No. 23-275

In The Supreme Court of the United States

NANCY AVINA,

Petitioner,

v.

UNION PACIFIC RAILROAD,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THERE IS A MULTI-FACETED CONFLICT REGARDING THE NATURE OF PREEMPTION UNDER THE RAILWAY LABOR ACT[1]

1. Respondent asserts that the question presented is whether "petitioner's claims must be resolved through arbitration." Br. Opp. i. But the petition specifically asserted that the arbitral mechanism (the National Railroad Adjustment Board) has no jurisdiction to hear claims such as petitioner's seeking to enforce antidiscrimination statutes (Pet. 4, 35), and respondent tellingly does not dispute that description of the limits on the Board's jurisdiction.

The EEOC has correctly explained that the Board could not adjudicate federal or state civil rights claims.

> Under the RLA, the Adjustment Board resolves "minor disputes" between carriers and their employees with reference solely to the existing CBA between the parties, and is thus authorized to determine *only* contractual rights and obligations. *Hawaiian Airlines* [*v. Norris*], 512 U.S. [246,] 254-55 [1994)] (citing NRAB Third Div. Award No. 19790 (1973) ("this Board lacks jurisdiction to enforce rights created by State or Federal Statutes ... "); *United Airlines, Inc*., 48 LA 727, 733

[1] A related question is presented in *Polk v. Amtrak National Railroad Passenger Corporation*, No. 23-249. To assist the Court in considering the petitions together, counsel for petitioner in *Polk* will file her reply by December 12, and will waive the 14 day rule in Supreme Court Rule 15.5.

> (BNA) (1967) ("The jurisdiction of this system Board does not extend to interpreting and applying the Civil Rights Act.")) ... Arbitration of "minor disputes" under the RLA is thus incapable of vindicating ... federal statutory rights....

Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant, *Brown v. Illinois Central Railroad Co.*, 254 F.3d 654 (7th Cir. 2001),15 ("EEOC *Brown* Amicus Brief").

Thus, the issue presented by the petition regarding federal and state antidiscrimination claims such as this is not whether they should be enforced in an arbitral forum (the Board) rather than in court, but whether such civil rights can be enforced at all.

2. Respondent insists that all circuits hold that a claim asserting a right created by federal or state law (such as an antidiscrimination statute) is always a minor dispute under the RLA, and thus preempted or precluded, if the claim involves a subsidiary issue that would be affected by the interpretation of a CBA. But the lower courts and the EEOC disagree with that description of the state of the law in the courts of appeals.

The petition identifies six lower court decisions which conclude there is a conflict regarding what constitutes a minor dispute under the RLA, and quotes each of those opinions. Pet. 29-31. The brief in opposition did not dispute the assertion that those lower court opinions conclude that there is indeed such a conflict, and did not question the accuracy or fairness of

the quotations set out in the petition. Respondent does not criticize or discuss the reasoning of those six cases. Indeed, respondent never mentions this portion of the petition at all. A lower court consensus that there is indeed a circuit split does not disappear simply because a respondent refuses to address that consensus.

Respondent asserts that "the circuits, including the Eighth Circuit, now unanimously apply" the following rule: "a claim is a minor dispute if it required interpretation of a collective bargaining agreement." Br. Opp. 17. But the EEOC expressly insists that is not even the prevailing law, least of all the "unanimous" view of the courts of appeals. "The determination whether a claim arising under a federal statute is precluded by the RLA ... does *not* turn on whether the federal claim required interpretation of a CBA...." EEOC *Brown* Amicus Brief, 12 (emphasis added); see *id*. ("the determination whether a claim arising under a federal statute is precluded under the RLA does *not* turn on whether the federal claim requires interpretation of a CBA....") (emphasis added). According to the EEOC, the courts of appeals "have uniformly held that the RLA does not preclude claims arising under federal civil rights laws ... " *Id*. 15. And the EEOC relies for its description of federal appellate decisions on the same cases relied on in the petition. *Id*. at 15-16 (quoting *Saridakis v. United Airlines* 166 F.3d 1272, 1277 (1999); *Bates v. Long Island R.R. Co*., 997 F.2d 1028 1034-35 (2d Cir. 1993), and *McAlester v. United States*, 851 F.2d 1249, 1254-56 (10th Cir. 1988)). In another amicus brief, the EEOC again pointed out that "federal

appellate courts have ... held that the RLA does not preclude individuals from litigating claims arising from federal employment discrimination laws, even where resolution of the statutory claim required consideration of CBA provisions." Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *Tice v. American Airlines*, 288 F.3d 313 (2002), (quoting, inter alia, *Saridakis*, *Bates* and *McAlester*).

