No. _____

In the Supreme Court of the United States

ROSARIO Y. MENDOZA,
INDIVIDUALLY AND ON BEHALF OF THE
ESTATE OF MARCOS A. HOYOS MARTINEZ,

Petitioner,

v.

RUSH TRUCK CENTERS OF TEXAS, L.P. D/B/A
RUSH ENTERPRISES, INC. A/K/A
RUSH TRUCK CENTER-EL PASO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition raises important questions about the application of the "transportation worker" exception to mandatory arbitration under the FAA. The reported decision of Texas' Eighth Court of Appeals acknowledged that this Court's decisions require analysis of whether a worker is a member of a "class of workers" that play a direct and necessary role in the free flow of goods in interstate commerce.

In addition, this petition also raises an issue of great significance regarding the preemptive effect of the FAA for state workers' compensation laws and systems to handle work-related injury and death claims. The lower federal courts have treated the FAA's preemptive effect as reaching any state law affecting arbitration, including in the context of workers' compensation statutes, irrespective of the fact that the arbitration agreement at issue would not be enforceable under Texas law. The Question Presented are:

1. By focusing solely on what Mr. Hoyos, the worker at issue in this matter, was doing before his untimely on-the-job fatal incident instead of the fact that Mr. Hoyos was employed as a mechanic working on DOT commercial motor vehicles that deliver goods in interstate commerce, does the lower court opinion in this case conflict with this Court's decisions in *Southwest Airlines v. Saxon*, 596 U.S. 450 (2022), and *Bissonnette v. LePage Bakeries Park St., LLC*. 601 U.S. 246 (2024)?

2. Should the FAA have such preclusive effect where, as here, FAA preemption threatens to undermine the delicate balance that state law strikes via the intersection of workers' compensation laws and systems affording workers a swift and clear process and remedy for on-the-job injuries and tort law claims?

PARTIES TO THE PROCEEDINGS

Petitioner ROSARIO Y. MENDOZA, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MARCOS A. HOYOS MARTINEZ, was plaintiff in the Texas state trial court, appellee in the intermediate court of appeals, and petitioner in the Supreme Court of Texas.

Respondent RUSH TRUCK CENTERS OF TEXAS, L.P. D/B/A RUSH ENTERPRISES, INC. A/K/A RUSH TRUCK CENTER-EL PASO, was defendant in the Texas state trial court, appellant in the intermediate court of appeals, and respondent in the Supreme Court of Texas.

LIST OF PROCEEDINGS

Supreme Court of Texas

No. 23-0864

Mendoza v. Rush Truck Ctr. of Tex., L.P.

Order Denying Petition for Review: November 15, 2024

Eighth Court of Appeals El Paso, Texas

No. 08-22-00226-CV

Rush Truck Centers of Texas, L.P. d/b/a Rush Enterprises, Inc., a/k/a Rush Truck Center-El Paso, *Appellant,* v. Rosario Y. Mendoza, Individually and on Behalf of the Estate of Marco A. Hoyos Martinez, *Appellee.*

Final Opinion: September 1, 2023

District Court of El Paso Cty., Texas 448th Dist. Court

No. 2022DCV0350

Rosario Y. Mendoza, Individually and on Behalf of the Estate of Marco A. Hoyos Martinez v. Rush Truck Centers of Texas, L.P. d/b/a Rush Enterprises, Inc., a/k/a Rush Truck Center-El Paso

Final Order: October 11, 2022

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OPINIONS BELOW

The order of the Supreme Court of Texas denying review is unreported and is reproduced at App.1a. The opinion of the Eighth Court of Appeals (El Paso, Texas) and the dissenting opinion from that court are reported at 676 S.W.3d 821, and are reproduced at App.2a, 46a. The judgment of the Eighth Court of Appeals is reproduced at App.48a. The trial court order from the 448th District Court, El Paso County, Texas, denying respondent's motion to compel arbitration is reproduced at App.50a.

JURISDICTION

The state trial court entered an order denying Respondent Rush Truck Centers' motion to compel arbitration under the FAA on October 11, 2022. App.50a. Rush Truck Centers appealed that interlocutory decision to the Eighth Court of Appeals, where a divided panel reversed the trial court's order on September 1, 2023. App.2a, 48a. Petitioner Rosario Y. Mendoza timely sought review in the Supreme Court of Texas on November 15, 2023. On November 15, 2023, the Supreme Court of Texas denied review. App.1a.

This Court has jurisdiction under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Tenth Amendment

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

9 U.S.C. § 1

> . . . nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

Texas Labor Code § 408.011(a)-(b)

> (a) Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a

legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

(b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.

Texas Civil Practice and Remedies Code § 171.002(a)(3)-(4) and (c):

(a) This Chapter [the Texas Arbitration Act] does not apply to: . . .

(3) a claim for personal injury, except as provided by Subsection (c);

(4) a claim for workers' compensation benefits; . . .

(c) A claim described by Subsection (a)(3) is subject to this chapter if:

(1) each party to the claim, on the advice of counsel, agreed in writing to arbitrate; and

(2) the agreement is signed by each party and each party's attorney.

STATEMENT OF THE CASE

A. Hoyos' Employment with Rush Trucking Centers

Rush Truck Centers of Texas is an interstate commercial motor vehicle dealership and service center that sells trucks, services trucks, and sells parts for trucks. Supp CR 44:6-10. Rush Truck Centers has dealership and service center facilities in 23 states. Supp CR 42:22-24. The goal of Rush Truck Centers' business is to assist interstate carriers by increasing commercial motor vehicle uptime, lowering operating costs, and offering complete maintenance solutions. Supp CR 45:15-46:18.

Rush Truck Centers first hired Marco A. Hoyos Martinez in June 2019 as a Custom Vehicle Solutions fabricator at Rush's facility in Denton, Texas. Supp CR 95:17-96:9. Mr. Hoyos worked for Rush Truck Centers in that capacity from June 2019 through April 2020. Supp CR 115:7-18. Rush Truck Centers furloughed Mr. Hoyos from that position on April 3, 2020. Supp CR 115:7-18; 118:9-11.

On October 22, 2020, Rush Truck Centers offered Mr. Hoyos a job as a Body Shop Technician Level 2 at its Interstate 10 service center in El Paso, Texas. Supp CR 118:9-11; 121:20-22; 122:1-11. Rush Truck Centers agreed that the position it offered Mr. Hoyos is synonymous with that of a mechanic. Supp CR 119:9-12; 146:22-24; 147:8-19. Rush Truck Centers expects this type of worker to repair and service commercial motor vehicles quickly to get them back on the public interstate highways. CR 197; Supp CR

46:6-18; 47:19-21. Mr. Hoyos accepted this job offer one day later. Supp CR 121:20-122:4.

Upon hiring, Rush Truck Centers requires employees to complete an online onboarding process. Supp CR 83:14-17. The online onboarding documents include an arbitration agreement. CR 41-42. The critical part of that Rush-drafted document states:

> Both I [Hoyos] and the Company [Rush Truck Centers] agree that any claim, dispute, and /or controversy that I may have against the Company . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"). Included within the scope of this agreement . . . are all disputes, whether based on tort, negligence, contract, statute, . . . equitable law, or otherwise. The only exceptions to binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for workers' compensation benefits, (medical and disability) [sic], unemployment compensation benefits, or other claims that are not subject to arbitration under current law.

CR 41. The purported arbitration agreement is silent as to whether a claim for death benefits under the Texas Workers' Compensation Act ("TWCA") is excluded from its scope. CR 41.[1] As Rush Truck Centers' corporate representative confirmed, the purported arbitration agreement excludes claims for workers' compensation benefits from its scope. CR 41; Supp CR 137:4-14.

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[1] There is no such thing as "disability benefits" under the TWCA. *See generally* Tex. Labor Code § 401.011. *See also* CR 134-138.

The corporate representative also agreed that workers' compensation benefits are those benefits provided under the TWCA, including death benefits. Supp CR 138:10-16; 146:9-16.

B. Hoyos' Work-Related Death

On November 23, 2020, around two weeks after Mr. Hoyos started work at the El Paso location of Rush Truck Centers, Mr. Hoyos was cleaning a DOT commercial motor vehicle to be used in interstate commerce for final painting. CR 101-02. Rush Truck Centers instructed Mr. Hoyos to perform the assigned work on the DOT commercial motor vehicle using an unsecured ladder at heights above 6 feet. CR 101-02. Mr. Hoyos performed the assigned work in a poorly ventilated garage bay without any personal protective equipment or fall protection. CR 101-02. Unfortunately, Mr. Hoyos fell from the unsecured ladder to the concrete floor, which eventually caused his death. CR 101-02. Mr. Hoyos was covered by workers' compensation insurance at the time of his work-related death. CR 193-195; Supp CR 73:12-17.

C. Subsequent Legal Proceedings

Following Mr. Hoyos' work-related death (and in an apparent attempt to try to limit Mr. Hoyos's heirs to exclusive remedies under the TWCA), Rush Truck Centers proactively submitted a workers' compensation claim to the Texas Workers' Compensation Commission for Mrs. Mendoza to begin receiving statutory death benefits. Supp CR 64:14-19; 65:16-21. But Rush Truck Centers did not submit the claim for death benefits under the TWCA to mandatory arbitration. Supp CR 36:4-6.

Mr. Hoyos' widow, Rosario Mendoza, exercised her rights under section 408.011(b) of the TWCA by suing Rush Truck Centers in state court for gross negligence to recover exemplary damages for the conduct which proximately caused Mr. Hoyos's work-related death. CR 10-17. Rush Truck Centers in turn filed a motion to submit Mrs. Mendoza's gross negligence claim under the TWCA to mandatory arbitration. CR 34-42. Mrs. Mendoza resisted arbitration on multiple grounds, including that Mr. Hoyos was a "transportation worker" within the meaning of the FAA's exception for "any other class of workers engaged in foreign or interstate commerce" (the "transportation worker" exception). 9 U.S.C. § 1.

The evening before the hearing on Rush Truck Centers' motion to compel arbitration, Rush Truck Centers submitted to the trial court an affidavit from Jacob Madrid, Rush's general manager, that purports to describe Mr. Hoyos's job duties such that he does not fall under the FAA's exception for "transportation workers." Supp CR 31-33. During the hearing on the motion to compel, Mrs. Mendoza objected to the Madrid affidavit. RR 16-23. The hearing was not evidentiary; the trial court denied Rush Truck Centers' motion on the pleadings without entering findings or conclusions and without specifying its reason(s) for denying the motion. CR 150 (App.50a).

The intermediate state court of appeals (the Eighth Court of Appeals in El Paso, Texas) reversed in a published opinion. 676 S.W.3d 821 (App.2a). Relying on Mr. Madrid's self-serving affidavit, the state court of appeals determined that Mr. Hoyos was not a "transportation worker" within the meaning of the FAA's exception for "transportation workers." *Id.*

at 840-44 (App.36a-44a). The state appellate court also determined that requiring submission of the gross negligence claim, made under the TWCA's express provision authorizing statutory heirs to file such a claim (*see* Tex. Labor Code § 408.011(b)), to arbitration under the FAA was proper, even though that claim is a central feature of Texas' workers' compensation system, impliedly holding that the FAA preempts section 408.011(b).

Mrs. Mendoza filed a petition for review with the Supreme Court of Texas, which denied the petition without written order on November 15, 2024. (App.1a).

