No. 23-275

IN THE

Supreme Court of the United States

NANCY AVINA,

Petitioner,

v.

UNION PACIFIC RAILROAD CO.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Railway Labor Act requires all disputes involving the "interpretation or application" of collective bargaining agreements to be resolved through arbitration. 45 U.S.C. § 153 First (i). In this case, petitioner's discrimination claims turned on whether a faxed resume constituted a job application under the collective bargaining agreement. The question presented is whether the Eighth Circuit correctly held, consistent with this Court's precedent and every other circuit to have addressed the issue, that petitioner's claims must be resolved through arbitration.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation, a publicly traded company. No publicly traded corporation is known to own 10% of the stock of Union Pacific Corporation.

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BRIEF IN OPPOSITION

Respondent Union Pacific Railroad Company respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Railway Labor Act (RLA) requires all "minor disputes" in the railroad industry to be heard by an arbitrator, not by the courts. A minor dispute, as this Court held in *Hawaiian Airlines, Inc. v. Norris*, is one that "involve[s] controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." 512 U.S. 246, 253 (1994) (quotation marks omitted). In the decision below, the Eighth Circuit correctly applied the RLA and this Court's precedent to preclude discrimination claims that could not be resolved without interpreting the collective bargaining agreement.

Every circuit to have considered that question has concluded, like the Eighth Circuit here, that claims requiring the interpretation of a collective bargaining agreement must be arbitrated. If the claim arises under federal law, it is precluded; if the claim arises under state law, it is preempted. Under no circumstance can the claim be litigated in court. This unanimous view of the circuits is consistent with Congress's "essential" goal in passing the RLA: to keep minor disputes "out of the courts." *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam).

Petitioner's alleged split on this question is contrived and nonexistent. Petitioner argues that some circuits hold that discrimination claims are never "preempted or precluded by the RLA" because they "are based on independent statutes." Pet. 2. But that

is simply wrong. No circuit has endorsed that illogical result, which would blow a hole in Congress's framework for channeling the interpretation of collective bargaining agreements to a designated arbitration tribunal. Nor do any circuits differ from the Eighth on the proper rule for identifying minor disputes. All circuits to have been presented with the question have applied the same familiar rule established in *Hawaiian Airlines*. This Court need not grant review merely to reiterate what it has already said.

There is no reason to review this case. The Eighth Circuit applied the stated rule correctly, and petitioner does not claim otherwise. And petitioner admits that she failed to argue below that RLA preclusion is not a jurisdictional bar, raising waiver and preservation hurdles that make this case a poor vehicle for addressing the shallow circuit conflict on that issue. Moreover, no matter what this Court might decide on any RLA question, the outcome of this case will be the same: The district court already ruled, based on undisputed facts, that petitioner's claims would fail on the merits were they not precluded by the RLA. This Court should not waste its resources on a case where its ruling will not matter.

The Court should deny the petition.

STATEMENT

1. The early U.S. railroad industry was riven with tension between labor and management, which frequently boiled over into strikes, sometimes violent. *See* Kelly Collins Woodford et al., *Complete Preemption Under the Railway Labor Act*, 36 Transp. L.J. 261, 283 (2009). Seeking to quell this tension after "a half-century of worker agitation, social turmoil and congressional experimentation," Congress in 1926

passed the country's first major nationwide labor legislation: the RLA. Frank N. Wilner, *The Railway Labor Act: Why, What and for How Much Longer—Part II*, 57 Transp. Prac. J. 129, 130 (1990). The RLA "promote[s] stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines*, 512 U.S. at 252.

Under this framework, the "two classes" of labor disputes—"the major and the minor disputes"—are resolved through distinct mechanisms. *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). Major disputes, which are "large issues" relating to "the formation of collective agreements or efforts to secure them," *id.*, proceed through a "lengthy process of bargaining and mediation," *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n* (*Conrail*), 491 U.S. 299, 302 (1989). Minor disputes, on the other hand, are those that "aris[e] or grow[] 'out of grievances or out of the interpretation or application of [collective bargaining] agreements concerning rates of pay, rules, or working conditions.'" *Id.* at 303 (quoting 45 U.S.C. § 151a). They are "subject to compulsory and binding arbitration before" either the "National Railroad Adjustment Board" or "an adjustment board established by the employer and the unions representing the employees" (collectively, the "Adjustment Board"), which have "exclusive jurisdiction over minor disputes." *Id.* at 303-04.

"Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R. Co.*, 439 U.S. at 94; *see Polk v. Amtrak Nat'l R.R. Passenger Corp.*, 66 F.4th 500, 505 (4th Cir. 2023) (noting RLA's purpose was to "get[] courts out of the business of interpreting [collective bargaining agreements]"). To carry

out that congressional mandate, this Court has developed a clear rule for identifying minor disputes that traces the RLA's own language: A minor dispute is one that "grow[s] out of the interpretation of existing [collective bargaining] agreements." *Slocum v. Del., Lackawanna & W. R.R. Co.*, 339 U.S. 239, 243 (1950). The Court has reiterated this rule on many occasions over the last three-quarters of a century. *See, e.g.*, *Conrail*, 491 U.S. at 305 ("The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement."); *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 490, 496 n.4 (1989) ("Minor disputes are those involving the interpretation or application of existing contracts."); *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 33 (1957) (minor disputes are "controversies over the meaning of an existing collective bargaining agreement").

Most recently, in *Hawaiian Airlines*, the Court addressed how that rule applies to claims that arise not directly out of a collective bargaining agreement, but from some other legal source. Importing the standard established in the related context of the Labor Management Relations Act, the Court explained that claims based on "rights . . . that exist[] *independent* of the contract" are not preempted or precluded by the RLA, but that the RLA *does* preempt or preclude such claims that are "dependent on the interpretation of a" collective bargaining agreement, because those claims are not actually "independent" of the agreement. 512 U.S. at 260, 262-63 (emphasis added) (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 408-10 (1988)).

2. Petitioner Nancy Avina, a Hispanic woman in her 40s, is a longtime employee of Union Pacific's Kansas City warehouse and a member of the Transportation Communications Union. Pet. App. 2a, 58a. As a member of the union, petitioner is and has been at all relevant times subject to a 2006 collective bargaining agreement between the union and Union Pacific. *Id.* 2a. Among other things, that agreement establishes an application process for filling posted (or "bulletined") Union Pacific job openings—through which "[e]mployees desiring bulletined positions must have their applications, in duplicate, on file in the office of the bulletin, or in the office of the supervisor as may be specified on the bulletin." *Id.* 56a. The agreement also provides for "amend[ments]" to the "bulletining process." *Id.* 57a.

In 2017, Union Pacific announced an opening for a "material supervisor" position. Pet. App. 15a. Petitioner was interested in the position and attempted to apply by "faxing her resume." *Id.* 15a-16a. Since at least 2009, however, Union Pacific has used an online tool, "iTrakForce," to collect applications for job openings. *Id.* 2a, 81a. Because petitioner had not submitted an application through iTrakForce, "her name never made it onto the official list of candidates," and she did not receive the job. *Id.* 2a. The same position opened up a year later. *Id.* 2a-3a. As before, petitioner sought to apply by faxing her resume rather than using iTrakForce. *Id.* She again did not receive the job. *Id.* She later "learn[ed] that the applicants who received the positions were either younger [than her], white, or both." *Id.* 3a.

3. In 2019, petitioner filed this lawsuit against Union Pacific in Missouri federal court. D. Ct. Dkt. 1. She alleged that Union Pacific's decisions not to hire

her for the material supervisor positions had been based on her age or race and were thus discriminatory. D. Ct. Dkt. 28, ¶¶ 42-49, 50-56. Following discovery and motions practice, her case proceeded to an eight-day jury trial.

Soon after trial began, it became clear that petitioner's case depended in large part upon interpretation of the collective bargaining agreement. An undisputed element of her discrimination claims required her to prove that she "was qualified and applied for" the material supervisor positions. *Austin v. Minn. Mining & Mfg. Co.*, 193 F.3d 992, 995 (8th Cir. 1999). As a result, at trial her counsel "specifically questioned Union Pacific employees about what the collective-bargaining agreement requires of applicants" in an effort to show that petitioner had applied for the positions. Pet. App. 3a. For instance, counsel asked one company employee about his "understanding about some of the policies" in the collective bargaining agreement, including the requirement that applicants "must have their applications in duplicate on file." D. Ct. Dkt. 130, at 21-27.

Based on petitioner's repeated questioning and statements regarding what it meant to "apply" for a position under the collective bargaining agreement, Union Pacific moved mid-trial to dismiss her claims as "minor disputes" under the RLA that must be heard by the Adjustment Board, not by a federal court. *See* D. Ct. Dkt. 131. After the close of petitioner's case-in-chief, Union Pacific also moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), on both RLA preclusion and legal-sufficiency grounds. *See* D. Ct. Dkt. 135.