3. Respondent claims that in *Bates v. Long Island Railroad Co*., 997 F.3d 1028 (2d Cir. 1993), the Second Circuit did not decide whether the need to interpret a CBA would result in preemption in a discrimination case, ducking that issue because it was not clear to the court whether such interpretation was required in that case. Br. Opp. 11. But decisions in the Second Circuit even subsequent to *Hawaiian Airlines* treat *Bates* as establishing a per se rule that civil rights claims are not subject to RLA preemption.[2] As the quoted portion of *Bates* makes clear, what actually occurred in *Bates* is the opposite of respondent's account; the Second Circuit held that a statutory discrimination claim is not preempted, regardless of whether CBA interpretation is required, and thus did not need to resolve whether

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[2] *Urena v. American Airlines, Inc*., 152 Fed. Appx. 63, 65 (2d Cir. 2005) ("statutory civil rights claims" not preempted, citing *Bates*); *Prokopiou v. The Long Island Railroad Co*., 2007 WL 1098696, at *4 (S.D.N.Y. Apr. 9, 2007) ("statutory civil rights claims" not preempted, quoting *Bates*); *Adams v. N.J. Transit Rail Operations*, 2000 WL 224108, at *9 (S.D.N.Y. Feb. 28, 2000) ("federal statutory claims" are not preempted, citing *Bates*).

interpretation was involved in that case. 997 F.2d at 1034, quoted at Pet. 20.

Saridakis v. United Airlines, 166 F.3d 1272, 1277 (9th Cir. 1999), did not, as respondent contends, hold regarding "the multitude of state and federal claims brought by the plaintiff" that whether a dispute is minor "turns on where it 'can be resolved without interpreting the [CBA].'" Br. Opp. 12. Under *Saridakis*, a need for interpreting a CBA clearly is relevant only to "state law claims" which are treated "unlike" federal statutory claims. 166 F.3d at 1277. *Saridakis* holds that rights created by federal statutes are never preempted by the RLA. 166 F.3d at 1276-77. Decisions in the Ninth Circuit consistently construe *Saridakis* to establish such a per se rule for federal statutory claims.[3] The decision in *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 921 (9th Cir. 2018) (en banc), on which respondent relies (Br. Opp. 12), concerns preemption of state law claims. And in the Ninth Circuit under *Alaska Airlines*, a claim is only preempted with regard to the particular dispute about the meaning of a CBA. In the Ninth Circuit, once that issue has been resolved under the RLA,

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[3] *Powell v. Union Pacific R. Co*., 864 F.Supp.2d 949, 958 (E.D. Cal. 2017) ("federal statutory rights"; "federal labor laws"); *Miller v. Southwest Airlines Co*., 923 F.Supp.2d 1206, 1211 (N.D. Cal. 2013) (Title VII rights); *Shim v. United Air Lines, Inc.*, 2012 WL 6742529, at n.6 (D. Hawai'i Dec. 13, 2012) (Americans With Disabilities Act); *Columbia Export Terminal, LLC v. International Longshore and Warehouse Union*, 23 F.4th 836, 848 (9th Cir. 2022) (Americans with Disabilities Act).

unlike in the Eighth Circuit, the state law claim can proceed in court. 898 F.3d at 922, 922 n.14.

