Airlines, Inc*., 468 F.3d 1056, 1060–61 (8th Cir.2006). But since 2010, the Eighth Circuit has applied the CBA interpretation standard. *Sturge v. Northwest Airlines*, 658 F.3d 832, 837 (8th Cir.2011) (citing *Hawaiian Airlines*); *Richardson v. BNSF Railway Co*., 2 F.4th 1063, 1067 (8th Cir.2021); *Avina v. Union Pacific Railroad Co*., 72 F.4th 839, 842–44 (8th Cir.2023) (quoting *Hawaiian Airlines*). In the Eighth Circuit the RLA bar, when applicable, preempts state law claims and precludes federal law claims.

This reversal of the Eighth Circuit interpretation of minor dispute is described in *Ratfield v. Delta Air Lines, Inc*., 2023 WL 5178593, at *10–*11 (D.Minn. Aug. 11, 2023). *Ratfield* noted that "initially [the Eighth Circuit] hewed to" the holding in *Hawaiian Airlines* that claims were not barred by the RLA if "the 'only source' of the asserted rights was state (or federal) law." 2023 WL 5178593, at *9–*10 (quoting

*Hawaiian Airlines*, 512 U.S. at 258, 388). But, the court explained, subsequent Eighth Circuit decisions had invoked different language from *Hawaiian Airlines* to adopt a different legal standard.

> Courts began to emphasize certain language from *Hawaiian Airlines* to find a broader swath of claims preempted under the RLA. Though the Supreme Court's test rested upon the legal character of the claim, and whether the source of the right existed independently of the CBA, the Court in *Hawaiian Airlines* also cited with approval its precedent analyzing preemption in the context of the Labor-Management Relations Act.... It summarized that authority, explaining that state-law claims are only preempted under the LMRA if they are "dependent on the interpretation of a CBA," ... and "can be 'conclusively resolved' by reference to an existing CBA[.]".... In recent years [decisions in the Eighth Circuit] have seized upon that language—regarding whether a claim is *dependent upon the interpretation of a CBA*—to find claims preempted where analyzing the elements of the plaintiff's claim would require interpreting any term of their CBA.... These cases illustrate how the test for RLA preemption has moved from one based solely upon the legal character of the claim to one that also considers whether any term of the CBA might be implicated by the court's analysis.

*Id*. at 10 (quoting *Hawaiian Airlines*, 512 U.S. at 262) (emphasis in original). *Ratfield* illustrates the problems

that have arisen because of the divergent standards in *Hawaiian Airlines*.

### D. The Conflict Is Widely Recognized

"Courts are divided over whether RLA precludes a railroad employee from prosecuting a Title VII claim in a court. Some have found that RLA precludes an employee from litigating in a court claims brought pursuant to federal civil rights statutes, including Title VII.... However, the majority of courts considering this issue have held that RLA does not preclude an employee from prosecuting a Title VII or other federal civil rights claim in a court, and that such a claim(s) does not constitute a 'minor dispute.'" *Prokopiou v. The Long Island Railroad Co.*, 2007 WL 1098696, at *3–*4 (S.D.N.Y. April 9, 2007).

"[C]ourts have long been divided on their approach to the issue of RLA preclusion of discrimination claims, caused in no small way, as one circuit observed, by 'somewhat imprecise and often conflicting language in the cases that discuss' the issue." *Roache v. Long Island Railroad*, 487 F.Supp.3d 154, 167–68 (E.D.N.Y. 2020) (contrasting decisions in the Second and Seventh Circuits) (quoting *Adams v. American Airlines*, 2000 WL 14399, at *7 (10th Cir. Jan. 10, 2000)).

In *Ratfield v. Delta Air Lines, Inc.*, 2023 WL 5178593 (D.Minn. August 11, 2023), the district court, noting the divergent standards applied by the courts of appeals, commented that "although this Court sees merit in the approaches adopted by the Third, Fifth,

Sixth, and Seventh Circuits, the law of the Eighth Circuit Court of Appeals is binding here." 2023 WL 5178593, at *15. "There has been some disagreement among the various courts as to the proper test for determining whether the RLA takes precedence over discrimination statutes." *Malobabich v. Norfolk Southern Corp.*, 2011 WL 1791306, at *2 (W.D.Pa. May 10, 2011) (contrasting decisions applying the independent-right standard with decisions applying the CBA-interpretation standard). The conflict predates *Hawaiian Airlines*. See, e.g., *Middleton v. CSX Corp.*, 694 F.Supp. 941 947 (S.D.Ga. 1988) ("[w]hile the Supreme Court has reserved the specific question of whether railroad employees must exhaust the remedies outlined in the Railway Labor Act before bringing a § 1981 claim against the employer, .... lower courts have faced the issue and reached conflicting results.").