The district court orally granted both motions from the bench, Pet. App. 46a, and later issued a

written opinion setting forth its reasoning in more detail, *id.* 47a. The court's opinion explained—relying on *Hawaiian Airlines*—that although "discrimination claims arising under federal law *generally* are not" precluded by the RLA, such claims *are* precluded where they require courts to determine "'the meaning of an existing [collective bargaining agreement] in a particular fact situation.'" *Id.* 53a-55a (quoting 512 U.S. at 253). Petitioner's claims fell into the latter camp because, as her counsel's questioning at trial made clear, "provisions of the [collective bargaining agreement] must be interpreted in deciding whether [petitioner] properly applied for this position," including what it means under the agreement for applicants to "have their applications, in duplicate, on file." *Id.* 68a. As Union Pacific had pointed out—and petitioner never contested—RLA preclusion is a jurisdictional bar. *Id.* 51a-52a; *see* Pet. 12-13 (conceding that petitioner "did not dispute" this point). The court therefore dismissed petitioner's claims for lack of subject-matter jurisdiction. Pet. App. 76a-77a.

The court also held, in the alternative, that Union Pacific "would be entitled to judgment as a matter of law" on petitioner's claims even if they were not precluded by the RLA. Pet. App. 78a. That is because petitioner had not shown, and could not show, that she was "similarly situated" to the employees who were considered for the position, another required element of her discrimination claims. *Id.* 79a-81a. The record had established that petitioner had "never properly submitted her application for either" material supervisor position using Union Pacific's iTrakForce system. *Id.* 81a. Nor had petitioner presented any "evidence that any applicant outside of the protected [racial or age] group only emailed or faxed or handed in a resume without using iTrakForce." *Id.*

This failure to "show similarly situated employees not part of the protected group were promoted to the positions instead" of petitioner would defeat her claims as a matter of law, wholly independent of the RLA. *Id.*

4. The Eighth Circuit affirmed. Pet. App. 10a-11a. The court of appeals first confirmed that the governing standard for determining whether petitioner's claims involve a "minor dispute," and thus must be dismissed for lack of subject-matter jurisdiction, was whether they "'require[]' the interpretation of 'some specific provision of the collective-bargaining agreement.'" *Id.* 6a (quoting *Boldt v. N. States Power Co.*, 904 F.3d 586, 591 (8th Cir. 2018)). The court also agreed that, to prove her discrimination claims, petitioner would have to show that she "actually applied for either promotion." *Id.* 7a.

Any attempt to make that showing, the court held, would be "'inextricably bound up' with the interpretation of" the collective bargaining agreement. Pet. App. 7a-8a (quoting *Johnson v. Humphreys*, 949 F.3d 413, 417 (8th Cir. 2020)). To conclude that petitioner had applied for the positions, an adjudicator necessarily would have to decide "[w]hether faxed resumes count as applications." *Id.* 8a. To decide *that* question, in turn, an adjudicator would have to interpret the collective bargaining agreement. *Id.* The trial record left no doubt on that score: It was "*replete* with questioning, testimony, and evidence revealing the necessity of interpreting . . . the [collective bargaining agreement]." *Id.* 9a.

Because petitioner's "case involve[d] a 'minor dispute' over the meaning of a collective-bargaining agreement," it could not proceed in federal court. Pet. App. 10a (quoting *Hawaiian Airlines*, 512 U.S. at 253). The task of interpreting the collective

bargaining agreement was reserved for the Adjustment Board alone. Hence, the court concluded, "[i]f [petitioner] wants to pursue this case further, she will have to do so elsewhere." *Id.* And since the RLA presented a jurisdictional bar to petitioner's claims—which she once again "did not" contest, Pet. 17—the court did not review the district court's alternative ruling that petitioner's claims failed as a matter of law, Pet. App. 8a n.4.

REASONS FOR DENYING THE PETITION

The federal courts of appeals are unanimous on the question presented by this case—whether the RLA preempts or precludes courts from hearing claims that require interpretation of a collective bargaining agreement. It does. The unanimity among the circuits on this question is not surprising, as this Court's *Hawaiian Airlines* decision already addressed the issue and provided the controlling legal rule. Nor is there any other compelling reason for review. The decision below correctly applied the controlling rule to the facts here. The distinct, unrelated jurisdictional issue that petitioner never raised below but now attempts for the first time to inject into the case is not cleanly presented and would implicate a host of waiver and preservation problems. And even if this Court adopted petitioner's view of the law—on what constitutes a minor dispute or on whether RLA preclusion is jurisdictional—it would almost certainly make no difference to the outcome of this case. The Court should deny the petition.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT AND IS CONSISTENT WITH THE VIEWS OF THE UNITED STATES.

Petitioner seeks to portray the Eighth Circuit's decision as inconsistent with the decisions of other circuits and the views of the United States. Neither portrayal is accurate.

