No. 23-51

IN THE

Supreme Court of the United States

NEAL BISSONNETTE, *et al.*,

Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PROFESSORS SAMUEL ESTREICHER AND DAVID SHERWYN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Samuel Estreicher is Dwight D. Opperman Professor of Law, Director of NYU's Center for Labor and Employment Law, and Director of its Institute of Judicial Administration.[1] He has authored more than a dozen books and over 150 professional articles. His books include *Cases and Materials on Employment Discrimination and Employment Law: The Field as Practiced*, which is now in its sixth edition, and *Beyond Elite Law: Access to Civil Justice in America* (Cambridge Univ. Press, 2015). Professor Estreicher has served as the Chief Reporter for the American Law Institute's Restatement of Employment Law (2015), has published numerous articles on arbitration issues and has drafted dispute-resolution rules for the Center for Public Resources, is a member of the arbitral roster of the American Arbitration Association (with whom he has worked to improve accessibility for pro se claimants), has testified before President Clinton's Commission of the Worker-Management Relations on design of employee-friendly arbitration programs, and was co-counsel for petitioner in *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001). For over 20 years, he has authored the Arbitration Law column for the New York Law Journal. Professor Estreicher is a longstanding

[1] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

exponent of employment arbitration, if properly designed, as a means of providing hearings and recourse for working people not earning enough or otherwise able to attract competent counsel.

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As two professors who have taught and written extensively about the intersection of employment and arbitration law, *amici* have a strong interest in the question presented by this case.

SUMMARY OF THE ARGUMENT

The Federal Arbitration Act ("FAA") embraces a pro-arbitration policy, subject to a limited exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in

foreign or interstate commerce." 9 U.S.C. § 1. In this case, Petitioners propose an interpretation of the residual clause ("any other class of workers engaged in foreign or interstate commerce") in Section 1 of the FAA that sweeps so broadly it would cover *any* worker involved in the transportation of goods or people in interstate commerce, whatever the nature of the employer's business. Such a reading should be rejected as inconsistent with the history and purpose of the FAA, and because it would result in countless workers losing their federal right under the FAA to enforceable agreements for employment arbitration, which for many employees is the only forum where, as a practical matter, they will receive a merits hearing on their claims.

I. Petitioners' reading of the residual clause conflicts with the FAA's history and original purposes. The choice to exclude "seamen" and "railroad employees" from the FAA's sweep was no accident. See Brief of Respondents ("Resp. Br.") 23–27. Labor strikes were a key reason why Congress enacted alternative dispute mechanisms specifically designed for a few categories of transportation workers in strife-torn industries. When Congress enacted the FAA in 1925, it included the exemption and its residual clause to enable select categories of workers to arbitrate their disputes under pre-existing processes specially designed to resolve labor disputes in their industries. Congress plainly did not exclude from the FAA other employees whose work simply involved transportation tasks but did not work in transportation industries subject to federal laws

establishing special dispute resolution systems. Petitioners would have the Court ignore this history and read the residual clause so broadly as to frustrate Congress's clear purpose.

II. Petitioners' interpretation of Section 1's residual clause also undermines the real advantages that arbitration offers to parties—especially employees not earning enough or otherwise able to attract competent counsel to help them navigate the court-based litigation system. In the context of employee-employer disputes, arbitration is the only way for most workers to have their disputes heard and adjudicated, given that many of them do not attract the attention of the private bar and many employees cannot afford to litigate in court. In considering Petitioners' proposed reading of Section 1's residual clause, these policy considerations cannot be ignored.

ARGUMENT

I. Petitioners' Reading of Section 1 Is Incompatible with the FAA's History and Purpose

The FAA "establishes a federal policy favoring arbitration." *Shearson/Am. Exp. Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) (cleaned up); see also David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1562–63 (2005) ("[T]he law is relatively settled: courts will enforce mandatory arbitration agreements

so long as the employee is not in the transportation industry and the agreement satisfies certain due process criteria."). Despite the pro-arbitration policy enacted by Congress, Petitioners argue that the decision below should be overturned because, "when the FAA was enacted, anyone engaged in interstate transportation was 'engaged in commerce'—regardless of what industry they worked in." Brief of Petitioner ("Petr. Br.") 2; see also *id.* 16–17. A review of the history and context of the FAA's enactment shows that Petitioners are wrong. Congress carved out of the FAA's regime solely a narrow set of industries critical to the transportation of goods and services across state lines and for which Congress had previously enacted special dispute-resolution regimes.