The Tenth Circuit decision in *McAlester v. United Air Lines, Inc*., 851 F.2d 1249, 1254 (10th Cir. 1988), announces a per se rule whose rationale would apply regardless of whether there is a dispute about the meaning of a CBA. "Because a plaintiff's § 1981 action sounds in tort and is based upon a federal statutory rather than contractual duty, McAlester's claim cannot be a 'minor dispute' subject to the exclusivity provisions of the RLA." 851 F.2d at 1255. *McAlester* has been applied in a Title VII case that did involve a claimed dispute about a CBA. *Mosqueda v. Burlington Santa Fe Ry.*, 981 F.Supp. 1403 (D. Kan. 1997). Respondent invokes a passage in *Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 836 (10th Cir. 1996), which refers to whether a claim is "inextricably intertwined" with the terms of a CBA. Br. Opp. 13. But the remainder of that paragraph in *Fry* makes clear that this standard is met only when "the wrong complained of actually arises in some manner from a breach of the defendant's obligations under a collective bargaining agreement." *Id*. Respondent cites a reference in *Adams v. American Airlines, Inc*., 2000 WL 14399 (10th Cir. Jan. 10, 2000) to whether a claim is "inextricably intertwined" with the meaning of a CBA. Br. Opp. 13. But the Tenth Circuit's explication of that phrase relies "[f]irst" on whether the plaintiff's Title VII claim "emanates from a source independent of the CBA." *Id.* The other factors deemed relevant by the Tenth Circuit in *Adams* did not include a need to interpret a CBA.

4. The petition describes the circuit conflict regarding what legal consequence follows under the RLA if (as often occurs) the litigation of a claim arising from a federal statutory right involves a subsidiary issue that would be affected by the interpretation of a CBA. Pet. 2-3, 19, 23-24, 25. The Seventh Circuit holds that in such a situation the court should retain jurisdiction of the case, stay proceedings, and permit the parties to seek resolution before the Board of any subsidiary dispute about the meaning of the CBA in question. Pet. 23-24 (citing *Tice v. American Airlines, Inc.*, 288 F.3d 313, 318-19 (7th Cir. 2002)).[4] In the Sixth Circuit, the presence of such a subsidiary dispute does not bar judicial resolution of the underlying statutory claim, but merely requires the plaintiff to seek possible relief from the Board before pursuing a judicial claim. *Emswiler v. CSX Transp. Inc.*, 691 F.3d 782, 792 (6th Cir. 2012); see Pet. 25 (quoting exhaustion requirement). In the Eighth Circuit, on the other hand, the presence of such a subsidiary issue is an absolute bar to any judicial consideration of the statutory claim involved. Respondent does not deny that the Seventh Circuit established a different standard in *Tice*, or that the Sixth Circuit applies a different standard under *Emswiler*. The brief in opposition simply ignores this conflict, never refers at all to the Seventh Circuit decision in *Tice*, and never refers to the exhaustion

[4] 288 F.3d at 318 ("The suit must be stayed until the dispute over the agreement is resolved by the only body authorized to resolve such disputes, namely an arbitral panel. It follows that if the resolution of the dispute does not resolve the issues in the suit, the suit can resume.").

requirement in *Emswiler*. That circuit conflict did not disappear simply because respondent refused to address it.

5. If this case had been filed in the Second, Ninth or Tenth Circuit, because plaintiff seeks to enforce rights created by federal statutes, it would have been decided on the merits. If the case had been filed in the Fifth or Seventh Circuits, it would have been decided on the merits unless respondent could show that some interpretation of the CBA would conclusively establish whether respondent acted with a discriminatory motive when it denied plaintiff the disputed promotions, an unlikely prospect. In the Seventh Circuit, even if respondent made that showing, the case would have been stayed (not dismissed) while petitioner sought interpretation of the CBA from the Board. In the Sixth Circuit the plaintiff could obtain resolution of the merits of this case if she first attempted to pursue her statutory claims before the Board. The Eighth Circuit, on the other hand, holds that this case can never be adjudicated in a state or federal court. And this Court held in *Hawaiian Airlines*, as the EEOC has since reaffirmed, that the Board does not have jurisdiction to adjudicate such statutory claims. This is not merely a circuit conflict; it is circuit chaos.