A. The Circuits Are In Agreement.

The decision below held that a dispute is minor under the RLA, and thus cannot be heard by the courts, if it "require[s] the interpretation of some specific provision of [a] collective-bargaining agreement." Pet. App. 6a (quotation marks omitted). This holding tracks *Hawaiian Airlines* to the letter, and the same rule is applied uniformly by the federal courts of appeals. Petitioner attempts to manufacture a circuit conflict by asserting that (1) some circuits hold that claims "involv[ing] a right created by statute" are *never* "preempted or precluded by the RLA," and (2) other circuits have adopted a different rule than the Eighth Circuit for identifying which claims are minor disputes under the RLA. Pet. 18-19. Both assertions are wrong. The posited conflict is illusory.

1. Petitioner first points to the Second, Ninth, and Tenth Circuits as purportedly holding that the RLA never preempts or precludes claims, including discrimination claims, that are "based on independent statutes, and are not created by a collective-bargaining agreement." Pet. 2. This characterization of the cases cited is incorrect. But even if any of petitioner's dated cases *ever* stood for that proposition, their holdings did not survive *Hawaiian Airlines*, as later controlling cases from these three circuits make clear.

The primary (and pre–*Hawaiian Airlines*) Second Circuit case cited by petitioner, for instance, does not conflict with the decision below. There, the plaintiffs had brought statutory discriminatory-discharge claims against a railroad. *See Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1034 (2d Cir. 1993). Although the circuit held that those claims were not precluded by the RLA, it did not answer the pertinent question here—whether interpretation of a collective bargaining agreement would be *required* to resolve the claims. *See id.* The railroad had raised that point, but the court elided it, noting only that the claims "*may* implicate . . . portions of the[] collective-bargaining agreements." *Id.* (emphasis added). *Bates* thus did not hold, as petitioner wrongly suggests, that there is no RLA preclusion even if interpretation of an agreement is required.

Regardless, even if *Bates* could be read in that way, it was superseded by *Hawaiian Airlines*. Post–*Hawaiian Airlines* decisions from the Second Circuit, although not arising directly in the context of *statutory* claims, have on several occasions applied the clarified rule governing claims requiring interpretation of a collective bargaining agreement—without ever suggesting that some other rule would apply to statutory claims. *See, e.g.*, *Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 943 F.3d 568, 579 (2d Cir. 2019) (explaining that "contract interpretation issues are the hallmark of a minor dispute and thus subject to mandatory resolution" by the Adjustment Board); *Bhd. of Locomotive Eng'rs v. Long Island R.R. Co.*, 85 F.3d 35, 39 (2d Cir. 1996) (holding that claim was "outside the jurisdictional authority of the courts" where it involved "interpret[ation] [of] the provisions of the [collective bargaining agreement]"); *Gay v. Carlson*, 60 F.3d 83, 88 (2d Cir. 1995) (holding that claims were not

preempted because "[n]o interpretation of the collective bargaining agreement [was] required to resolve" them). The sole post–*Hawaiian Airlines* Second Circuit decision that petitioner cites is irrelevant to the question presented, as it neither addressed the governing rule nor involved a statutory claim requiring interpretation of a collective bargaining agreement. *See Urena v. Am. Airlines, Inc.*, 152 F. App'x 63, 65 (2d Cir. 2005) (unpublished).

The single Ninth Circuit case cited by petitioner is equally unhelpful to her position. Far from establishing a circuit conflict, that case in fact articulated precisely the same rule as the Eighth Circuit did below. As the Ninth Circuit explained, the question whether a dispute is "minor" turns on whether it "can be resolved without interpreting the [collective bargaining] agreement itself." *Saridakis v. United Airlines*, 166 F.3d 1272, 1277 (9th Cir. 1999). Applying that rule to the multitude of state and federal claims brought by the plaintiff, the court held that some claims were preempted or precluded because they *did* "require[] an interpretation of the" agreement, while others were not preempted or precluded because they presented "purely factual questions" that did not require interpretation of the agreement. *Id.* at 1277-78. Nothing in the court's analysis rested on whether the claims were statutory. Indeed, the en banc Ninth Circuit has since expressly rejected any such distinction, holding that even where a claim is "not grounded in" a collective bargaining agreement but is instead based on a statute, the claim is preempted or precluded "to the extent there is an active dispute over the meaning of contract terms." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 921 (9th Cir. 2018) (en banc) (emphasis and quotation marks omitted).