REASONS FOR GRANTING THE PETITION

I. The State Appellate Court Opinion Conflicts with This Court's Decisions Regarding the FAA's "Transportation Worker Exception

A. This Court's Recent "Transportation Worker" Jurisprudence

Generally, the FAA provides for the enforceability of

> a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration any controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal[.]

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) (quoting 9 U.S.C. § 2). However, Congress excluded from the FAA's coverage "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Circuit City*, 532 U.S. at 112 (quoting 9 U.S.C. § 1) (emphasis added). Courts applying Section 1 routinely refer to Section 1's "class of workers engaged in . . . interstate commerce" language as creating a "transportation worker" exception to mandatory FAA arbitration. *See id.*

In *Circuit City*, this Court explained that Section 1 applied to contracts with "transportation workers" and explained that, to qualify as a "transportation worker," such workers must at least play a "necessary role in the free flow of goods[.]" *Circuit City*, 532 U.S. at 121. Since *Circuit City*, the Court has twice provided further guidance on the scope of the transportation worker exemption.

First, in *Southwest Airlines v. Saxon*, the Court outlined a two-step inquiry to determine whether a given worker qualifies for the exemption. 596 U.S. 450, 455 (2022). A court must first define the "relevant class of workers" to which the worker at issue belongs. *Saxon*, 596 U.S. at 455. This classification turns on "the actual work that the members of the class, as a whole, typically carry out." *Id.* at 456. Then, the court must determine whether that class of workers is engaged in foreign or interstate commerce. *Id.* at 455. The class of workers "must be actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* at 458. Based on this construction, the Court had no trouble concluding that a worker who loaded cargo on

and off airplanes belonged to a class of workers engaged in interstate commerce. *Id.* at 459.

Most recently, in *Bissonnette v. LePage Bakeries Park St. LLC*, 601 U.S. 246 (2024), this Court rejected a categorical approach that is based solely on whether the employer is primarily engaged in the transportation industry. *Id.* at 253-54. But critically for the present matter, this Court's opinion in *Bissonnette* assuredly does not hold that the nature of the employer's business is irrelevant to the analysis. Indeed, this Court emphasized in *Bissonnette* that the statutory language at issue refers to "classes" of workers. 601 U.S. at 251, 252, 253; 9 U.S.C. § 1.

B. Mr. Hoyos Belonged to a "Class of Workers" that Included Technicians and Mechanics

As to the first step of the inquiry, Mr. Hoyos belongs to a class of workers who manually make ready new interstate commercial vehicles and repair and service commercial motor vehicles used in interstate commerce. *See Saxon*, 596 U.S. at 455-56.

Rush Truck Centers' business is comprised of interstate commercial truck dealerships and service centers across the country. Supp CR 44:6-17; 46:6-9; 47:22-48:10; CR 197-198. At these facilities, Rush Truck Centers sells and services commercial motor vehicles used in interstate commerce and sells parts for such commercial motor vehicles. Supp CR 44:15-17; 45:15-24; CR 197-198.

Mr. Hoyos worked for Rush Truck Centers as a Body Shop Technician Level 2 at its I-10 service center in El Paso, Texas, which is located near the intersection

of I-10 and US Loop 375 which runs to the U.S.-Mexico port of entry. CR 101; Supp CR 119:3-8. To be clear, Rush Truck Centers' corporate representative testified that this position is synonymous with that of a mechanic. Supp CR 119:9-12; 146:22-24; 147:8-19. Rush Truck Centers expects this type of worker to repair and service commercial motor vehicles quickly to get such commercial vehicles back on the public interstate highways. Supp CR 46:6-18; 47:5-21; CR 197-198. Mr. Hoyos and his fellow technicians/mechanics performed this exact type of work at Rush's I-10 facility. CR 101; Supp CR 119:3-13.

C. Mr. Hoyos' "Class of Workers" Is Engaged in Interstate Commerce

The second step of the *Saxon* inquiry is whether that class of workers is engaged in foreign or interstate commerce. *Saxon*, 596 U.S. at 455. At the time of this incident, Mr. Hoyos was cleaning for final painting to put a new DOT commercial vehicle on the highway for a company whose website evidences that it does interstate work between Texas and New Mexico. CR 101-102 (Hoyos was working on a vehicle owned and operated by El Paso Disposal at the time of the incident); RR 25:14-26:3.[2] Without the work performed by Mr. Hoyos and his fellow technicians/mechanics (*i.e.*, his "class of workers"), a commercial motor vehicle cannot be placed into service or operated, thereby

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[2] El Paso Disposal's website confirms that it is engaged in interstate commerce. https://www.elpasodisposal.com/ (website for El Paso Disposal, last visited June 6, 2024 "El Paso Disposal LP provides residential, commercial and construction trash and recycling services in El Paso County, TX and Doña Ana and Otero County, NM.")

preventing the transport of goods in interstate commerce. Supp CR 148:2-23. Simply put, Mr. Hoyos belonged to a class of workers who played a necessary role in keeping the commercial trucks on the interstate for the free flow of goods in interstate commerce. *See Circuit City*, 532 U.S. at 121.

At the trial court level, Rush Truck Centers' only evidence that Mr. Hoyos did not qualify for the transportation worker exception was the affidavit of Jacob Madrid, a Rush general manager. Mr. Madrid purports to describe Mr. Hoyos's job description, the type of work Mr. Hoyos performed in the three weeks prior to his death, the industry in which Rush Truck Centers' business operates, and the allegedly minimal amount of revenue Rush Truck Centers generated from mechanical and body repair services for commercial motor vehicles. CR 418-420. Based on these purported facts, Rush Truck Centers contended that Mr. Hoyos did not belong to a class of workers engaged in interstate commerce.

The state court of appeals (wrongfully relying on the Madrid affidavit) attributed undue weight to the comparatively small monetary value of Mr. Hoyos' work to Rush Truck Centers' overall business. 676 S.W.3d at 843-44 (App.39a-43a). But this fact is irrelevant after this Court's *Bissonnette* decision. 601 U.S. at 254 (rejecting lower court holding that to qualify as "transportation worker," employee must work for entity that "pegs its charges chiefly to the movement of goods or passengers" and its "predominant source of commercial revenue is generated by that movement").

The state court of appeals also erroneously placed too much emphasis on the particular work Mr. Hoyos performed for Rush Truck Centers during the short

time he was employed there before Rush Truck Centers' gross negligence caused Mr. Hoyos' death. 676 S.W.3d at 842-44 (App.39a-44a). Mr. Hoyos was hired by Rush Truck Centers to work as part of a class of workers whose main role is to provide mechanical and bodywork services for commercial motor vehicle owners and operators so that they can get back on the road to engage in interstate commerce. The only facts that matter under this Court's "transportation worker" decisions are those regarding the type of work Mr. Hoyos and his fellow technicians (the relevant "class of workers" for these purposes) performed generally, not for whom they did it or whether their employer's gross negligence caused their death at a time when the only actual work they had done arguably might not qualify them as a "transportation worker." And according to Rush Truck Centers' own corporate representative, Mr. Hoyos' job was synonymous with a mechanic and Rush Truck Centers expected this type of worker to repair and service commercial motor vehicles quickly to get such commercial vehicles back on the highways quickly.

This is important because the state court of appeals' opinion could lead to unjust results in other cases just as it did here. Mr. Hoyos' situation differs little from that of a hypothetical person hired to drive a tractor-trailer delivering goods in interstate commerce who is killed on the first day of work while he is driving his first load that just happens to involve a wholly in-state route. Under the state court of appeals' analysis, the fact that the worker belonged to a class of workers who are clearly "transportation workers" would not matter because he never actually engaged in interstate commerce during his employment. But he

clearly *is* a "transportation worker" under *Bissonnette* and *Saxon*. So too with Mr. Hoyos.

Accordingly, Mr. Hoyos' work also satisfies the second step of the inquiry. *See Saxon*, 596 U.S. at 458-59. Because Mr. Hoyos belonged to a class of workers who make ready, repair or service commercial motor vehicles used for interstate commerce to get such vehicles on the public highways, the transportation worker exception applies—and therefore the state courts should not have concluded that Mrs. Mendoza's wrongful death claim was subject to arbitration under the FAA.

II. THE FAA SHOULD NOT BE CONSTRUED TO PREEMPT STATE WORKERS' COMPENSATION LAW

Since this Court's decision in 1984 in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court has held that § 2 of the FAA creates federal substantive rights and that state courts must enforce § 2 irrespective of any state law, rule, or policy that "stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 563 U.S 333, 343 (2011). The FAA was passed 100 years ago, in 1925, to require federal courts to honor valid arbitration agreements. But state-law workers' compensation systems provide an extensive forum to address on-the-job injury and death claims, and the Texas workers' compensation system has been in place since 1913.[3] Nothing in the plain language of the FAA reflects any congressional intent to force state courts to disregard state workers'

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[3] *See* https://www.tdi.texas.gov/wc/dwc/history. html#:~:text=House%20Bill%207-,Introduction, compensation%20benefits%20to%20their%20employees. ("History of workers' compensation in Texas," Texas Department of Insurance webpage (last visited April 8, 2025)).

compensation systems for arbitration agreements that state law would not enforce.

The state appellate courts here implicitly treated the FAA as preemptive of the State system of worker's compensation and irrespective of Rush Truck Centers' inequitable conduct in unilaterally submitting Mrs. Mendoza's TWCA claim for death benefits to the TWCC to reap the benefits of the TWCA vis-à-vis death benefits while insisting on arbitration of Mrs. Mendoza's gross negligence/wrongful death claim under the TWCA. Indeed, the published opinion of the state intermediate appellate court allows employers (in Texas and elsewhere) to pick and choose claims to evade longstanding protections that state workers' compensation systems provide for workers. Thus, this case raises the important question of the preemptive effect of the FAA under such circumstances.

A. Federal Courts Erroneously Hold that the FAA Preempts State Workers' Compensation Systems that Require Resolution of Comp Claims Under State Law, Including State Arbitration Law

While Mrs. Mendoza has not located any decision by this Court expressly holding that the FAA preempts state law requiring that workers' compensation claims be processed solely within the state's workers' compensation system and laws, lower federal courts have so held. For example, the Fifth Circuit Court of Appeals considered an employee's argument that her state law retaliation claims "should have been heard by [a] court [rather than an arbitrator], because Texas state law does not favor arbitration for personal injury or workers' compensation claims." *Miller v. Public Storage*

Management, Inc., 121 F.3d 215, 219 (5th Cir. 1997). The Fifth Circuit rejected this argument, noting that any state law that disfavors arbitration for workers' compensation or personal injury claims is inconsistent with this Court's decision in *Keating* that "[t]he FAA preempts conflicting state antiarbitration law." *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 at 219.

Similarly, a federal district court in West Virginia expressly held that a state law limiting arbitration of workers' compensation claims is preempted by the FAA. *Pine Ridge Coal Co. v. Loftis*, 271 F. Supp. 2d 905, 908-09 (S.D. W. Va. 2003). The court in *Loftis* was faced with a wage agreement that "contains a clear and unmistakable waiver of an employee's right to bring suit under state workers' compensation laws." *Id.* at 908. Seeking to avoid arbitration, the plaintiff invoked a West Virginia statute that precluded any employer or employee from entering into any contract that would exempt them from the burdens, or waive the benefits, of the state's workers' compensation system. *Id.* at 908-09. The court rejected this argument, concluding that the state statute at issue, "as applied to a contractual arbitration agreement, is preempted by § 2 of the [FAA]." *Id.* at 909 ("[T]o the extent that W. Va. Code § 23-2-7 would require judicial consideration of claims brought under the state workers' compensation statutes, § 23-2-7 is preempted by [the FAA].").