A. The years leading to enactment of the FAA saw significant strikes in transportation industries causing serious economic disruption

1. In the decades preceding the FAA, the railroad industry in particular was marked by strikes that frequently halted massive portions of the country's freight and transit services, resulting in nation-wide disruption that affected various industries. For instance, in the Great Railroad Strike of 1877, 100,000 workers throughout the mid-Atlantic, Midwest, and Northeast participated in a weeks-long strike during which "the major part of the country's transportation system and thousands of industries dependent on it were brought to a halt." Phillip S. Finer, *The Great Labor Uprising of 1977* 8–11, 239

(1977). Although the strike primarily affected the railroad industry, in "several cities" the strike "expanded to many other industries," such as in St. Louis, where it grew into "a systematically organized and complete shutdown of all industry." *Id.* at 9.

Rail strikes continued throughout the remainder of the nineteenth century, with devasting consequences, as businesses dependent on rail transport waned due to lack of supply; "[f]actories felt a dearth of material, especially of fuel[,]" "their goods could not be shipped[,]" and coal became scarce. F. W. Taussig, *The South-Western Strike of 1886*, 1 Q.J. Econ. 184, 202–03 (1887). The most famous of the strikes, the Pullman Strikes in 1894, disrupted railway traffic across the country and ended only with military intervention. A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Pol. Econ. 540, 541–542 (1901).

2. Labor strikes similarly rocked the shipping industry throughout the late nineteenth and early twentieth centuries. Major strikes in the early 1900s halted activity in important ports across the country, such as a weeks-long 1901 strike in the port of San Francisco. Thomas Walker Page, *The San Francisco Labor Movement in 1901*, 17 Pol. Sci. Q. 664, 679, 683–84 (1902). In New Orleans, a series of strikes between 1901 and 1908, related to disagreements over wages and the then-available arbitration system, repeatedly halted "the flow of commerce" in the port. Eric Arnensen, *Waterfront Workers of New Orleans* 160, 174–75 (1991).

In the Great Lakes region, after a series of strikes between 1901 and 1908, a major strike in 1909 created serious havoc when, after shipping companies recruited inexperienced sailors to replace strikers, a passenger ship and a freighter collided, shutting down a Canadian lock for nearly two weeks. Matthew Laurence Daley, *An Unequal Clash: The Lake Seamen's Union, the Lake Carriers' Association, and the Great Lakes Strike of 1909*, 18 N. Mariner 119, 126–27, 130–31 (Spring 2018). As the strike continued, "state arbitration boards of New York, Ohio, Indiana, Illinois, Wisconsin, and Michigan"—which had grown "[c]oncerned by the sheer size of the strike"—offered mediation in an attempt to resolve the strike. *Id.* at 132. The seamen's union "moved quickly to announce" that they would mediate; industry leaders, on the other hand, rejected the invitation, and so the strike continued. *Ibid.*

B. Congress responded to this labor strife by establishing dispute-resolution schemes for resolving labor disputes in the industries affected by these conflicts

Well before enactment of the FAA, in response to the labor strife in rail and shipping industries, Congress enacted alternative dispute mechanisms designed for those industries.

1. ***Railroad Employees.*** The repeated and disruptive strikes in the railroad industry led to numerous congressional enactments aimed at providing alternative dispute mechanisms to resolve

railroad labor unrest. See Frank N. Wilner, *The Railway Labor Act & the Dilemma of Labor Relations*, 31–35, 42–48 (1991). Congress thus enacted various schemes specifically for railroad workers, including a scheme that was in effect at the time the FAA was passed. The Arbitration Act of 1888, 25 Stat. 501, created a mechanism by which "differences or controversies" between "railroad or other transportation companies engaged in the transportation of property or passengers" in interstate commerce and "employees of said railroad companies" would be submitted to a "board of arbitration." 25 Stat. at 501–02. In other words, the Act created a dispute-resolution scheme specifically for "common carriers . . . and their employees." *Id.* at 501.

The Erdman Act of 1898, 30 Stat. 424, which replaced the 1888 Arbitration Act, similarly imposed its dispute-resolution scheme on "any common carrier or carriers and their officers, agents, and employees except masters of vessels and seamen" that were "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment" in interstate or foreign commerce. 30 Stat. at 424. Same for the Newlands Labor Act of 1913. 38 Stat. 103, 103–04 (providing for arbitration with employees of "any common carrier or carriers . . . engaged in the transportation of passengers or property" by rail or by rail and water in interstate or foreign commerce).