The lower courts disagree about which standard is the majority rule. Several opinions hold that no preemption or preclusion of discrimination claims is the prevailing view. "[M]ost of the cases addressing whether the RLA preempts claims under federal anti-discrimination statues have held that there is no preemption." *Adams v. American Airlines, Inc.*, 2000 WL 14399, at *7. "[A] majority of cases have held that federal statutory claims are not 'minor disputes' within the ambit of the RLA...." *Adams v. New Jersey Transit Rail Operations*, 2000 WL 224107, at *9 (S.D.N.Y. Feb. 28, 2000). "The overwhelming majority of cases have found that federal statutory claims were not 'minor disputes' within the ambit of the RLA and, thus, an

independent federal statutory claim could be pursued." *McElveen v. CSX Transp., Inc*., 1996 WL 481105, at *4 (D.S.C. Aug. 21, 1996). But other opinions say the opposite. "[Plaintiff's] argu[ment] that federal civil rights claims are categorically excepted from RLA's dispute-resolution procedures [is] undermined by the weight of authority." *Roache v. Long Island Railroad*, 487 F.Supp.3d 154, 167–68 (E.D.N.Y. 2020). "[N]umerous courts have held that the RLA precludes claims brought pursuant to all manner of federal civil rights statutes...." *Crayton v. Long Island R.R*., 2006 WL 38333114, at *5 (E.D.N.Y. Dec. 29, 2006). In the court below Amtrak insisted that "[t]he holding in [the Ninth Circuit decision in] *Saridakis* represents a broad exception to RLA preclusion that other courts have not adopted." Appellees' Brief, 13. But all agree that there is a conflict.

## II. THE FOURTH CIRCUIT DECISION IS CONTRARY TO THE PREVIOUSLY EXPRESSED VIEWS OF THE GOVERNMENT

The decision of the Fourth Circuit is inconsistent with the interpretation of the RLA urged by the United States in this Court, and advanced by the EEOC in the lower courts. The views of the United States are of particular significance here, because the government agencies for which the Solicitor General speaks include the NRAB.

In its brief in *Hawaiian Airlines*, the government repeatedly urged that the test for whether a claim was preempted by the RLA is whether the claim was asserting a right created by the CBA, or a right created by [in that case] state law. "[T]he test for preemption turns on whether the state law claim asserted by a railroad employee is based on the collective bargaining agreement." Brief for the United States as Amicus Curiae Supporting Respondent, *Hawaiian Airlines, Inc. v. Norris*, No. 92-2058, 20 (merits brief). "In *Andrews* the Court held that a railroad employee's state law wrongful discharge claim is subject to the RLA's exclusive arbitral mechanism where the 'source of the employee's right ... is the collective-bargaining agreement'...." *Id*., 10. "*Buell* ... confirms that when a cause of action is based on substantive rights independent of the collective bargaining agreement, it is not preempted by the RLA even if parallel claims could also have been brought as minor disputes under the RLA." *Id*., 23. "First(i) of the RLA does not preempt claims based on independent tort duties, rather than on the collective bargain agreement." *Id*., 25. The RLA could not "preempt claims premised on state-law duties ... that are independent of duties assumed under the collective bargaining agreement," because "arbitrators exceed their authority if they premise their decisions on a source of law outside the collective bargaining agreement." Brief of the United States as Amicus Curiae, *Hawaiian Airlines, Inc. v. Norris*, No. 92-2058, 13 (brief regarding certiorari). As the government has repeatedly pointed out in other cases, an arbitrator has no authority to enforce state or federal rights

outside the scope of a collective bargaining agreement. Brief of the United States as Amicus Curiae, *Barrentine v. Arkansas-Best Freight System, Inc*., 17–19; Brief of the United States as Amicus Curiae, *Alexander v. Gardner Denver*, 7.

The EEOC maintains that under *Hawaiian Airlines* the standard for determining whether a claim is a minor dispute is whether it seeks to enforce an independent statutory right.