B. The FAA Was Never Intended to Preempt State Workers' Compensation Law

Mrs. Mendoza respectfully suggests that such federal jurisprudence treating the FAA's preemptive scope as extending to carefully calibrated state workers'

compensation systems is simply wrong, and this Court should say so in this case. There is nothing in the FAA's legislative history to suggest that Congress, when passing the FAA 100 years ago, intended that the FAA's reach would extend to preempt state workers' compensation systems, which are purely creatures of state law and which reflect a state's measured attempts to balance the state's policy interests in legislating the relationship between employers and employees when an employee is injured or killed on the job. Construction of the FAA to require states to honor arbitration provisions in employment contracts that would compel arbitration of workers' compensation claims where state law would preclude mandatory arbitration[4] would allow unscrupulous employers to completely circumvent mandatory workers' compensation systems, thereby threatening the entire workers' compensation system.

Justice O'Connor's dissent in *Keating* carefully and extensively recounts the FAA's legislative history and persuasively argues that the FAA was understood by the Legislature to be a "procedural rule" applicable only in federal courts. *See Keating*, 465 U.S. at 23-29 (O'Connor, J., joined by Rehnquist, C.J., dissenting) (detailing FAA's legislative history and concluding that, in passing FAA, Congress intended FAA to apply only in federal court proceedings). To be sure, Justice O'Connor's view did not carry the day and this Court has made the FAA fully applicable and binding on state courts. But that does not mean her recounting of

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[4] *See* Tex. Civ. Prac. & Rem. Code § 171.002(a)(3)-(4), (c) (providing that (1) agreements to arbitrate a claim for workers' compensation benefits are invalid, and (2) agreements to arbitrate personal injury claims are invalid unless signed by both parties and their legal counsel).

the FAA's legislative history was incorrect, or that the legislative history is irrelevant to the issue Mrs. Mendoza asks this Court to consider now.

To the contrary, workers' compensation is a creature of state law that provides for resolution of claims for on-the-job injuries via purely state law proceedings. Since the FAA was intended to be a rule of federal procedure applicable only in federal courts, clearly Congress did not intend to destroy state workers' compensation actions, which would only rarely be litigated in federal courts, into mandatory arbitration under the FAA. Indeed, even given this Court's conclusion in *Keating* that the FAA was intended to create federal substantive rights, that is still no reason to conclude that the FAA should be construed to preempt state law regarding arbitration of workers' compensation claims. A federal substantive arbitration right should not extend to require arbitration of claims under state workers' compensation systems, which call for application of specialized rules, regulations, and procedures regarding the types of benefits available and how those benefits are to be calculated, and that already afford employers limited liability for on-the-job injuries. Thus, even construing the FAA as affording employers a substantive right to enforce contractual arbitration provisions, that right should not and does not extend to arbitration of workers' compensation claims.

This Court should grant certiorari in this case and revisit its FAA jurisprudence to make clear that the FAA does not, and was never intended to, preempt state workers' compensation laws (like the one at issue in this case).

CONCLUSION

For the foregoing reasons, Petitioner Rosario Y. Mendoza, Individually and on Behalf of the Estate of Marcos A. Hoyos Martinez respectfully requests that this Court grant her petition for writ of certiorari and reverse the judgment of the state court of appeals requiring her to submit her state-law claims to mandatory arbitration under the FAA.

Respectfully submitted,

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April 14, 2025

APPENDIX TABLE OF CONTENTS

ORDER DENYING PETITION FOR REVIEW, SUPREME COURT OF TEXAS (NOVEMBER 15, 2024)

SUPREME COURT OF TEXAS

MENDOZA

v.

RUSH TRUCK CTR. OF TEX., L.P.

Case No. 23-0864

COA #: 08-22-00226-CV

TC#: 2022DCV0350

Today the Supreme Court of Texas denied the petition for Review in the Above-Referenced Case.

OPINION, EIGHTH COURT OF APPEALS
EL PASO, TEXAS
(SEPTEMBER 1, 2023)

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676 S.W.3d 821

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RUSH TRUCK CENTERS OF TEXAS, L.P.
d/b/a RUSH ENTERPRISES, INC.,
a/k/a RUSH TRUCK CENTER-EL PASO,

Appellant,

v.

ROSARIO Y. MENDOZA, Individually and on Behalf of the Estate of MARCO A. HOYOS MARTINEZ,

Appellee.

No. 08-22-00226-CV

Appeal from the 448th Judicial District Court of El Paso County, Texas (TC# 2022DCV0350)

Before: RODRIGUEZ, C.J., PALAFOX, and SOTO, JJ.

OPINION

BACKGROUND

In a single issue, Appellant challenges the denial of a motion to stay proceedings and compel arbitration. We reverse.

Factual Background and Procedural Background

Appellant, Rush Truck Centers of Texas, L.P. (Rush), is a Texas truck dealership that engages in the sale of heavy and medium duty trucks, and provides parts, service, and body work for heavy and medium duty trucks. Marco A. Hoyos Martinez, was initially hired by Rush in 2019 as a fabricator at Rush's Denton, Texas office. As part of Rush's electronic onboarding process, Hoyos was required to create a username and password to access and sign his onboarding documents. In April 2020, Hoyos was furloughed due to the COVID-19 pandemic. In October 2020, an offer to rehire Hoyos as a Body Service Technician Level II was made by Rush Truck Centers of El Paso. Hoyos used the same electronic onboarding system from 2019 for the execution of the 2020 onboarding documents after he was rehired. The 2020 onboarding documents included the "Employment At-Will and Arbitration Agreement" (the Arbitration Agreement). Hoyos accessed the Arbitration Agreement with his personal credentials and electronically signed it on November 5, 2020. Hoyos then began working for Rush again.

On November 23, 2020, Hoyos fatally fell from a ladder as he was cleaning a vocational garbage disposal truck with soapy water to prepare it for re-painting. A workers' compensation claim was filed and Appellee, Rosario Y. Mendoza (Mendoza), is currently receiving

death benefits under the Texas Workers' Compensation Act (TWCA) as his surviving spouse.[1],[2] On January 31, 2022, Mendoza initiated a gross negligence and workers' compensation lawsuit against Rush after her late husband's death.

The pleadings allege the gross negligence claim is based on Rush's failure: to instruct Hoyos on the use of an unsecured ladder at heights above six feet; to provide necessary and proper training; to provide fall protection; to supervise; to allow ventilation; provide noxious fume protection, and other proper personal protective equipment, and therefore, breached its nondelegable duty to provide a safe workplace to its employees. On June 29, 2022, Rush filed its motion to stay proceedings and compel arbitration. was held. On October 11, 2022, the trial court denied the motion to stay proceedings and compel arbitration. This accelerated appeal followed. Mendoza opposed the motion, and a hearing

DISCUSSION

In a single issue, Rush challenges the denial of its motion to stay proceedings and compel arbitration. First, Rush maintains there is a valid arbitration agreement and Mendoza's claims fall within the scope of the Arbitration Agreement. Second, Rush did not waive its right to arbitration, and the Arbitration Agreement remains within the Federal Arbitration Act's

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[1] It is undisputed Rush maintained a workers' compensation insurance policy and Hoyos was an employee covered by workers' compensation insurance at the time of his death.

[2] The record is not clear as to who filed the workers' compensation claim.

coverage because the exception for individuals personally engaged in interstate commerce does not apply. We agree.

Standard of Review

We review the trial court's ruling on a motion to compel arbitration based on an abuse of discretion standard. *CC Rest., L.P. v. Olague*, 633 S.W.3d 238, 241 (Tex. App.—El Paso 2021, pet. dism'd). The trial court "clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 207 (Tex. App.—El Paso 2004, orig. proceeding). The question of whether an arbitration agreement is valid and enforceable is a question of law we review de novo. *Solcius, LLC v. Meraz*, No. 08-22-00146-CV, 2023 WL 2261414, at *4 (Tex. App.—El Paso Feb. 27, 2023) (mem. op.). We also review the trial court's purely legal determinations de novo, and any clear failure to correctly determine the law constitutes an abuse of discretion. *Olague*, 633 S.W.3d at 241. If a valid and enforceable arbitration agreement exists covering Mendoza's claims, the trial court abused its discretion in failing to compel arbitration. *Id.* (citing *Firstlight Federal Credit Union v. Loya*, 478 S.W.3d 157, 161 (Tex. App.—El Paso 2015, no pet.)).

A. Validity of the Arbitration Agreement

As a threshold matter, we begin our analysis with determining whether a valid arbitration agreement exists. As the party moving to compel arbitration, Rush must prove a valid arbitration agreement exists and Mendoza's claims at issue fall within the scope of that agreement. *Rachal v. Reitz*, 403 S.W.3d 840, 843

(Tex. 2013). Upon doing so, the burden shifts to Mendoza to disprove the existence of a valid and enforceable arbitration agreement. *See In re DISH Network, L.L.C.*, 563 S.W.3d 433, 441 (Tex. App.—El Paso 2018, orig. proceeding).

(1) Contract formation

For an arbitration agreement to be valid, it must contain the state law-required contract elements. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227–28 (Tex. 2003); *Olague*, 633 S.W.3d at 241. A binding contract requires: (1) "an offer"; (2) "an acceptance in strict compliance with the terms of the offer"; (3) "a meeting of the minds"; (4) "each party's consent to the terms"; and (5) "execution and delivery of the contract with intent that it be mutual and binding." *Karns v. Jalapeno Tree Holdings, L.L.C.*, 459 S.W.3d 683, 692 (Tex. App.—El Paso 2015, pet. denied).

The Texas Uniform Electronic Transactions Act (the Act) was enacted considering the increasing use of electronic contracts. *Solcius*, 2023 WL 2261414, at *4 (internal citations omitted). In a contest to the validity of an electronic signature and whether it is attributable to an individual, the focus is on the efficacy of the security procedures applied in the electronic transaction. *Id.*; TEX. BUS. & COM. CODE ANN. § 322.009(a) ("An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable."). Once the parties have agreed to conduct business by electronic means, the party seeking to

enforce the electronic signature must present evidence to establish the efficacy of the security procedures utilized in the transaction. *Solcius*, 2023 WL 2261414, at *4 (citing *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199, 204 (Tex. 2021)). A security procedure is defined by the Act as

> a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

Tex. Bus. & Com. Code Ann. § 322.002(13).

The party opposing enforcement of an electronic agreement may present evidence to undermine the security procedures utilized in the transaction by showing it "lack[ed] integrity or effectiveness[.]" *Solcius*, 2023 WL 2261414, at *5 (citing *Aerotek*, 624 S.W.3d at 210). When the efficacy of the security procedures has been conclusively established and the party opposing enforcement has failed to present evidence of fraud or lack of reliability, a court must enforce the contract. *See id*.

(2) Efficacy of Rush's security procedures

We begin by noting Mendoza does not contest the parties' agreement the onboarding process would be electronic; she does, however, contest the validity of the electronic signature and whether it can be attributed to Hoyos. Thus, we need only consider

whether Rush provided evidence to support a finding that the electronic onboarding system—the security procedure at issue—was sufficient to conclusively establish the genuine nature of Hoyos's signature. *See id.* We conclude it did.