The statute in force at the time of the FAA's passage, Title III of the Transportation Act of 1920, 41 Stat. 456, imposed a dispute-resolution scheme for disputes between "carrier" companies—as relevant here, "any carrier by railroad, subject to the Interstate Commerce Act[,]" 24 Stat. 379 (1887)—and their "employees" or "subordinate officials." 41 Stat. at 469. The carriers regulated by the Interstate Commerce Act (and thus Title III of the Transportation Act) were "common carriers or carriers engaged in the transportation of passengers or property . . . for a continuous carriage or shipment" by rail or water in interstate or foreign commerce. 24 Stat. at 379.

Courts and the Interstate Commerce Commission ("ICC") interpreted the Interstate Commerce Act's application to "common carrier[s] . . . by railroad" to companies in the railroad industry, rather than private companies that may incidentally send materials by rail over state lines. *Ibid.* For example, in 1925, the ICC issued an order related to train car shortages regulating the use of so-called "assigned cars," or private train cars owned by a coal mine but used by a common carrier railroad "for loading and transportation," including for supply to the public. *Assigned Car Cases*, 274 U.S. 564, 568, 578–79 (1927). Although this order regulated the ability of common carriers to use private cars assigned by coal companies for use in transportation by those common carriers, further illustrating Congress's industry focus, this Court noted that "[p]rivate coal car owners, coal mine operators, coal miners, coal distributors and large coal consumers" only became parties to a suit

involving regulation of common carrier use of private cars "by intervention[,]" because "every carrier subject to" the ICC's "jurisdiction was made a respondent." *Id.* at 572.

Another example of the Transportation Act's distinction between the railroad industry and private track arose in the context of when a railroad or coal company sought to build additional track to connect a mine with an interstate carrier's track. If a common carrier was to operate as a common carrier over the track—such as to serve the public or a large community, or to use private railroad track as a "bridge line" to connect other industries to lines of the interstate railroad system—approval of the ICC was required. See *J.K. Dering Coal Co.* v. *Cleveland, C., C. & St. L. Ry.*, 206 I.C.C. 661, 666 (1935) ("clear distinction between a carrier serving a mine or industry over a private track constructed by the mine or industry to connect with the carrier's rails" versus "extension of a carrier's service over a private track, as a bridge line, to reach mines or industries which have in turn built private tracks to connect with the bridge line[,]" the latter of which would "clearly" require ICC approval).

On the other hand, the ICC noted a year after passage of the FAA that track to be used by a railroad company carrier, which would be "intended to serve as a common carrier to so large a community" and was thus subject to the ICC's authority, would be distinguished from that same track previously used to transport goods within a single manufacturing

industry, which was not subject to the ICC's authority. See *Acquisition of Line by Iberia & Vermilion R. Co.*, 111 I.C.C. 660, 660–63 (1926); see also *State of Idaho* v. *United States*, 10 F. Supp. 712, 716 (D. Utah 1935), *aff'd*, 298 U.S. 105 (1936) (track connecting coal mine and carrier financed in part by coal company and never "of service to other industries or the public generally" not subject to ICC jurisdiction).

In sum, these authorities reflect consistent distinctions by this Court, the lower federal courts, and the ICC between companies in the railroad industry, which were subject to the ICC's authority, and track of coal or other private companies outside the ICC's authority.

2. *Shipping.* Congress also set forth a specific regime addressing disputes in the shipping industry, a scheme that remained in effect at the time of the FAA's enactment.

Thus, in 1872, Congress passed the Shipping Commissioners Act, which regulated "[s]eamen engaged in Merchant Ships belonging to the United States[,]" 17 Stat. 262, and accordingly "prescribed regulations concerning the employment, wages, treatment, and protection of seamen." *Inter-Island Steam Nav. Co.* v. *Byrne*, 239 U.S. 459, 460 (1915). In addition, the Act created a system of "shipping-commissioners" to oversee ports and perform duties "relating to merchant seamen and merchant ships." 17 Stat. at 263. Under Sections 25 and 26 of the Act, these shipping commissioners were responsible for

administering a dispute-resolution system requiring that "every shipping-commissioner shall hear and decide any question whatsoever . . . which both parties agree in writing to submit to him[,]" including that in disputes "relating to the wages, claims, or discharge of any seamen." *Id.* at 267.

Most notably, the Shipping Commissioners Act of 1872—along with other earlier and subsequent federal laws governing seamen—tied the meaning of "seamen" to work in the merchant service, that is, workers engaged in the transport of people or property, as opposed to merely any worker on board a vessel that may travel in interstate or foreign commerce in connection with work to be performed in other industries. See *id.* at 262 (regulating "Seamen engaged in Merchant Ships"); First Congress Act of 1790, ch. 29, 1 Stat. 131 ("An Act for . . . regulation of Seamen in the merchants service); Seamen's Act of 1915, 38 Stat. 1164 ("An Act To promote the welfare of American seamen in the merchant marine of the United States"); see also *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 460 (2022) ("seamen . . . constitute[s] a subset of workers engaged in the maritime shipping industry") (internal quotation marks omitted).[2]

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[2] The Merchant Marine Act of 1920, which established comprehensive regulations of common carriers by water, amended the Seamen's Act of 1915 to add that "any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law," including that any "common-law right or remedy in cases of personal injury to railway employees shall apply." 41 Stat. 988 at 1007.