Petitioner's Tenth Circuit cases likewise reflect no circuit conflict. *McAlester*—which also pre-dates *Hawaiian Airlines*—merely stands for the uncontroversial proposition that discrimination claims are not *per se* preempted or precluded by the RLA. *See McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1254 (10th Cir. 1988). All agree on that point. But the court was not presented with the question presented here—whether discrimination claims *requiring interpretation of a collective bargaining agreement* are preempted or precluded. As to that issue, later Tenth Circuit cases have properly emphasized that "the threshold question" for any statutory claim is "whether resolution of the federal and state law claims . . . requires interpretation or application of" a collective bargaining agreement. *Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 836 (10th Cir. 1996). And petitioner's other Tenth Circuit case explicitly cuts *against* its assertion of a conflict. That case explained, consistent with the decision below, that the RLA bars "any suit that is inextricably intertwined with consideration of the terms of the labor contract." *Adams v. Am. Airlines, Inc.*, 2000 WL 14399, at *7 (10th Cir. Jan. 10, 2000) (unpublished) (citing *Fry*, 88 F.3d at 836); *cf.* Pet. App. 8a (holding that petitioner's claims are "inextricably bound up with the interpretation" of the collective bargaining agreement (quotation marks omitted)).

In sum, the Second, Ninth, and Tenth Circuits do not conflict with the Eighth on the question presented. All four circuits apply the familiar *Hawaiian Airlines* rule.

2. Petitioner's next attempt to gin up a circuit conflict is even less tenable. Put simply, petitioner argues that there is some daylight between a rule that a dispute is minor if it can be "'conclusively resolved' by

interpreting the [collective bargaining agreement]," and a rule that a dispute is minor if it "require[s] interpretation of the collective bargaining agreement." Pet. 24-26 (quotation marks omitted). This same argument was raised by the petitioner in *Hawaiian Airlines*, and this Court rejected it, holding that the two phrasings of the rule are "fully consistent" with each other. 512 U.S. at 262-63. And the circuits that petitioner identifies as purportedly adopting one or the other phrasing have in fact used both phrasings interchangeably—including in many of petitioner's own cited authorities.

Take, for instance, the Seventh Circuit. Petitioner claims that it "applies a conclusive-resolution standard," citing two cases (*Carlson* and *Brown*). Pet. 22-23. But one of those cases, *Brown*, is peppered with both phrasings, refuting any claim that the circuit has come down firmly on one side. *Brown* uses variants of "conclusively resolved" nearly a dozen times, and also uses "requires interpretation of" several times, all to mean precisely the same thing. *Compare, e.g.*, *Brown v. Ill. Cent. R.R. Co.*, 254 F.3d 654, 664 (7th Cir. 2001) ("[T]he RLA will not bar a plaintiff from bringing an independent state or federal claim in court unless the claim could be '*conclusively resolved*' by the interpretation of a [collective bargaining agreement]."), *with id.* ("[A] plaintiff employee [may] bring an ADA claim in federal court against his employer (even if his employment is governed by a [collective bargaining agreement] which is subject to the RLA), unless the resolution of his ADA claim *requires the court to interpret* the [collective bargaining agreement]'s terms as a potentially dispositive matter.") (emphases added). There is no difference between these two articulations of the same rule.

Other Seventh Circuit precedent has also used the "requires interpretation of" language, contrary to petitioner's assertion that the circuit has adopted a different rule. In one case, the court explained that the RLA "preempts state-law actions that would require interpreting a" collective bargaining agreement. *Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 763 (7th Cir. 2008). In another, the court emphasized that "whether the adjudication of a plaintiff's claim requires interpretation of a" collective bargaining agreement is a "crucial[] element of the *Hawaiian Airlines–Lingle* preemption standard." *Monroe v. Mo. Pac. R.R. Co.*, 115 F.3d 514, 519 (7th Cir. 1997). The legal rule articulated in these cases is precisely the same as the one used in the decision below.

The Fifth Circuit, too, which petitioner wrongly says has also adopted a distinct "conclusive-resolution standard," Pet. 24, has used both phrasings of the rule interchangeably, including within a single decision. The only case from that circuit that petitioner cites itself uses each. The court noted both (1) that the "distinguishing feature of a minor dispute is that [it] may be *conclusively resolved* by interpreting the existing collective bargaining agreement," and (2) that the federal claims at issue were thus not precluded because they did not "*require interpretation*" of the collective bargaining agreement. *Carmona v. Sw. Airlines Co.*, 536 F.3d 344, 348 (5th Cir. 2008) (cleaned up; emphases added). Other cases from the circuit have likewise referenced both phrasings of the rule. *See, e.g.*, *Hirras v. Nat'l R.R. Passenger Corp.*, 44 F.3d 278, 281 (5th Cir. 1995) (using both).

There is thus no conflict between the Seventh or Fifth Circuits and the Eighth Circuit. Their decisions all apply the same *Hawaiian Airlines* rule: a dispute is minor where it requires interpretation of a

collective bargaining agreement. Minor differences in language do not alter the underlying rule.