According to Mendoza, there is no evidence of the efficacy of the onboarding system because the onboarding record summary does not specify the applicable time zone or the location of the computer Hoyos used when he signed the Arbitration Agreement. Although Mendoza acknowledges the records summary identifies an IP address, she claims it is nonetheless unreliable because it does not identify the computer Hoyos used. She also points us to "inaccuracies" in the records summary—the summary indicates one of the events on the Arbitration Agreement was updated before Hoyos viewed the documents. In addition, Mendoza claims the insufficiency of the safety procedures is further shown by the lack of any Rush employee (1) observation of Hoyos completing the onboarding system; (2) speaking to him directly while he completed the onboarding process; or 3) reviewed his responses. We disagree.

When Hoyos was hired in October 2020, he was required to create credentials—a username of his choice, which would be his email address, and a password of his choice—to electronically access the onboarding documents for his employment. Hoyos created his own credentials and logged into the system using his username and password to access the onboarding documents.

Kipp Sassaman, Rush's authorized representative and Vice President of Human Resources, was deposed by Mendoza regarding Rush's electronic onboarding

system. Sassaman explained Hoyos provided authorization to accept signatures electronically, had to physically view and sign the Arbitration Agreement by clicking "Sign and agree," which then would have inserted his electronic signature in the respective signature block. The system automatically dated and saved the time Hoyos signed the Arbitration Agreement.

> Sassaman: He signed electronically, it put the signature in the signature line and the date above it.
>
> Appellant's counsel: That is Mr. Hoyos put the date there or-strike that. Whoever was filling out this form, if they did, in fact, fill it out, was that Hoyos or was that put there by the person filling it out, or was that done electronically by your computer from your company?
>
> Sassaman: It would have been the date he signed it and it would have been inserted electronically.
>
> Appellant's counsel: So that would have been done electronically by something in your company, correct?
>
> Sassaman: That would have been based on the information Mr. Hoyos entered into the system . . . the date of his signature.
>
> Appellant's counsel: The question is simple: The blank that is filled out . . . is that done by the person on the other end of the computer, or is that done by your systems at Rush Truck Center?

> Sassaman: Again, when he agreed to sign electronically and signed it electronically, the day he signed that would have been inserted–it would have been captured in the software and inserted into the document.
>
> Appellant's counsel: How does that capture it?
>
> Sassaman: I don't know how the software is built, but it's–
>
> Appellant's counsel: It's automatic? . . .
>
> Sassaman: Correct.
>
> Appellant's counsel: What is the name of the software?
>
> Sassaman: This document would have been signed as part of the onboarding, so the software we use is UKG.

Sassaman testified Hoyos did not provide his email address or password to Rush, and neither Rush, nor any employees, have the ability to access his account. According to Sassaman, the username and password an employee creates ensures the system is secure and only the employee can access his or her account. Once an individual agrees to sign documents electronically, they would then select "Sign and agree" in order for the system to insert their signature.

On the Arbitration Agreement itself, right above the signature block, it plainly states: "MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS." Hoyos electronically signed the Arbitration Agreement on November 5, 2020. According to the electronic records

summary, Hoyos viewed and electronically signed the Arbitration Agreement at 10:03 p.m. on November 5, 2020.

An electronic signature is binding in Texas. *Aerotek*, 624 S.W.3d at 207–08. We have held that a "signature, electronic or otherwise, is generally deemed to be sufficient to show assent to an arbitration agreement." *Alorica v. Tovar*, 569 S.W.3d 736, 740 (Tex. App.—El Paso 2018, no pet.). We also have previously declined to hold a corporation's electronic records showing the purported log-in and viewing of a document by an employee conclusively established sufficient notice *in light of* the employee's sworn statements that she never saw the Arbitration Agreement at issue. *Kmart Stores of Texas, L.L.C. v. Ramirez*, 510 S.W.3d 559, 570 n.6 (Tex. App.—El Paso 2016, pet. denied).

Here, there is no sworn statement by Hoyos, Mendoza, or anyone, alleging Hoyos did not sign the Arbitration Agreement. We find no evidence in the record that undermines the enforceability of Hoyos's electronic signature. Rather, Mendoza focuses on the sufficiency of safety procedures of Rush's electronic onboarding process, alleges Hoyos did not personally sign the Arbitration Agreement because Rush employees did not directly observe Hoyos complete the onboarding process. Additionally, Mendoza asserts the system neither identifies the applicable time zone and location where the recorded event occurred, nor identifies the specific computer Hoyos used to sign the document. However, these assertions by Mendoza do not create a fact issue as to the validity of the Arbitration Agreement. *See Aerotek*, 624 S.W.3d at 208 ("[W]e cannot agree with the dissent's suggestion that merely denying an electronic signature qualifies as some evidence in

showing an electronically signed arbitration agreement's invalidity."). We find Mendoza's allegations fail to show Rush's onboarding process lacked integrity or effectiveness.

As the party resisting arbitration, Mendoza has the burden to provide evidence to uphold a favorable ruling on appeal. *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 132 (Tex. App.—El Paso 2018, no pet.). Here, Mendoza has not provided any evidence supporting a claim Hoyos did not electronically sign the Arbitration Agreement, or the email address or computer he used did not belong to him. Further, Mendoza has not produced evidence the computer he used was inaccessible to him, or he could not read, or could not read English.

As we have recognized before, a party, such as Rush, "is not required to produce evidence to establish the genuine nature of a signature on an arbitration agreement in the absence of a sworn challenge to the signature." *Wright v. Hernandez*, 469 S.W.3d 744, 752 (Tex. App.—El Paso 2015, no pet.). There is no dispute Hoyos continued working after signing the Arbitration Agreement on November 5, 2020. Texas law has long recognized an employee can be bound to arbitration if the employee received electronic notice of an arbitration agreement and continued working thereafter. *See Firstlight*, 478 S.W.3d at 168–71; *see also In re Halliburton Co.*, 80 S.W.3d 566, 568–69 (Tex. 2002) (orig. proceeding) (when employee reported to work after being notified of the arbitration agreement, he accepted the offer, and the employer and employee became bound to arbitrate any disputes); *see also In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006) (orig. proceeding) (per curiam) (at-will employ-

ee received notice of the modified employment terms requiring arbitration and then continued working, and thus accepted those terms as a matter of law, despite lack of any evidence that the employee signed the acknowledgment form).

Under the framework of the Act, Mendoza was tasked with undermining the authenticity of the Arbitration Agreement by presenting evidence of fraud or lack of reliability. *See Solcius*,

2023 WL 2261414, at *4. Mendoza failed to do so. We find Rush has established the efficacy of the security procedures utilized in the transaction and the electronic signature is attributable to Hoyos. We must therefore enforce the Arbitration Agreement. *See id*.

B. Scope of the Arbitration Agreement

(1) Mendoza's claims

Mendoza maintains her claims are independent, nonderivative causes of action under Article 16, § 26 of the Texas Constitution and § 408.001 of the Texas Labor Code, and fall outside the scope of the Arbitration Agreement. We proceed to the question whether Mendoza's claims fall within the scope of the Arbitration Agreement given she has pled only under Article 16, § 26 of the Texas Constitution and § 408.001 of the Texas Labor Code.

(a) Article 16, § 26

Article 16, § 26 of the Texas Constitution, as amended, provides, "Every person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving

husband, widow, heirs of his or her body[.]" Tex. Const. art. 16, § 26. The Texas Supreme Court explained,

> With a statutory cause of action for compensatory damages *already in place*, the constitution was amended to allow for punitive damages in favor of the wrongful death beneficiaries. The question soon arose whether this amendment . . . granted a punitive recovery independent of compensatory relief. As soon as it arose, the question was answered in the negative.

Travelers Indem. Co. of Illinois v. Fuller, 892 S.W.2d 848, 851 (Tex. 1995).

The Texas Supreme Court further explained the purpose of Article 16, § 26 was to "*expressly* resolve common law and statutory ambiguity." *Fuller*, 892 S.W.2d at 852. "It did not abrogate the common law requirement of actual damages and extend the remedy to those with no cause of action under the Act." *Id.* The Eastland Court of Appeals has explained:

> History makes clear that Section 26 was adopted to resolve ambiguities existing in the statutory and common law of punitive damages. When wrongful death statutes were first adopted, the question arose: Did the statute create a new cause of action in the heirs of the deceased or did it simply transmit the decedent's right to sue? Shortly after Section 26 was adopted, Texas Courts held that it was the latter, finding that Section 26 did not grant a punitive recovery independent of a recognized claim for compensatory relief. Consequently, Section 26

> does not abrogate the common-law requirement of actual damages or extend a right to seek punitive damages to those with no cause of action under the Wrongful Death Act.

Garrett v. Patterson-UTI Drilling Co., L.P., 299 S.W.3d 911, 916 (Tex. App.—Eastland 2009, pet. denied).

(b) Section 48.001

Section 408.001 of the Texas Labor Code provides:

> (a) Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.
>
> (b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.
>
> (c) In this section, "gross negligence" has the meaning assigned by Section 41.001, Civil Practice and Remedies Code.

Tex. Lab. Code Ann. § 408.001. Therefore, an employee who receives workers' compensation benefits cannot bring a lawsuit against the employer for actual damages arising out of the incident which caused him injury. *See id.* § 408.001(a); *see also Wagner v. FedEx Freight, Inc.*, 315 F.Supp.3d 916, 920 (N.D. Tex. 2018) ("[A]n employee who is injured or killed on the job and is

covered by workers' compensation insurance cannot seek recovery from an employer other than through the remedies and procedures provided by the TWCA."). However, when an employee's on the job death was caused by an intentional act or omission of the employer or by the employer's gross negligence, exemplary damages may be recovered. *See* Tex. Lab. Code Ann. § 408.001(b). As the Fourteenth Court of Appeals explained,

> section 408.001(a) explains what the Workers' Compensation Act does—*i.e.*, it provides an exclusive remedy for covered employees and their beneficiaries, substituting the right to statutory benefits for the right to recover actual damages from the worker's employer—and section 408.001(b) explains what the Act does not do—*i.e.*, it does not prohibit certain of a covered employee's survivors from recovering exemplary damages from an employer who caused the employee's death through its intentional act or omission or its gross negligence. Compare *id.* § 408.001(a) with *id.* § 408.001(b). The text of section 408.001(b) is unambiguous, and reading the statute in accordance with its plain language would not produce absurd results. We therefore conclude that section 408.001(b) of the Workers' Compensation Act does not create a nonderivative cause of action for exemplary damages independent of the Wrongful Death Act.

See Ross v. Union Carbide Corp., 296 S.W.3d 206, 214 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (en banc).