Courts interpreting the 1872 Shipping Commissioners Act treated fisherman and those employed on fishing vessels differently, even when they may have traveled over state borders—further evidencing the limits of the laws existing in the early 1900s governing only those who worked in the transportation industries (and, thus, evidencing the industry-based reach of the FAA's Section 1 carve-out). The court's reasoning in *The Cornelia M. Kingsland* is illuminating. 25 F. 856, 858 (S.D.N.Y. 1885). There, the court noted that, as a general matter, "[f]ishermen . . . in all our legislation from the inception of the government downwards, have been treated distinctively under the name of 'fishermen;' never under the name of 'seamen.'" *Id.* The court further determined that, under the 1872 Act, the particular fisherman at issue was excluded from the definition of "seamen," despite the fact that he was "shipped . . . on several voyages" on which "he performed the duties of a seaman." *Id.* at 857. In another case, "the libelant shipped . . . at San Francisco . . . as a fisherman, for a voyage to Behring sea and return," but despite the interstate voyage, the court found that "the libelant was not a seaman." *Telles* v. *Lynde*, 47 F. 912, 912, 916 (N.D. Cal. 1891).

Congress adhered to this distinction in 1915, when it enacted the Seamen's Act of 1915. That legislation governed "seamen" on "merchant vessels of the United States[,]" but stated that it "shall not apply to fishing or whaling vessels, or yachts"; in another section, Congress again distinguished between fisherman and seamen by specifying that the section "shall apply to

fishermen employed on fishing vessels as well as to seamen." 38 Stat. at 1164, 1169.

C. Petitioners' reading of Section 1 cannot be squared with the FAA's history and purpose

As this Court recognized, "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 121 (2001) (noting that at the time the FAA was passed, there were arbitration schemes for seamen, "grievance procedures" for railroad employees, and an "imminent" forthcoming comprehensive "mediation and arbitration" statute for railroad employees). The carve-out was focused on industries (rail and shipping) that provided transportation services to the U.S. economy at a level that made these industries indispensable and the effects of their strikes extend beyond any single state, and for which Congress had already specified legislation. The point was not to exclude any class of worker from the policy favoring arbitration simply because they travelled, but simply to provide that the FAA would not apply to a narrow class of workers in the transportation industries because they had already been accounted for in specific legislative schemes. See *id.*

Limiting Section 1's residual clause to certain classes of workers within the transportation industry harmonizes the then-existing or soon-contemplated

alternative dispute resolution schemes for workers in the shipping and railroad industries with the language of Section 1's exemption of "seamen" and "railroad employees." Petitioner's reading, on the other hand, would ahistorically and nonsensically sweep in large swaths of workers not employed within the transportation industry but that perform some work in interstate transportation—for example, workers like the fisherman in *Telles* that worked aboard a ship traveling from California to the Behring Sea, but nevertheless was determined not to be a "seaman." 47 F. at 912, 916. The historical context thus shows that Congress's reference to other workers in Section 1's residual clause is better read to align with Respondents' reading rather than the overbroad interpretation that Petitioners advocate. *See* Resp. Br. 21, 26, 37–38 (interpreting Section 1 as limited to workers in the "transportation industry," *i.e.*, entities "selling . . . transportation services").

II. Arbitration Benefits Employees as well as Employers

The context of the FAA's enactment shows that Section 1 of the FAA was meant to provide a "narrow" exception to the FAA's purpose of making arbitration agreement "valid, irrevocable, and enforceable," 9 U.S.C. § 2, for workers who play a necessary role in the free flow of goods[,]" except for those working in transportation industries for whom Congress created special dispute-resolution machinery, *Circuit City*, 532 U.S. at 121. That result also accords with sound policy considerations—then and now—recognizing

that arbitration can be a fair, efficient method of resolving disputes.