6. Respondent suggests that the government in *Hawaiian Airlines* urged the Court to apply in RLA cases the interpretation standard (utilized in LMRA cases under *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988)). Br. Opp. 17. But what the United States actually said, in the (petition stage) brief relied on by respondent, was that the *Lingle*

interpretation standard used in LMRA cases is different than the legal standard the Court used in RLA cases.[5]

7. Respondent concedes there is a circuit conflict regarding whether RLA preemption is jurisdictional. Br. Opp. 21. That issue is squarely within the terms of the question presented, which includes "in what way" RLA preemption would "limit ... claims under anti-discrimination statutes...." Pet. i. Preemption that strips federal and state courts of jurisdiction over certain claims obviously limits those claims in a manner different than preemption which is merely a defense to the claims. The circuit conflict on this important issue, and the argument in favor of review by this Court, were fully developed in the petition. Pet. 29, 32-33, 36-37.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case is an ideal vehicle for resolving the standard governing what constitutes a minor dispute under the RLA. Specifically, it is the perfect vehicle for determining what the lower courts are to do in the common situation in which a plaintiff seeks to enforce a statutory right (invoking the right-creation standard in *Hawaiian Airlines*, which bars preemption), but the case involves a subsidiary issue that could be affected

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[5] Brief for the United States as Amicus Curiae, *Hawaiian Airlines v. Norris* (petition stage amicus brief), 15; see *id*. at 9.

by the interpretation of a CBA (triggering the interpretation standard, also in *Hawaiian Airlines*, which requires preemption). The petitioner in this case seeks to enforce statutory rights: the ADEA and section 1981.

This case illustrates how a CBA-interpretation issue can be relevant to, but yet not dispositive of, a statutory claim. The controlling factual issue in this case is whether the respondent denied petitioner several promotions because of her race and age. Respondent claimed that it had denied her those promotions because it was the company's practice to consider only workers who uploaded their resumes. Petitioner denied that was respondent's practice, noting that the position announcements expressly advised workers interested in the positions to "EMAIL OR FAX RESUME." Pet. 8, 9. Company officials did not claim to have based that asserted practice on the CBA (Pet. App. 63a), but counsel for respondent sought to buttress respondent's proffered justification by asserting that the CBA *should* be construed to require uploading. Rejection of respondent's proposed interpretation of the CBA would not compel a finding of a discriminatory motive, and acceptance of that interpretation would not preclude such a factual finding.

Respondent objects that petitioner did not urge the courts below to hold that RLA preemption is nonjurisdictional. Br. Opp. 7, 9, 19, 21-22. But petitioner could not contest that issue in the courts below, because it was already settled law in the Eighth Circuit that RLA preemption is jurisdictional. Pet. 13. It would have been pointless, if not vexatious, for petitioner to

have urged the district judge or the appellate panel to disregard the controlling Eighth Circuit decisions on this precise issue. Thus "[t]his question is rightly before [the Court] even though [petitioner] did not urge the Court of Appeals to [hold that RLA preemption is not jurisdictional].... [T]his position was squarely barred by Circuit precedent...." *United States v. Vonn*, 535 U.S. 55, 59 n.1 (2022).

Respondent objects that this is a poor vehicle for deciding anything because the petition presents several distinct grounds for overturning the Eighth Circuit decision. Br. Opp. 22. But this Court routinely resolves cases that present two or more arguments. A holding by this Court that RLA preemption is non-jurisdictional would not preclude the Court from reaching and addressing the standard defining a minor dispute.

Finally, respondent argues that it would be a mistake to grant review in this case because respondent assertedly will "almost certainly" prevail on remand when the lower courts reach merits. Br. Opp. 23. But in deciding whether to grant review regarding a procedural or jurisdictional issue, this Court does not consider which party is likely to ultimately prevail on the merits. The purpose of review by this Court is not to award victory to the party most likely to prevail on remand on other issues, but to resolve questions of law that are, as in the instant case, important to a wide range of current and future litigants. Because the railroad and airline industries to which the RLA applies are heavily unionized, whether the RLA precludes

workers in cases such as this from enforcing federal and state statutory rights in *any* forum is a matter of great importance to millions of workers in those industries.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit. The Court should also grant review in *Polk v. Amtrak National Railroad Passenger Corporation*, No. 23-249, and should set the cases for argument in tandem.

Respectfully submitted,

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