As for the remaining circuits, petitioner acknowledges that the First, Fourth, and Sixth Circuits all apply this same legal rule. *See* Pet. 2, 24-27; *see, e.g.*, *Polk*, 66 F.4th at 507 ("Since [plaintiff's] Title VII claim requires the interpretation of a [collective bargaining agreement], it is a minor dispute."); *Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 793 (6th Cir. 2012) (employment discrimination claim precluded where it "requires interpretation of the collective bargaining agreement"); *O'Brien v. Consol. Rail Corp.*, 972 F.2d 1, 5 (1st Cir. 1992) (holding that claim under state discrimination statute "is barred because resolution of [the] claim would require interpretation of the collective-bargaining agreement").

Even the Third and Eleventh Circuits (which petitioner does not mention), the only other circuits to have addressed the issue, have reached the same conclusion. *See, e.g.*, *Stouffer v. Union R.R. Co.*, 85 F.4th 139, 144 (3d Cir. 2023) ("[A] federal claim that depends for its resolution on the interpretation of a [collective bargaining agreement] lacks independence from the [agreement], and the RLA precludes it."); *Pilkington v. United Airlines*, 112 F.3d 1532, 1538 (11th Cir. 1997) (explaining that claims are preempted "where interpretation of a [collective bargaining agreement] is required"). There is simply no circuit conflict on the question presented. Every circuit to have answered the question—which is all of them but the D.C. and Federal Circuits—has arrived at the same answer, mandated by *Hawaiian Airlines*.

B. The Decision Below Aligns With The Views Of The United States.

With no actual divide among the circuits to point to, petitioner also argues that certiorari is warranted because the decision below is purportedly "contrary to the previously expressed views of the government." Pet. 33. As an initial matter, courts of appeals routinely disagree with the government; such disagreement is hardly a "compelling reason[]" to grant certiorari. Sup. Ct. R. 10. In any event, there is no disagreement. The government briefs highlighted by petitioner either advocated for the same rule that the Eighth Circuit applied here or did not speak to the question at all.

The government's amicus brief in *Hawaiian Airlines*, for example, agreed that this Court's *Lingle* decision—recall that *Lingle* was the case addressing preclusion in the related context of the Labor Management Relations Act, *see supra* p. 4—"supplies an appropriate analogy" for the RLA. Br. for the U.S. as Amicus Curiae Supporting Respondent, at 14, *Hawaiian Airlines, Inc. v. Norris*, No. 92-2058 (Jan. 5, 1994). As the government explained, *Lingle* had held that a "state tort was 'independent of [a] collective-bargaining agreement' because its resolution did 'not *require* construing that agreement.'" *Id.* at 15 (alterations omitted) (quoting *Lingle*, 486 U.S. at 407). That rule, the government went on, was "instructive in the RLA context." *Id.* This Court later agreed with the United States, expressly "adopt[ing] the *Lingle* standard to resolve claims of RLA pre-emption." *Hawaiian Airlines*, 512 U.S. at 263. And it is that same rule—a claim is a minor dispute if it requires interpretation of a collective bargaining agreement—that the circuits, including the Eighth Circuit, now unanimously apply.

The other government briefs cited by petitioner are no more helpful to her position. One of them, a relic from 1973, merely argued that where a claim is "peculiarly statutory in nature, existing independently of the collective bargaining agreement," the claim should be "vindicated . . . in the courts." Br. for the U.S. as Amicus Curiae, at 7, *Alexander v. Gardner-Denver Co.*, No. 72-5847 (Oct. 29, 1973). But that says nothing about whether a statutory claim is independent of a collective bargaining agreement if it requires interpretation of that agreement. *See Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 832 (7th Cir. 2014) ("On occasion, . . . a claim is brought under state or federal law that in reality asserts rights established by a collective bargaining agreement."). The government's *Barrentine* brief, and the EEOC's *Brown* brief, are inapt for the same reason. *See* Br. for the U.S. as Amicus Curiae, at 6, *Barrentine v. Ark.-Best Freight Sys., Inc.*, No. 79-2006 (Nov. 1980) (arguing that an arbitrator has "no authority to decide *purely statutory matters*" (emphasis added)); Br. of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant, at 10 n.9, *Brown v. Ill. Cent. R.R. Co.*, No. 00-2349 (7th Cir. Oct. 13, 2000) (similar). Accordingly, there is no "inconsisten[cy]," Pet. 33, between the Eighth Circuit's decision and the government's views as expressed in prior legal briefs.