(c) Texas Precedent on § 48.001(b) and Article 16, § 26

The Fourteenth Court of Appeals has specifically found "a claim for exemplary damages under article XVI, section 26 is a derivative cause of action[.]" *Id.* at 213. In *Ross*, the employee developed an asbestos-related disease from workplace exposure prompting him and his wife to sue several asbestos manufacturers under theories of strict liability, negligence, gross negligence, intentional conduct, and breach of warranty. *Id.* at 209. The employee and his wife ultimately signed a release agreement, which settled their claims and barred future claims against the manufactures and his employer. *Id.* at 209–211. The employee died two years later. *Id.* His wife and children, appellants, brought an exemplary damages claim against the employer, alleging the employee's death was caused by the employer's willful act, omission, or gross neglect in exposing him to workplace asbestos. *Id.* at 211. The claim was brought pursuant to Article 16, § 26 of the Texas Constitution and the Workers' Compensation Act—specifically § 408.001(b) of the Texas Labor Code. *Id.* The employer moved for summary judgment relying on the affirmative defense of release, which the trial court granted. *Id.* The appellants argued the employee could not have "validly assigned, settled, or released their claims arising from [employee's] death." *Id.* The court held the release executed by the employee and his wife "broadly cover[ed] all claims and damages against [the employer], including those under the Wrongful Death Act. Thus, the Release bars appellants' claims unless the claims are properly asserted on some basis other than the Wrongful Death Act." *Id.* at 212.

In *Ross*, appellants argued their claims were not brought pursuant to the Wrongful Death Act, but "instead contend[ed] that specific provisions of the Texas Constitution and the Workers' Compensation Act, alone or in combination, create an exemplary-damages cause of action that is both independent of the Wrongful Death Act and nonderivative of [employee's] rights." *Id.* Appellants argued, among other things, that the employee could not release his survivors' exemplary-damages claim under Article 16, § 26 of the Texas Constitution and § 408.001(b). *Id.* at 213.

To answer this question, the Fourteenth Court of Appeals first analyzed whether the claim was an independent exemplary-damages claim under the TWCA. *Id.* They determined it was not. *Id.* According to the court, its analysis was "made easier because our highest court already has analyzed and explained, in a unanimous decision, this section's purpose:"

> [T]he reason for adoption of the constitutional provision was to allow for exemplary damages under the Wrongful Death Act because of an early interpretation that such damages were not authorized by the Act. . . . It did not abrogate the common law requirement of actual damages and extend the remedy to those with no cause of action under the [Wrongful Death] Act.

Id. (quoting *Fuller*, 892 S.W.2d at 851–52). The court then, relying on *Fuller*, held a claim for exemplary damages under Article 16, § 26 of the Texas Constitution is "asserted through the Wrongful Death Act, not separately from it." *Id.* ("Thus, *Fuller* makes clear that a claim for exemplary damages under article XVI, section 26 is asserted through the Wrongful Death Act,

not separately from it."). In turn, the court found an employee's "'pre-death contract may limit or totally bar a subsequent action' by his wrongful-death beneficiaries." *Id.* Accordingly, the court held because the release broadly discharged the employer from liability, which included liability for exemplary damages and wrongful death, "and a claim for exemplary damages under article XVI, section 26 is a derivative cause of action that may be asserted only through the Wrongful Death Act, appellants' claim for exemplary damages under the Texas Constitution is barred by the Release." *Id*. The court also concluded "section 408.001(b) of the Workers' Compensation Act does not purport to create an independent cause of action, but instead identifies an exception to the Act's exclusivity provision." *Ross*, 296 S.W.3d at 214. We agree. We, too, have previously held that § 408.001(b) is not an independent cause of action. *See Hudspeth Cnty. v. Ramirez*, 657 S.W.3d 103, 110–11 (Tex. App.—El Paso 2022, no pet.).

In *Hudspeth*, we held § 408.001 of the Texas Labor Code is not an independent cause of action. *Id*. at 110–11. There, the decedent, who was an employee of the Hudspeth County Sheriff's Office, died following an on-the-job injury. *Id*. at 106–07. Appellee, individually and as a representative of the decedent's estate, filed suit against Appellants, Hudspeth County and the Hudspeth County Sheriff's Office, for wrongful death under the Wrongful Death Act seeking exemplary damages for gross negligence. *Id.* at 107. Appellee later included an additional claim under the Workers' Compensation Act, and an alternative claim under the Tort Claims Act. *Id.* Appellants filed a plea to the jurisdiction, which was granted. *Id.* The crux of the

issue on appeal was whether Appellants retained governmental immunity. *Id*. Appellants argued they could not be liable under § 408.001(b) of the Texas Labor Code. *Id*. Appellee maintained she was not bringing a cause of action under the Tort Claims Act, but rather, under § 408.001(b) of the Texas Labor Code. *Id*. We found appellee's claim for exemplary damages under § 408.001(b) of the Texas Labor Code had no jurisdictional basis for two reasons, one of which is relevant to the current analysis at hand; we held § 408.001(b) "is neither an independent cause of action nor a waiver of governmental immunity." *Id*. at 110–11.

The U.S. District Court for the Northern District of Texas has agreed, providing that § 408.001(b) "does not confer an independent cause of action for exemplary damages upon a plaintiff," but rather, "preserves a tort claim that arises elsewhere." *Wagner*, 315 F.Supp.3d at 921. In *Wagner*, plaintiffs brought a gross negligence suit seeking exemplary damages against their father's employer, FedEx. *Id*. at 918. FedEx removed the case to the Northern District of Texas asserting federal jurisdiction. *See* 28 U.S.C. §§ 1332, 1441. In response, plaintiffs filed a motion to remand, claiming the action was not removeable because their claim for gross negligence arises under the TWCA, specifically under § 408.001(b) of the Texas Labor Code. *Wagner*, 315 F.Supp.3d at 918. FedEx maintained § 408.001(b) does not create an independent cause of action for gross negligence, but instead, preserves a preexisting cause of action under the Texas Wrongful Death Act. *Id*. at 919. Thus, FedEx maintained the gross negligence claim does not arise under the TWCA and was properly removable. *Id*. According to plain-

tiffs, however, § 408.001(b) creates a cause of action for exemplary damages and therefore "arises under" the TWCA and is not removeable. *Id.*

The Northern District of Texas found the "plain language" of § 408.001(b) and the "most natural reading of the statute" suggests that a right to sue for exemplary damages for wrongful death already exists; § 408.001(b) merely "preserves a tort claim that arises elsewhere." *Id.* at 921. The court conducted a historical examination of the Texas Constitution, the Texas Wrongful Death Act, and the TWCA in reaching its conclusion, which we find is instructive. *Id.* at 922.

By the enactment of the Wrongful Death Act in 1860, a deceased employee's spouse or heirs could sue, for the very first time, an employer for damages resulting from an on-the-job death. *Id.* Following the enactment, a division of authority resulted as to whether exemplary damages were recoverable under the Wrongful Death Act. *Id.* (citing *Fuller*, 892 S.W.2d at 850). Article 16, § 26 of the Texas Constitution resolved the split in authority and was amended to make exemplary damages recoverable. *Id.* Then, in 1913, the Texas legislature enacted the TWCA, which provided the exclusive remedy for an employee's on-the-job injury, except for claims of gross negligence by a deceased employee's spouse and heirs, which the Texas Constitution expressly recognizes, and which existed prior to the passage of the TWCA. *Id.* (citing *Trinity Cnty. Lumber Co. v. Ocean Accident & Guar. Corp., Ltd.*, 228 S.W. 114, 117–18 (Tex. [Comm'n Op.] 1921) ("It is thus apparent that the [TWCA] does not impose liability for exemplary damages. It does not alter in this respect the liability of the employer prior to the passage of the [TWCA]. It neither adds to nor

takes from such liability, but leaves the law with reference thereto as it stood before the passage of the act and subject to the same defenses" (emphasis added).). Thus, the historical setting of these provisions support that § 408.001(b) does not create an independent cause of action for gross negligence. The court also analyzed the purpose of the TWCA and its statutory structure in further support of this conclusion, which we find particularly persuasive. *See id*. at 924. The purpose of the TWCA is to "expediently resolve an injured employee's claim" without the "burden of proving their employer's negligence . . . and in exchange, an employee is prohibited from seeking common-law remedies from his employer, including an action for gross negligence resulting in his or her death." *Id*. at 924–25 (quoting *Hughes Wood Products, Inc. v. Wagner*, 18 S.W.3d 202, 206–07 (Tex. 2000)) (internal quotation marks omitted). The TWCA provides an "extensive, regulatory framework" for resolving the claims of injured workers, which "stands in stark contrast" to § 408.001(b)'s "simple provision that it does not prohibit the recovery of exemplary damages." *Id*. at 924 (citing *Gomez v. O'Reilly Auto Stores, Inc.*, 283 F.Supp.3d 569, 573 (W.D. Tex. 2017)). This difference, "indicates that a party must look outside the TWCA's statutory framework for determining the elements of proof necessary to recover for an employer's gross negligence." *Id*. at 924 According to the court, § 408.001(b) "does not advance the purpose of the TWCA—to expediently resolve an injured employee's claims." *Id*. at 925. We agree. § 408.001(b) provides a remedy to surviving spouses and heirs, and merely states it does not *prohibit* the recovery of exemplary damages for the gross negligence of an employer, "consistent with the Texas

Constitution's mandate and pre-existing wrongful death legislation." *Id.*

We recognize, however, that Texas appellate courts have concluded the contrary—the recovery of exemplary damages for an employer's gross negligence provides an independent cause of action. *See Zacharie v. U.S. Natural Resources, Inc.*, 94 S.W.3d 748 (Tex. App.—San Antonio 2002, no pet.); *see also Smith v. Atlantic Richfield Co.*, 927 S.W.2d 85 (Tex. App.—Houston [1st Dist.] 1996, writ denied). In *Zacharie*, Martha Zacharie was exposed to toxic airborne substances from her workplace. *Id.* at 751. Martha filed suit against her employer one day before the statute of limitations expired, alleging negligence and seeking actual and exemplary damages. *Id.* That same day, her attorney requested citations be issued by private process; the citations were issued, but were never served. *Id.* Martha died a few months after and her daughters subsequently joined the lawsuit and amended the original petition to include a cause of action under the TWCA and the Texas Survival Statute, along with a claim of gross negligence. *Id.* The employer moved for summary judgement, which was granted. *Id.* The court directly addressed whether the Zacharie children had an independent, nonderivative cause of action under Article 16, § 26 and § 408.001 for gross negligence and exemplary damages. *Id.* at 756. The Fourth Court of Appeals, in acknowledging the Texas Supreme Court has not addressed this issue directly, relied on its own precedent and that of the Fourteenth Court of Appeals in holding "the TWCA, in conjunction with Article 16, Section 26 of the Texas Constitution expressly allows a surviving spouse or child to bring an independent claim for exemplary damages against

an employer for gross negligence that resulted in an employee's death." *Id.* (citing *Perez v. Todd Shipyards Corp.*, 999 S.W.2d 31, 33 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), *Smith v. Atl. Richfield Co.*, 927 S.W.2d 85, 87 (Tex. App.—Houston [1st Dist.] 1996, writ denied)).

However, we must note that in *Ross*, the Fourteenth Court of Appeals expressly overruled its prior decision, admitting that *Perez* does not accurately represent the settled law; "the reasoning in *Perez* cannot be reconciled with that of the . . . decisions of the Texas Supreme Court." *Ross*, 296 S.W.3d at 214–15 (citing *Fuller*, 892 S.W.2d at 851–52; *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345–47 (Tex. 1992); *Sullivan–Sanford Lumber Co. v. Watson*, 155 S.W. 179, 180 (Tex. 1913); *Thompson v. Fort Worth & R.G. Ry. Co.*, 80 S.W. 990, 992 (Tex. 1904)). *Zacharie* also relies on *Smith* out of the First Court of Appeals. *Smith*, 927 S.W.2d at 87.