> The Supreme Court in *Hawaiian Airlines* ... , followed the reasoning of *Buell* to hold that "a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the [CBA]." ... The Court in *Hawaiian Airlines* thus reaffirmed that the critical question in deciding whether the RLA requires arbitration is whether the source of the claim is a substantive legal right independent of the CBA.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant, *Brown v. Illinois Central Railroad Co*., 10 n.9 (quoting 512 U.S. at 260). "The determination whether a claim arising under a federal statute is precluded by the RLA or LMRA does not turn on whether the federal claim required interpretation of a CBA...." *Id*., 14–15.

## III. THE CIRCUIT CONFLICT PRESENTS AN IMPORTANT PROBLEM WHICH ONLY THIS COURT CAN RESOLVE

This complex circuit conflict is of manifest importance. Almost every circuit has its own combination of legal standard regarding preemption or preclusion of discrimination claims and rule as to the consequence of doing so. The same claim would be resolved in very different ways among the various circuits. Because of the interstate nature of the railroad and airline business, there would often be in personam jurisdiction and venue over the same claim in multiple circuits.

Although the courts of appeals which hold the RLA limits discrimination claims disagree about the nature of that limitation, all of the limitations are fatal as a practical matter. The Fourth Circuit directs claimants to present discrimination claims to the Board,; but this Court has already recognized that the Board has no jurisdiction to resolve such statutory claims.

> Significantly, the adjustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights. See, e.g., NRAB Fourth Div. Award No. 4548 (1987) (function of the National Rail Adjustment Board (Board) is to decide disputes in accordance with the controlling CBA); NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board's authority); NRAB Third Div. Award No. 19790 (1973) ("[T]his Board lacks jurisdiction to

> enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreements"); *Northwest Airlines/Airline Pilots Assn., Int'l System Bd. of Adjustment*, Decision of June 28, 1972, p. 13 ("[B]oth the traditional role of the arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]"); *United Airlines, Inc*., 48 LA 727, 733 (BNA) (1967) ("The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act").

*Hawaiian Airlines*, 512 U.S. at 254–55.[14] Under the Fourth Circuit decision, the forum that has exclusive jurisdiction over discrimination claims involving CBA interpretation is a forum that does not have jurisdiction at all.

The rule in the First, Fifth and Eighth Circuits is less subtle; discrimination claims to which the RLA

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[14] See Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant, *Brown v. Illinois Central Railroad Co*., 14 ("Far from requiring [the plaintiff] to arbitrate his ADA claim, ... the RLA does not even authorize an arbitral Adjustment Board to determine the parties' respective rights and obligations under the ADA."); Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiffs-Appellants, *Tice v. American Airlines*, ("Because the RLA authorizes an arbitral adjustment board to resolve 'minor disputes' with reference solely to the terms of the existing CBA between the parties, the Board is without jurisdiction to determine whether the airline's practices violate the plaintiffs' statutory rights under the ADEA.").

applies are preempted (if state law claims) or precluded (if federal claims), and thus extinguished. The Sixth and Seventh Circuits require claimants with such discrimination claims to get the Board to resolve any issues regarding the meaning of the relevant CBA. There would often be no way to do that, and such suggestions would be entirely impracticable in cases in which issues about the meaning of a CBA arise in the middle of trial, as has repeatedly occurred.[15] A defendant in many circuits can create these insurmountable obstacles merely by thinking up some matter of plausibly relevant CBA interpretation.

These are not problems that the lower courts can solve. This Court's own RLA decisions set out divergent standards which regularly yield different results in discrimination cases, as they did in the instant case. It is difficult to fault the courts of appeals because they have selected and applied different passages and standards from *Hawaiian Airlines*. Only the Court can sort this all out.



[15] E.g., *Avina v. Union Pacific Railroad Co*., 72 F.4th 839, 842 (8th Cir.2023); *Klotzbach-Piper v. National Railroad Passenger Corp*., 2021 WL 4033071, at *5–*6 (D.D.C. Sept. 3, 2021); *Hamilton v. National Passenger Railroad Corp.*, 2020 WL 6781234, at *4–*5 (D.D.C. Nov. 18, 2020); *Said v. National Railroad Passenger Corp.*, 390 F.Supp.3d 46, 54–57 (D.D.C. 2019).

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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