II. THERE IS NO OTHER REASON TO GRANT REVIEW.

There is no reason that could justify this Court's review in light of the lack of any circuit conflict. Petitioner does not dispute that the Eighth Circuit correctly applied the legal rule to the facts, leaving no errors for this Court to fix. This case is also an exceptionally poor vehicle for addressing the question

actually presented or the distinct jurisdictional issue that petitioner never mentioned below but now seeks to raise in her petition. The jurisdictional issue, which does not appear to be encompassed by petitioner's question presented, raises complicated preservation and waiver problems that may ultimately prevent the Court from deciding the legal question. And regardless, nothing this Court might decide on any RLA issue is likely to affect the outcome of the case. Even in the unlikely event that the Court repudiates its precedent and adopts a radically different rule for identifying "minor disputes" under the RLA or holds that RLA preclusion is not jurisdictional, petitioner would *still* automatically lose on remand. That is because the district court already ruled in the alternative, on the undisputed factual record, that petitioner's claims fail on the merits. Given the uncontested facts, this alternative ruling is exceedingly unlikely to be disturbed on appeal. This Court should preserve its resources for cases in which its review actually matters.

A. The Decision Below Was Correct.

This Court generally does not grant certiorari to review alleged errors in the application of properly stated legal principles. There is little reason for the Court to do so here. Although petitioner disagrees with the rule that the Eighth Circuit applied, she has not even argued to this Court that the Eighth Circuit erred in its application of that rule to her case. Nor could she have. The decision below was plainly correct.

The court of appeals' reasoning was sound. First, petitioner could succeed on her discrimination claims only if she showed that she had applied for the relevant positions. Pet. App. 7a. Second, to show that she had applied for the relevant positions, petitioner

would have to establish that she had satisfactorily completed the application process laid out in the collective bargaining agreement. *Id.* 7a-8a. Third, because the collective bargaining agreement did not explicitly address the use of iTrakForce, any adjudicator would have to interpret the agreement to assess how iTrakForce fits into the agreement's application process and whether petitioner satisfied that process. *Id.* 8a. Finally, because interpretation of the agreement was required to resolve petitioner's claims, they were precluded under the RLA as a minor dispute. *Id.* 10a.

The only link in this chain that petitioner even attempted to dispute below (but, again, does not now) was the third. *See* CA8 Appellant Br. 20 (agreeing that she had to show that she applied for the positions), 24 (agreeing that claims requiring interpretation of a collective bargaining agreement are precluded), 31-32 (agreeing that she had to show that she had satisfied the agreement's application process). But there is no question that the "heart of the dispute" here is "a disagreement over the interpretation" of the collective bargaining agreement. *Brown*, 254 F.3d at 664. Specifically, the central question is what it means to "have" an "application . . . on file," or whether any other express or implied term of the agreement could be construed to permit petitioner to apply for the positions by faxing her resume. This question is dispositive. If faxing her resume was not an "application" under the agreement, then her discrimination claims must fall. The decision below was thus right to hold that whether she had applied for the positions was "inextricably bound up" with interpretation of the agreement. Pet. App. 8a (quotation marks omitted). There is no error for this Court to correct.

B. This Case Is A Poor Vehicle For Review Of Any RLA Question.

Review is also unwarranted because this case is a poor vehicle to decide the actual question presented, let alone the separate issue whether RLA preclusion is jurisdictional.

The latter issue, which petitioner repeatedly seeks to conflate with the actual question presented, involves whether the Eighth Circuit properly held that RLA preclusion deprives a federal district court of subject-matter jurisdiction. Although there is some disagreement on that question in the courts of appeals, *see Giles v. Nat'l R.R. Passenger Corp.*, 59 F.4th 696, 702 n.3 (4th Cir. 2023) (noting a shallow two-circuit "split"), it is not cleanly presented here.

Just as this Court does not traditionally take cases for purposes of error correction, it likewise "[o]rdinarily" does not grant review on "questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This presumption against review of new issues accords with the consistent practice of appellate courts, which "abstain from entertaining issues that have not been raised and preserved." *Wood v. Milyard*, 566 U.S. 463, 473 (2012). Indeed, "[o]nly in exceptional cases will this Court review a question not raised in the court below." *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958).

These principles all counsel firmly against granting review to consider the issue whether RLA preclusion is jurisdictional. There is nothing exceptional here. Petitioner never raised or even hinted at the issue below. As she concedes, she "did not dispute" that RLA preclusion was jurisdictional in the district court, Pet. 12, and "did not ask" the Eighth Circuit to assess the question, either, Pet. 17. For that reason,

if the Court *did* grant certiorari to resolve this issue, it may not even be able to reach the merits of the issue. It would first have to navigate a thicket of fact-bound and thorny waiver and preservation questions to assess "the propriety of reaching the merits" of the jurisdictional issue. *Schiro v. Farley*, 510 U.S. 222, 229 (1994).