There is no interplay of the TWCA in *Smith*, but there, the First Court of Appeals concluded that reliance on *Fuller*—for the proposition that gross negligence claims are derivative and not an independent cause of action—is misplaced because the plaintiff in *Fuller* was attempting to recover exemplary damages from an *insurance company* rather than the *employer*. *Id.* at 87–88. In *Smith*, the court considered whether the family's claim was still viable because the decedent himself could not have sued for injuries had he survived due to the exclusive remedy for workers' compensation benefits. *Id.* at 87. The First Court of Appeals reasoned that the former TWCA "specifically provided for exemplary damages in wrongful death cases brought against *employers* where gross negligence is proved . . . [and] [n]o such express provision

is made for cases against insurers." *Id.* at 88. On this basis, the court in *Zacharie* held the Zacharie children had a viable cause of action, and their rights were not derivative. *Zacharie*, 94 S.W.3d at 758.

As to the distinction of a cause of action for exemplary damages for gross negligence against an employer as opposed to an insurance company, the Fourteenth Court of Appeals in *Ross* recognized, "[t]his argument, however, appears to have been a red herring, for the *Smith* opinion contains no indication the family pursued its claim under the Texas Constitution rather than the Wrongful Death Act." *Ross*, 296 S.W.3d at 225 n.7. We agree.

We recognize we are departing from the opinion of the First Court of Appeals and some federal courts. *See, e.g.*, *Zacharie*, 94 S.W.3d at 758; *Smith*, 927 S.W.2d at 87–88*; see also Sbrusch v. Dow Chemical Co.*, 124 F.Supp.2d 1090, 1092 (S.D. Tex. 2000); *Johnson v. City of Houston*, No. H-12-2786, 2013 WL 789075, at *2–3 (S.D. Tex. Mar. 1, 2013) (mem. op.). However, notwithstanding this contrary Texas authority, the historical setting in which the provisions were enacted, along with the purpose of the TWCA and its statutory structure, and the plain language of § 408.001(b), lead us to conclude that neither Article 16, § 26 of the Texas Constitution, nor § 408.001(b) of the Texas Labor Code, alone or in conjunction, create an independent cause of action for the recovery of exemplary damages for an employer's gross negligence. *See Hudspeth*, 657 S.W.3d at 107–11; *see also Fuller*, 892 S.W.2d at 852; *Ross*, 296 S.W.3d at 212–17; *Wagner*, 315 F.Supp.3d at 920–31.

(2) Whether Mendoza's claims are subject to the Arbitration Agreement

Having found that neither Article 16, § 26, nor § 408.001(b), alone or in conjunction, create an independent cause of action, we now turn to whether Mendoza's claims are subject to the Arbitration Agreement. Mendoza asserts her gross negligence claim arises under the TWCA and the Arbitration Agreement's language excludes such workers' compensation benefits from its scope. In addition, and in the alternative, Mendoza claims the Arbitration Agreement is, at best, ambiguous, and should be construed against Rush. Mendoza specifically maintains the plain language of the Arbitration Agreement creates an ambiguity as to which type of workers' compensation claims are excluded. We disagree. For the following reasons, we find Mendoza's gross negligence claim is subject to the Arbitration Agreement, while Mendoza's claim for workers' compensation is not.

The provision in the Arbitration Agreement at issue provides:

> Both I and the Company agree that any claim, dispute, and/or controversy that I may have against the Company . . . , or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"). Included within the scope of this agreement (the "Agreement") are all disputes, whether based on tort, negligence, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on Title VII of the Civil Rights Act of 1964, as

> amended, or any other state or federal law or regulation), equitable law, or otherwise. *The only exceptions to binding arbitration shall be for* claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, *claims for workers' compensation benefits, (medical and disability), unemployment compensation benefits,* or other claims that are not subject to arbitration under current law (emphasis added).
>
> Mendoza's live petition reads, in pertinent part:
>
> This gross negligence lawsuit and Workers Compensation lawsuit against Defendants for the death of Marco A. Hoyos Martinez by Decedent's legal beneficiary surviving spouse Rosario Y. Mendoza is brought under the Texas Workers Compensation Laws of the State of Texas pursuant to § 408 of the Texas Labor Code, Article 1, Section 13 and Article 16 Section 26 of the Texas Constitution, among other laws.

(a) Gross negligence claim

Mendoza premises her gross negligence claim on Rush's non-delegable duty to provide a safe workplace to its employees and cites § 411.103 of the Texas Labor Code throughout her petition. *See* TEX. LAB. CODE ANN. § 411.103. Mendoza claims her gross negligence claim arises under the TWCA for workers' compensation benefits, and as such, the Arbitration Agreement's language excludes such workers' compensation benefits from its scope. However, although

we ultimately agree the workers' compensation claim is excluded from the Arbitration Agreement, we find Mendoza's assertions as to her gross negligence claims misguided.

In answering whether the gross negligence claim is subject to the Arbitration Agreement, we first address the interplay of the TWCA. The TWCA establishes the exclusive remedy for non-intentional, work-related injuries and provides an employee covered by workers' compensation insurance, or his legal beneficiary, may only recover benefits for work-related injuries. TEX. LAB. CODE ANN. § 408.001(a). Under the Texas Constitution, however, an employer that commits a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving spouse. TEX. CONST. art. 16, § 26. Following the Texas Constitution's mandate, the TWCA "does not prohibit" the recovery of exemplary damages by the surviving spouse of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence. Tex. Lab. Code Ann. § 408.001(b). *See Wagner*, 315 F.Supp.3d at 923 ("Essentially, despite restricting the method and manner in which an employee could recover damages for an on-the-job injury, the TWCA did not preclude a deceased employee's spouse and heirs from pursuing an exemplary damages claim—*a cause of action that existed prior to the passage of the TWCA*—because the Texas Constitution expressly recognizes such a right to recover damages" (emphasis added).).

The arbitration agreement recognizes these two pathways—workers' compensation benefits for non-intentional, work-related injuries by way of the TWCA's

statutory framework, and claims wherein exemplary damages may be recovered by surviving spouses and heirs for an employer's gross negligence. Workers' compensation claims are processed under the statutory, administrative procedure on a no-fault basis and are specifically excluded from the arbitration process under the agreement's plain language, while other tort claims, such as Mendoza's gross negligence claim, are subject to arbitration.[3] *See Wagner*, 315 F.Supp.3d at 924 ("the TWCA outlines complex administrative procedures for resolving injured workers' claims, *e.g.*, defining the types of benefits and computation for such benefits, detailing the procedures an employee must follow to file a claim, and detailing an administrative process for adjudicating disputes").

The language of § 408.001(b) does not create, but merely preserves a preexisting cause of action for gross negligence "because the Texas Constitution requires it." *Wagner*, 315 F.Supp.3d at 924 (quoting *Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153, 1154 (5th Cir. 1984) (per curiam) ("[T]he [Texas] legislature in section 5 [§ 408.001(b)'s predecessor] of the statute expressly exempted exemplary damages from the purview of the [TWCA] because the Texas Constitution requires it" (internal quotation marks omitted));

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[3] Additionally, Mendoza has asserted claims against Rush under authority granted in the Texas Constitution, as preserved in the Texas Labor Code by way of § 408.001(b), claiming Rush's alleged gross negligence caused Hoyos's fatal work injury. *See* Tex. Const. art. XVI, § 26; Tex. Lab. Code Ann. § 408.001(b). Mendoza would not be awarded workers' compensation benefits under the TWCA by way of her gross negligence claim; rather, she would be entitled to exemplary damages under a tort theory of negligence. *See* Tex. Const. art. XVI, § 26; Tex. Lab. Code Ann. § 408.001(b).

see TEX. LAB. CODE ANN. § 408.001(b). Section 408.001(b) specifically provides it "*does not prohibit* the recovery of exemplary damages by the surviving spouse" of a deceased employee whose death was caused by the employer's intentional act, omission, or gross negligence. Tex. Lab. Code Ann. § 408.001(b) (emphasis added). It serves to *except* a preexisting remedy mandated by the Texas Constitution for the recovery of exemplary damages for an employer's gross negligence. *See Mo-Vac Serv. Co., Inc. v. Escobedo*, 603 S.W.3d 119, 137 n.7 (Tex. 2020) ("Section 408.001(b) of the Act excepts from its exclusive remedy an action for 'recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.'").

Despite Mendoza's pleadings, she can neither convert a TWCA-remedies-preservation clause nor a constitutional-remedies provision into an independent cause of action to except it from mandatory arbitration on the basis of a "claims for workers' compensation benefits, (medical and disability)" exception in the Arbitration Agreement. *See Wagner*, 315 F.Supp.3d at 921 ("The most natural reading of the statute is that § 408.001(b) assumes a right to sue for wrongful death already exists—*i.e.*, it does not confer an independent cause of action for exemplary damages upon a plaintiff, but instead preserves a tort claim that arises elsewhere."); *Ross*, 296 S.W.3d at 217 ("[N]either article XVI, section 26 of the Texas Constitution nor section 408.001(b) of the Workers' Compensation Act, alone or in conjunction with one another, creates a nonderivative cause of action that may be asserted independently from the Wrongful Death Act."). Because claims under

the Wrongful Death Act are derivative of the injured person's claim and Hoyos agreed to arbitrate all disputes except TWCA claims, Mendoza's gross negligence claim thus falls within the scope of the Arbitration Agreement.[4]

(b) Workers' compensation claim

In contrast, Mendoza's claim for workers' compensation benefits under the TWCA is excluded from the Arbitration Agreement. Mendoza is currently receiving workers' compensation benefits under the statutory framework of the TWCA. Under the TWCA's no-fault statutory framework, employees are relieved of the burden of proving their employer's negligence, and it provides timely compensation for work-related injuries. *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 142 (Tex. 2003); *Wagner*, 315 F.Supp.3d at 924 (citing *Alvarado*, 111 S.W.3d at 142) ("The Texas legislature enacted the TWCA to expediently resolve injured workers' claims.").

We therefore find, a claim for workers' compensation benefits, including an alleged surviving spouse's claim for death benefits under the TWCA, such as Mendoza's, is a separate and distinct right to benefits dictated by the administrative framework of the statute. *See Wagner*, 315 F.Supp.3d at 924 ("Under the TWCA, employees are relieved 'of the burden of proving their

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[4] As to Mendoza's assertion that the Arbitration Agreement is at best, ambiguous, we disagree. The arbitration agreement expressly states, "within the scope of this agreement . . . are all disputes, whether based on tort, [or] negligence. . . . " Because we conclude Mendoza's gross negligence claim is a derivative claim that does not arise under the TWCA, it is thus a "dispute . . . based on tort" and is subject to arbitration.

employer's negligence,' and in exchange, an employee is prohibited 'from seeking common-law remedies from his employer,' including an action for gross negligence resulting in his or her death."); *see also* Tex. Lab. Code Ann. §§ 408.001–.222 (workers' compensation benefits), 409.001–.024 (compensation procedures), 410.002–.308 (adjudication of disputes); 410.002 ("A proceeding before the division to determine the liability of an insurance carrier for compensation for an injury or death under this subtitle is governed by this chapter."); § 410.104 ("If issues remain unresolved after a benefit review conference, the parties, by agreement, may elect to engage in arbitration in the manner provided by this subchapter. Arbitration may be used only to resolve disputed benefit issues and is an alternative to a contested case hearing."). Because the right to workers' compensation benefits, including death benefits, arises within the TWCA itself, the statutory right to pursue such administrative benefits cannot be altered by contract. As such, Mendoza's workers' compensation claim is not subject to the Arbitration Agreement, but rather, is properly within the statutory framework of the TWCA.[5]

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[5] On this basis, we need not address Mendoza's contract interpretation and construction argument, wherein she maintains that an ambiguity exists because the phrase "claims for workers' compensation benefits" is separated by a comma from the phrase "(medical and disability)". The portion she refers to reads: "The only exceptions to binding arbitration shall be for . . . *claims for workers' compensation benefits, (medical and disability),* . . . . " Our finding that the workers' compensation claim for benefits is a separate and distinct right to benefits dictated by the administrative framework of the TWCA and is expressly excluded from the Arbitration Agreement, is dispositive of her contract interpretation and construction argument.