A. Arbitration provides a net benefit for employees by guaranteeing that their legal claims will likely receive a hearing on the merits. When it comes to employment disputes, "[t]he right to a trial in federal court is, in reality, limited to high wage earners and those who have strong evidence of clear violations of the law." David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes*, 2 U. Pa. J. Labor & Empl. L. 73, 94 (1999); see also Samuel Estreicher & Matt Ballard, *A Critique of Public Citizen's Jeremaiad on the "Costs of Arbitration"*, 57 Dispute Res. J. 4:1, 5 (2002) ("[T]he vast majority of employees and consumers have low-stakes claims that would never be asserted in court. Thus, arbitration is the *only* forum available, as a practical matter, for resolution of these claims.").

Thus, as *amicus* Professor Estreicher observed more than twenty years ago, removing arbitration as a mechanism for resolving employment disputes essentially creates "a 'cadillac' system for the few and a 'rickshaw' system for the many," in which high-dollar or high-"impact" claims would end up in litigation (the "cadillac system") while low-dollar or individual claims not appealing to "impact" or "cause" lawyers languish on the pro se docket or in the backlog of administrative agencies (the "rickshaw system"). Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. Disp. Res. 559,

563 (2001).

Although the litigation alternative may now resemble a Tesla more than a Cadillac, the analogy remains apt. Without arbitration as an option for worker disputes, many if not most employment disputes would languish. On average, arbitration provides most individual claimants with a more efficient and more accessible form of justice that, while not a Tesla/Cadillac, is preferable to the rickshaw justice—if even that—one might find in court, adrift without competent counsel or trying to persuade an overloaded administrative agency to take their case.[3]

Arbitration is an efficient, employee-friendly means of resolving employment disputes. As *amici* have written, although "[c]onventional academic wisdom * * * [once] held that employees would not fare well in arbitration," quantitative research shows "that the assertions of many arbitration critics were either overstated or simply wrong." Sherwyn, et al., 57 Stan.

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[3] See EEOC, *Timeliness of Merit Final Agency Decisions in the Federal Sector* 1–2 (2023) ("Federal agencies have found it increasingly difficult to meet the regulatory timeframe for issuing an increasing number of [final agency decisions]" such that a majority of decisions in 2021 were untimely under the regulations); see also 29 C.F.R. § 1614.103-110 (setting out agency process for addressing complaints); Harry C. Katz, David Sherwyn & Paul Wagner, *Looking at Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA) Litigation and Arbitration from Both Sides Now: Proving that Arbitration Constitutes More Employee-Friendly Litigation and Providing Proposals to Improve the Process*, 37 ABA J. Labor & Empl. L. 21, 27–28 (forthcoming Dec. 2023) (discussing the decades-long backlog of cases awaiting resolution at the EEOC).

L. Rev. 1557, 1567 (2005); see also Samuel Estreicher, Michael Heise, & David Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers U. L. Rev. 375, 382–86 (2018) (collecting employee win rate data). Of course, there are critics of employment arbitration who remain undeterred by these findings. E.g., Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, Berkeley J. Emp. & Lab. L. 71 (2014).

Analyses of employment arbitration data reveals that these critics continue to compare apples (the few cases that manage to overcome the many gauntlets to a hearing on the merits) to oranges (claims in arbitration likely to receive a hearing on the merits without the winnowing process of the litigation system). See Estreicher, et al., 70 Rutgers U. L. Rev. at 383–84 ("[T]he incidence of summary judgments against claimants is a good deal lower [in arbitration] than found in litigation."). When comparing like with like, the data shows that plaintiffs in arbitration have a far greater incidence of success. Harry C. Katz, David Sherwyn & Paul Wagner, *Looking at Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA) Litigation and Arbitration from Both Sides Now: Proving that Arbitration Constitutes More Employee-Friendly Litigation and Providing Proposals to Improve the Process*, 37 ABA J. Labor & Empl. L. 21, 22 (forthcoming Dec. 2023) ("[w]hen [dispositive motions] are included, plaintiffs prevail in 19% of the resolved cases in arbitration and only 1% in litigation.").

B. An industry-based interpretation of Section 1's residual clause also promotes horizontal equity among similarly situated employees by ensuring those workers have access to the same dispute-resolution system. Petitioners' interpretation of Section 1's residual clause would create *inequity*, however, by excluding non-transportation-industry workers engaged in transportation-related tasks from dispute-resolution mechanisms that their similarly-situated co-workers could access.

For instance, under Petitioners' reading of Section 1, any employer making and selling baked goods would have to exclude from its dispute-resolution regime those workers who are engaged in delivery and other transportation-related tasks, which would undermine the benefit to that company of a single dispute resolution system. Not only that, but this differential treatment of similarly situated employees would invite potential discord among those who are subject to arbitration and those who are not. Interpreting Section 1's residual clause narrowly and rejecting Petitioners' sweeping and ahistorical reading of it will help avoid such outcomes.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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