What is more, deciding the jurisdictional issue in the negative—that is, holding that RLA preclusion is not jurisdictional—could taint this Court's consideration of the actual question presented as well. The district court had expressed some displeasure at RLA preclusion being raised mid-trial, Pet. App. 77a n.14, but determined that it was bound to decide the issue because it went to the court's subject-matter jurisdiction, *id.* 68a n.7. Petitioner now suggests that, absent that jurisdictional nature of the objection, she may have asked the district court to "reject [the] RLA objection as waived." Pet. 13. This argument could become a live issue again if the Court decides that RLA preclusion is not jurisdictional—such a decision would likely render it improper for the Court to resolve the question actually presented here without first remanding for the district court to assess any new waiver issues in the first instance.

All of these complications potentially barring the Court from reaching the merits of whatever questions it might grant certiorari on are "important consideration[s]" weighing against taking up this case. *Schiro*, 510 U.S. at 229. A "decision to grant certiorari represents a commitment of scarce judicial resources with a view to *deciding the merits* of one or more of the questions presented in the petition." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (emphasis added). Those scarce resources would be wasted if the Court ultimately concluded that it could not reach

the issues it wanted to reach because of waiver or preservation problems. "[S]ound judicial practice" thus "points toward declining to address" the jurisdictional issue, which petitioner failed to "properly preserve[]." *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (Kagan, J., concurring).

There is another, even larger vehicle problem with this case. No matter what the Court might hold on the question presented (or on the jurisdictional issue), it would almost certainly make no difference to the actual outcome of petitioner's case. That is because when the district court held that petitioner's claims were precluded by the RLA, the court also ruled, in the alternative, that her claims would fail "as a matter of law" in any event. Pet. App. 78a. The court explained, based on the "undisputed" factual record, that petitioner was "not similarly situated to those chosen" for the material supervisor positions "instead of her" because, owing to her failure to use the iTrakForce software, she had never been "within the pool of candidates considered for the . . . positions." *Id.* 81a-82a. That fact doomed all of the claims at issue here.

Although the court of appeals did not review this alternative ruling, Pet. App. 8a n.4, there is little doubt that if it had, it would have affirmed. The ruling was amply supported by undisputed or unrebutted evidence in the factual record. Petitioner admitted in her trial testimony that she did not submit an application for either position through iTrakForce. *See* D. Ct. Dkt. 153, at 945 ("Q. My question is, you did not submit a bid in [iTrakForce] on that position [the first material supervisor position]. Is that correct? A. I did not."); D. Ct. Dkt. 154, at 990 ("Q. . . . [Y]ou did not bid in [iTrakForce for the second position], did you? A: No."). It was unrebutted that the candidates

who *did* receive the positions submitted their applications through iTrakForce. *See* D. Ct. Dkt. 151, at 402-03; D. Ct. Dkt. 154, at 1081-82; CA8 Appellee Addendum, at 7-8. And no evidence whatsoever showed that any candidate interviewed or selected for the positions failed to apply through iTrakForce. On this record, no adjudicator could conclude that petitioner was similarly situated to the candidates interviewed or selected for the positions. Petitioner cannot succeed on her claims.

Moreover, her age-discrimination claims are *triply* defective. Leaving aside RLA preclusion, as well as that petitioner cannot show that she was similarly situated to those who were selected for the positions, each age-discrimination claim independently fails for additional reasons. The district court held that her claim as to the first material supervisor position was time-barred, Pet. App. 34a, which petitioner never challenged. And, as the district court later explained, her claim as to the second material supervisor position would "separately" fail on the merits "for the simple reason that the individual chosen for that position . . . was significantly older" than her. *Id.* 82a. Petitioner conceded that fact at trial. *See* D. Ct. Dkt. 154, at 991 (petitioner agreeing that successful applicant was "older" than her). Neither of these dispositive defects in petitioner's age-discrimination claims would be affected by anything that this Court decided with respect to the RLA.

So even if this Court granted certiorari, expended its limited time and resources hearing and deciding this case, and adopted petitioner's preferred view of the law (that the RLA never "preempt[s] a claim seeking to enforce a right created by statute," Pet. 16), nothing would fundamentally change. The district court has already expressed its view that petitioner's

claims fail regardless, and the factual record is devoid of any evidence that could lead the Eighth Circuit to reach any different conclusion. Remand would thus simply result in judgment once again being entered for Union Pacific. This Court should reserve review for those cases in which its intervention is both necessary and determinative. Here, it is neither.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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November 22, 2023