In conclusion, we find Mendoza's gross negligence claim is subject to the Arbitration Agreement, and Mendoza's claim for workers' compensation benefits is excluded from the Arbitration Agreement.

(3) Mendoza is bound to the Arbitration Agreement as a non-signatory

Mendoza further attempts to argue her claims fall outside the scope of the Arbitration Agreement because she cannot be bound to its terms as a non-signatory. Rush insists Mendoza's claims are dependent and derivative of Hoyos's rights, and because Hoyos signed a valid arbitration agreement, Mendoza's claims are bound by that agreement. We agree.

The Texas Supreme Court has held under Texas law, a decedent's pre-death arbitration agreement binds his or her wrongful death beneficiaries because the wrongful death cause of action is entirely derivative of Hoyos's rights. *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 644–45 (Tex. 2009). In *Labatt,* the Court concluded an arbitration agreement between an employee and his employer, signed before the employee's death and requiring arbitration pursuant to the Federal Arbitration Act (FAA), requires the employee's wrongful death beneficiaries to arbitrate their wrongful death claims against the employer, even as non-signatories. *Id.* at 645–47. The Court reasoned that although the beneficiaries were seeking compensation for their own personal loss, they still stood in the decedent's legal shoes and were thus bound by the arbitration agreement. *Id.* at 644 ("[I]t is well established that statutory wrongful death beneficiaries' claims place them in the exact 'legal shoes' of the decedent, and they are subject to the same defenses to which the

decedent's claims would have been subject."). The Court has consistently held the right of statutory beneficiaries in a wrongful death action is "entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death." *Id*. Similarly, we find Mendoza's claims are inherently derivative of Hoyos's rights. *See id.*

Furthermore, the Court held this includes enforcing binding arbitration agreements. *Id.* at 646 (rejecting beneficiaries' argument that agreements to arbitrate are different than other contracts, and they should not be bound by decedent's agreement, finding "[n]ot only would this be an anomalous result, we believe it would violate the FAA's express requirement that states place arbitration contracts on equal footing with other contracts."); *In re Golden Peanut Co., LLC*, 298 S.W.3d 629, 631 (Tex. 2009) (holding decedent's wrongful death beneficiaries were derivative claimants and as such, were bound by employee's agreement to arbitrate although they had not signed the arbitration agreement). The Court explained,

> If [employee] had sued for his own injuries immediately before his death, he would have been bound to submit his claims to arbitration. As derivative claimants under the wrongful death statute his beneficiaries are bound as well, . . . and the trial court clearly abused its discretion by refusing to compel arbitration (internal citations omitted).

Id. Similarly, because we have found Mendoza's claims are derivative and dependent on Hoyos's rights, and because Hoyos signed a valid and enforceable arbitration agreement, we find Mendoza's claims are bound by that agreement.

C. Waiver of right to arbitration

Mendoza maintains the trial court did not err in denying Rush's motion to stay proceedings and compel arbitration because Rush waived its right to submit her gross negligence claim to arbitration, or, in the alternative, quasi-estoppel estops Rush from submitting the gross negligence claim to arbitration. According to Mendoza, Rush waived its right to compel arbitration as to the gross negligence claim because after Hoyos's death, Rush "proactively submitted a workers' compensation claim for death benefits for this work-related death" and accordingly, "[t]his tactic of filing with the TWCC unequivocally establishes that Appellant elected to protect itself outside of arbitration because it stood to benefit from such decision." In other words, Mendoza argues because Rush chose to submit a workers' compensation claim under the TWCA rather than arbitration, therefore, Rush has waived its right to arbitrate the gross negligence claim, or in the alternative, should be estopped from submitting such claim to arbitration.

As discussed above, Mendoza's claim for workers' compensation benefits because of her husband's work-related fatal injury, was correctly submitted under the no-fault, administrative system created by statute. As established, Mendoza's claims for workers' compensation benefits arise out of, and are subject to, the TWCA. If Rush submitted Mendoza's claim for workers' compensation benefits under the no-fault, administrative framework of the TWCA, Rush did not waive its rights under the Arbitration Agreement as to Mendoza's gross negligence suit, which arises separate from and outside the TWCA.

There was no "election of remedies" as Mendoza suggests. Our reading of the Arbitration Agreement carves out workers' compensation benefits while tort claims are expressly subject to it. Accordingly, Rush did not waive its right to compel arbitration as to Mendoza's gross negligence claim by statutorily proceeding with the no-fault, administrative system of the TWCA for Mendoza's workers' compensation benefits based on Hoyos' work-related injury. *See In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam) (recognizing "a strong presumption against waiver under the FAA").

D. The FAA's § 1 interstate commerce exception

Mendoza further asserts the trial court's denial of the motion to stay proceedings and compel arbitration should be affirmed because Hoyos belongs to a class of workers engaged in interstate commerce, thus exempting him from the FAA's coverage. If true, Mendoza standing in Hoyos's legal shoes, would be exempt from the FAA and instead be subject to the Texas Arbitration Act (TAA). *See Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 97 (Tex. App.— Houston [1st Dist.] 2013) (citing Tex. Civ. Prac. & Rem. Code Ann. § 171.002(a)(3), (c)(2)). We begin by determining whether Hoyos falls within a "class of workers engaged in foreign or interstate commerce" which would exempt him from the FAA's coverage. 9 U.S.C. § 1.

The FAA governs arbitration agreements in instances where the agreement governs "a transaction involving commerce." 9 U.S.C. § 2. However, § 1 of the FAA excludes "contracts of employment of seamen, railroad employees, o*r any other class of workers engaged in*

foreign or interstate commerce" from its coverage. 9 U.S.C. § 1 (emphasis added). The U.S. Supreme Court has confined this language to exempt "contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

As the Court has observed, the FAA speaks of "workers," rather than "employees" or "servants." *Sw. Airlines Co. v. Saxon*, 142 S.Ct. 1783, 1788 (2022). The Court specified the word "workers" directs the interpreter's attention to "the performance of work." *Id.* The word "engaged" similarly emphasizes the actual work that the members of the class, as a whole, typically carry out; a worker is therefore a member of a "class of workers" based on what he or she does at the company, rather than what the company does generally. *Id.* ("Saxon [the worker,] is therefore a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally.").

Those subject to the exemption "must at least play a direct and 'necessary role in the free flow of goods' across borders." *Id.* at 1790 (quoting *Circuit City Stores, Inc.*, 532 U.S. at 121 (2001)). Stated differently, to qualify as a transportation worker, one must be personally, "actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* The focus is on what *actual* work is performed by the worker, rather than what the company does generally. *Id.* at 1788. Accordingly, we must determine whether Hoyos was a transportation worker within the meaning assigned by the Court in *Saxon*. *See id.*

Mendoza asserts Rush is an interstate commercial truck dealership and service center which is involved in interstate commerce. Therefore, it follows, Hoyos,

as a Body Shop Technician Level II, sold and serviced commercial motor vehicles and parts used in interstate commerce, rendering him a worker engaged in interstate commerce. According to Mendoza, Hoyos "played a necessary role in keeping the commercial trucks on the interstate for the free flow of goods in interstate commerce, which mandates commercial motor vehicle transport on the public highways." Further, Rush expected Hoyos "to repair and service commercial motor vehicles quickly to get such commercial vehicles back on the public interstate highways."

According to Jacob Madrid, the general manager of Rush Truck Center-El Paso, at the time of his death, Hoyos was a Body Shop Technician Level II (BS-II). This position was a level two out of five possible levels. As a BS-II, Hoyos's primary duties consisted of preparing vehicles and work areas for body detailing, repairs, and cleanup. This mostly required taping, sanding vehicles, removing badging and decals, and conducting minor body detailing, such as bumper repairs and paint refreshing. On the day of his death, Hoyos was cleaning a vocational garbage disposal truck with soapy water to prepare it for re-painting. According to Rush, the service department primarily repairs and executes the maintenance of vehicles, while the body shop, which is where Hoyos worked, consisted of "cosmetic and minor body" detailing work that is unrelated to engine or drivetrain function.[6]

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[6] We note Hoyos executed the onboarding documents on November 5, 2020 for employment as a BS-II, and the fatal incident occurred on November 23, 2020—*i.e.*, the entirety of his employment at issue consisted of the aforementioned duties.

Mendoza cites *Western Dairy Transport*, wherein we previously held a truck mechanic was not a transportation worker exempt from the § 1 exclusion. *Western Dairy Transport, LLC v. Vasquez*, 457 S.W.3d 458, 465 (Tex. App.—El Paso 2014, no pet.). There, we utilized the eight *Lenz* factors established by the U.S. Eighth Circuit. *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348, 352 (8th Cir. 2005). In *Lenz*, the Eighth Circuit formulated eight nonexclusive factors for determining whether an employee is a transportation worker. *Id.* The *Lenz* factors are as follows: (1) "whether the employee works in the transportation industry"; (2) "whether the employee is directly responsible for transporting the goods in interstate commerce"; (3) "whether the employee handles goods that travel interstate"; (4) "whether the employee supervises employees who are themselves transportation workers, such as truck drivers"; (5) "whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA"; (6) "whether the vehicle itself is vital to the commercial enterprise of the employer"; (7) "whether a strike by the employee would disrupt interstate commerce"; and (8) "the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties." *Id.*

We begin with the first *Lenz* factor and find the record does not support a finding that Rush is in the transportation industry. According to Jacob Madrid, Rush is not a trucking company and does not engage in the transportation of interstate commerce. Rush has the following departments: sales, service, parts, body, and finance. Rush's primary source of revenue

is the sale of vehicles and parts. In 2019 and 2020, Rush derived 83% of its revenue from sales, which included parts, and heavy duty and medium duty trucks. The service department and body shop, combined, produced approximately 7% of Rush's total revenue. The body shop, which is where Hoyos worked, produced 4.3% of Rush's total revenue. During the deposition of Sassaman, Rush's business model from its website was discussed:

> Mendoza's counsel: And just on the Maintenance and Repair Service, and it says, Full-Service Truck Maintenance and Repair Service. At the very top, At Rush Truck Centers, our goal is to increase your uptime and lower your operating costs, and complete maintenance solutions for all makes and models of commercial vehicles . . .
>
> Sassaman: Yes.
>
> Mendoza's counsel: Okay. And that's what you do, you are involved in what we–what is known in the trucking industry, under the Federal Motor Carriers Safety Act and the regulations that are defined as commercial motor vehicles, that's what your company deals with.
>
> . . .
>
> Sassaman: That is part of our business, yes.
>
> Mendoza'a counsel: And "commercial motor vehicle" means a vehicle over 10,000 pounds, correct?
>
> Sassaman: I believe so, yes.

> Mendoza'a counsel: And for you–for use in interstate transportation and commerce, correct?
>
> . . .
>
> Sassaman: It can be used for that, yes.
>
> Mendoza's counsel: And when you say "to increase your uptime and lower your operating costs," this is for the trucking industry, to tell them, when they come to Rush Truck Center, We'll fix your truck if you've got a problem with it and we'll get you back on the road as quickly as we can so that you lose as little time and expense as necessary to fulfill your interstate trucking business or whatever trucking business you are doing, right?
>
> . . .
>
> Sassaman: The goal of our service department is to repair trucks adequately and safely so they can be back on the road as fast as possible.

Hoyos did not work in the service department; he worked in the body department as a BS-II. Continuing with the deposition of Sassaman, he was asked:

> Mendoza's counsel: Would you say more than–would you say most of your business is involved in interstate transportation commerce trucking?
>
> . . .
>
> Sassaman: No. What I'm saying is: What those–what the customer uses the vehicle for is a wide variety of services. I can't say for sure, with certainty, that everything is interstate.
>
> . . .

> Some of our customers that we sell trucks to and service may indeed to interstate travel. But again, percentage-wise and such, I couldn't answer that.

Notably, the federal district court for the Central District of California concluded a mechanic working on engines and drivetrains of the trucks at a Rush Truck Centers of California-Whittier location, was not a transportation worker. *Fuentes v. Rush Truck Centers of California, Inc.*, No. 18-10446, 2019 WL 3240100, at *4–5 (C.D. Cal. Mar. 11, 2019) ("First, it is undisputed that Plaintiff, who worked as a mechanic at Rush Truck Centers, was not personally responsible for transporting goods. . . . Second, it does not appear that [Rush] engaged in business that was closely proximate to either the transportation industry or the transportation and delivery of goods."). The *Fuentes* court also found that Rush's primary mission is not transporting and moving goods, but rather, selling automobiles. *Id.* at *5. Additionally, the Fifth Court of Appeals in Dallas, in applying *Saxon*, held that because recruiters of truck drivers do not move any goods, and there was no showing that recruiters were necessary for transportation, the FAA's § 1 exclusion did not apply to truck driver recruiters. *Gordon v. Trucking Res. Inc.*, No. 05-21-00746-CV, 2022 WL 16945913, (Tex. App.—Dallas Nov. 15, 2022, no pet.) (mem. op.). Here, Rush is a network of truck dealerships, and a Texas federal court has confirmed that vehicle dealerships are not in the transportation industry. *See Tran v. Texan Lincoln Mercury, Inc.*, No. H-07-1815, 2007 WL 2471616, at *5–6 (S.D. Tex. Aug. 29, 2007) (mem. op.) (holding dealership was not engaged in "transportation industry" and thus employ-

ee was not a "transportation worker" under § 1 of the FAA). Accordingly, the record does not support a finding that Rush is in the transportation industry.

As for whether Hoyos was directly responsible for transporting goods in interstate commerce (second *Lenz* factor), and whether Hoyos handled goods that travel interstate (third *Lenz* factor), we find nothing in the record to show Hoyos ever transported or handled goods in interstate commerce. Hoyos was also not a supervisor (fourth *Lenz* factor). The record also does not support he was not within a class of employees for which special arbitration existed when Congress enacted the FAA (fifth *Lenz* factor). The record does not support or indicate Hoyos ever used or drove a vehicle, at all, as part of his duties (sixth *Lenz* factor). Additionally, the work performed by Hoyos amounted to a minimal percentage of Rush's total annual revenue—4.3%. Moreover, the record does not affirmatively establish Hoyos was involved in engine or drivetrain work, or the trucks Hoyos serviced as a BS-II traveled interstate. Accordingly, a strike by Hoyos and his class of workers, BS-IIs, would likely not disrupt interstate commerce (seventh *Lenz* factor). Lastly, as for the nexus between Hoyos's duties and the vehicles used in carrying out his duties, we emphasize the record does not contain any indicia Hoyos ever used or drove a vehicle as part of his duties, and we defer to our analysis under the *Saxon* framework, wherein we described the nature of Hoyos's work as a BS-II. Hoyos's duties, as described in the record, did not involve engine or drivetrain work, but rather, what was described as "cosmetic and minor body repairs." Applying the *Lenz* factors to a BS-II, as that position is explained in the

record before us, we further find that Hoyos was not a worker engaged in interstate commerce.

We find Hoyos's work tasks were not "necessary" for interstate commerce as his work primarily consisted of "cosmetic and minor body" detailing work and thus did not play a "direct and 'necessary role in the free flow of goods.'" *Saxon*, 142 S.Ct. at 1790. The record does not conclusively show Hoyos engaged in the transportation of goods across borders via the channels of interstate commerce. *See id.*; *see also Gordon*, 2022 WL 16945913 at *4 (explaining "[t]he record does not show that recruiters play a direct and necessary role in the transportation of goods across borders. The act of recruiting truck drivers for transportation companies does not actually move any goods"). Similarly, the record before us does not support Hoyos, as a BS-II, played a direct and necessary role in the transportation of goods across borders, or that conducting cosmetic and minor body work, actually moved any goods. *See Gordon*, 2022 WL 16945913 at *4.

Rather, according to Jacob Madrid, during the three weeks of Hoyos's employment as a BS-II, his work "almost entirely consisted of preparing vehicles for painting by sanding, taping, masking, and wrapping"[.] Hoyos also occasionally completed repairs such as "bumper repairs and paint refinishing." *See id.*

Accordingly, Hoyos is not exempt as a transportation worker, and the Arbitration Agreement is properly within the FAA's coverage.

CONCLUSION

We have found the Arbitration Agreement valid and Mendoza's gross negligence claims pursuant to Article 16, § 26 of the Texas Constitution and § 408.001 of the Texas Labor Code is subject to the Arbitration Agreement. Rush did not waive its right to arbitration, and the record before us does not support a finding Hoyos was a transportation worker.

For these reasons, we reverse the trial court's judgment denying Rush's motion to stay proceedings and compel arbitration. We reverse the trial court's judgment denying Rush's motion to stay proceedings and compel arbitration as to Mendoza's claim for gross negligence.

/s/ Yvonne T. Rodriguez
Chief Justice

September 1, 2023

GINA M. PALAFOX, JUSTICE, DISSENTING OPINION

Based on the protection afforded by the Texas Constitution, by laws of the State of Texas, and by controlling precedent of the Supreme Court of Texas, I would conclude that Appellees' gross negligence claim is expressly excluded, as a matter of law, from the scope of the arbitration agreement. *See* Tex. Const. art. XVI, § 26; *see also* Tex. Lab. Code Ann. §§ 408.001(b), 408.181, 408.186; *Mo-Vac. Serv. Co., Inc. v. Escobedo*, 603 S.W.3d 119, 135 (Tex. 2020) (Guzman, J., concurring).[1] Moreover, such exclusion applies regardless of whether or not the agreement is enforceable. Additionally, I would further conclude that the arbitration agreement itself provides that claims for workers' compensation benefits and other claims that are "not subject to arbitration under current law," shall be excluded from binding arbitra-

[1] In *Mo-Vac*, Justice Guzman's concurring opinion compared the permitted claims brought under the Wrongful Death Act with those brought under the Worker's Compensation Act. *See Mo-Vac*, 603 S.W.3d at 135 n.22 (comparing Tex. Civ. Prac. & Rem. Code § 71.004 (parents of the deceased may bring a wrongful-death action), with Tex. Lab. Code Ann. § 408.001(b) (only the decedent's surviving spouse and heirs may recover exemplary damages)). Describing the more limited scope of the Workers' Compensation Act, Justice Guzman stated: "The Workers' Compensation Act similarly permits recovery of exemplary damages when death is 'caused by an intentional act or omission of the employer or by the employer's gross negligence,' but unlike the wrongful-death statute, only 'the surviving spouse or heirs of the [decedent's] body' may invoke the exemplary-damages exception to the exclusive-remedy provision." *Id.* (quoting Tex. Lab. Code Ann. § 408.001(b)).

tion. In my view, this clause applies to Appellees' claim for gross negligence seeking to recover exemplary damages for the employer's conduct that proximately caused a work-related death. *See Zacharie v. U.S. Nat. Res., Inc.*, 94 S.W.3d 748, 758 (Tex. App.—San Antonio 2002, no pet.) (recognizing deceased worker's children's claim was brought under Article XVI, § 26 of the Texas Constitution and the Worker's Compensation Act).

Because a lawful basis exists to deny the motion to compel arbitration, I would affirm the trial court's ruling in its entirety. Because the majority concludes otherwise, I respectfully dissent.

/s/ Gina M. Palafox
Chief Justice

September 1, 2023

JUDGMENT, EIGHTH COURT OF APPEALS
EL PASO, TEXAS
(SEPTEMBER 1, 2023)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RUSH TRUCK CENTERS OF TEXAS, L.P.
d/b/a RUSH ENTERPRISES, INC.,
a/k/a RUSH TRUCK CENTER-EL PASO,

Appellant,

v.

ROSARIO Y. MENDOZA, Individually and on Behalf of the Estate of MARCO A. HOYOS MARTINEZ,

Appellee.

No. 08-22-00226-CV

Appeal from the 448th Judicial District Court of El Paso County, Texas (TC# 2022DCV0350)

Before: RODRIGUEZ, C.J., PALAFOX, and SOTO, JJ.

JUDGMENT

The Court has considered this cause on the record and concludes there was error in the judgment. We therefore reverse the judgment of the court below in accordance with this Court's opinion. We further order that Appellant recover from Appellee all costs of this

appeal, for which let execution issue. This decision shall be certified below for observance.

IT IS SO ORDERED THIS 1ST DAY OF SEPTEMBER, 2023.

/s/ Yvonne T. Rodriguez
Chief Justice

ORDER DENYING DEFENDANT RUSH TRUCK CENTERS OF TEXAS, L.P. D/B/A RUSH ENTERPRISES, INC., A/K/A RUSH TRUCK CENTER-EL PASO'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION (OCTOBER 11, 2022)

IN THE DISTRICT COURT OF EL PASO
COTINTY, TEXAS 448TH DISTRICT COURT

ROSARIO Y. MENDOZA, Individually and on Behalf of the Estate of MARCO A. HOYOS MARTINEZ

v.

RUSH TRUCK CENTERS OF TEXAS, L.P. d/b/a RUSH ENTERPRISES, INC., a/k/a RUSH TRUCK CENTER-EL PASO

Cause No. 2022DCV0350

Before: Sergio H. ENRIQUEZ, Judge 448th District Court.

On this day, came on to be considered, Defendant Rush Truck Centers of Texas, L.P., d/b/a Rush Enterprises Inc. a/k/a Rush Truck center El Paso's Motion to Stay Proceedings and compel Arbitration. The court, having reviewed and considered the Motions and Response filed is of the opinion and finds that the Defendant's Motion should be DENIED.

IT IS THEREFORE ORDERED; ADJUDGED and DECREED Defendant Rush Truck Centers of

Texas, L.P., d/b/a Rush Enterprises Inc. a/k/a Rush Truck center El Paso's Motion to Stay Proceedings and Compel Arbitration is DENIED.

SIGNED this 11 day of October, 2022.

/s/ Sergio H. Enriquez
Judge 448th District Court