

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

SOUTHWEST AIRLINES CO.,)	
Petitioner,)	
v.)	No. 21-309
LATRICE SAXON,)	
Respondent.)	

Pages: 1 through 74

Place: Washington, D.C.

Date: March 28, 2022

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SOUTHWEST AIRLINES CO.,)
) Petitioner,)
) v.) No. 21-309
LATRICE SAXON,)
) Respondent.)

Washington, D.C.

Monday, March 28, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:43 a.m.

APPEARANCES:

SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

JENNIFER D. BENNETT, ESQUIRE, San Francisco, California; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:43 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 21-309, Southwest Airlines
5 versus Saxon.

6 Mr. Dvoretzky.

7 ORAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Mr. Chief Justice, and
10 may it please the Court:

11 Section 1 of the FAA exempts only
12 classes of workers that work on an
13 instrumentality of foreign or interstate
14 commerce, like a plane, ship, or train, as it
15 moves goods or people across borders.

16 That rule follows from Circuit City
17 and Section 1's text and structure. Circuit
18 City held that the exemption reaches only
19 classes of workers engaged in foreign or
20 interstate transportation. As then Judge
21 Barrett held in Wallace, that means an exempted
22 class of workers must perform work analogous to
23 that of seamen and railroad employees.

24 Seamen and railroad employees' key
25 characteristic was working on ships and trains.

1 We know that because "seamen" was a term of art.
2 It meant workers who predominantly worked on a
3 vessel. Vessels, by definition, transported or
4 were capable of transporting goods or people
5 over water. And the paradigmatic seamen, as the
6 Court noted in *Chandris*, sailed long voyages.

7 That made seamen as a class actively
8 engaged in foreign or interstate transportation.
9 Critically, seamen did not include land-based
10 maritime employees. By specifying seamen,
11 Congress excluded stevedores, who are land-based
12 cargo loaders.

13 Now Saxon says the exemption covers
14 the entire airline industry. But Section 1
15 exempts classes of workers, not industries,
16 engaged in foreign or interstate transportation.
17 It says "seamen," not maritime employees. It
18 repeats "foreign or interstate," emphasizing
19 border crossing. And placed among these other
20 words, "railroad employees" similarly means
21 workers who perform their duties on the train.

22 Saxon is not exempt from the FAA.
23 Cargo loaders don't work on planes, just as
24 stevedores didn't work on ships. They load
25 cargo before other classes of workers, like

1 seamen and pilots, do the foreign or interstate
2 transportation. They may facilitate
3 transportation, but that's not the test Circuit
4 City requires.

5 I'm happy to take the Court's
6 questions.

7 CHIEF JUSTICE ROBERTS: Counsel, in
8 your brief and in your -- your opening here, you
9 seem to be very -- being very precise in one of
10 your phrases. You -- you say "emphasizing
11 border crossing" in -- in determining interstate
12 commerce.

13 Does your test require that the worker
14 who wants to be covered actually cross the
15 border?

16 MR. DVORETZKY: No, it does not. The
17 question, as then Judge Barrett explained in
18 Wallace, is whether movement of people or goods
19 through the channel of interstate commerce is
20 central to the job of the class of workers.

21 So you might have a particular worker
22 within that class who, on a particular day,
23 doesn't cross borders. But -- but the question
24 is whether -- whether -- the question is whether
25 border crossing and this kind of transportation

1 analogous to what seamen and railroad employees
2 did is central to the -- the job of the class of
3 workers.

4 CHIEF JUSTICE ROBERTS: Well, okay, so
5 what you're saying is you might have a worker in
6 a particular function who doesn't cross the
7 border, but if the other people on his team do,
8 then he -- it's okay?

9 MR. DVORETZKY: Well, I -- I -- I
10 think, in that hypothetical, Mr. Chief Justice,
11 it depends on whether your hypothetical worker
12 is in the same class of workers as the others on
13 the team.

14 When you're talking about a class of
15 ramp agent supervisors, they -- they all have
16 the same job description, and their job
17 description doesn't involve getting on the plane
18 and --

19 CHIEF JUSTICE ROBERTS: Yeah, well,
20 let's say it's a group and, you know -- but only
21 the -- the most senior members of the group are
22 the ones that do the actual border crossing, and
23 then the others have to, you know, have put in
24 three or four years at the junior position that
25 isn't crossing the border, but then they'll

1 eventually be on that.

2 I'm trying to figure out, when you say
3 emphasizing border crossing, exactly what you're
4 trying to sweep under the rug.

5 MR. DVORETZKY: So --

6 CHIEF JUSTICE ROBERTS: I don't mean
7 that in a pejorative sense.

8 (Laughter.)

9 MR. DVORETZKY: -- I think, when --
10 Congress emphasized border crossing by repeating
11 the words "foreign or interstate" before
12 "commerce." And so the particular type of
13 commerce that is at issue has to involve border
14 crossing of the sort, again, that seamen and
15 railroad employees did.

16 You might have some seamen who didn't
17 cross borders, but if the class --

18 CHIEF JUSTICE ROBERTS: But they would
19 be -- they would be covered?

20 MR. DVORETZKY: They would be covered.
21 They -- they would be covered. And, you know,
22 as for why that makes sense, this is like the
23 dull knives point that -- that Judge Bress made
24 in dissent in the Ninth Circuit. Knives as a
25 sharp -- as a class are sharp. You might have a

1 dull knife. It's still a knife. You might have
2 a seaman that doesn't cross borders, but because
3 the -- the char- -- the central characteristic
4 of seamen is to travel on ships and to do so
5 typically across borders, that's what satisfies
6 the Section 1 exemption.

7 And so, when we're looking at another
8 class of workers, like ramp agent supervisors
9 here, the question that we're asking is whether
10 the work they do is analogous to that.

11 CHIEF JUSTICE ROBERTS: Thank you.
12 That's very helpful.

13 JUSTICE SOTOMAYOR: Counsel, I see
14 your main argument, and you've repeated it again
15 today, is that stevedores weren't considered
16 seamen, but cargo loaders were considered
17 railroad workers.

18 And in New Prime, we noted that one of
19 Congress's purpose for exempting transportation
20 workers was that there were special arbitration
21 proceedings with respect to railroad workers and
22 seamen.

23 Why isn't it longshoremen? The -- the
24 Longshore Harbors Act has worker's compensation
25 for stevedores. So it would have surprised me

1 for Congress to have mentioned the seamen and
2 stevedores in that list of two transportation
3 workers because stevedores weren't even in the
4 arbitration realm. Is that correct?

5 So why don't I look at what was within
6 the definition of railroad workers, which
7 included cargo handlers?

8 MR. DVORETZKY: Justice Sotomayor, I
9 think the -- the term "railroad employees," read
10 in isolation, not in the context of Section 1,
11 could include cargo loaders, but it doesn't have
12 to. And so, when there are competing --

13 JUSTICE SOTOMAYOR: Well, stevedores
14 are a part of commerce, we said, in Puget Sound,
15 as much as the crew on the train. So cargo
16 handlers on the railroad are equally part of
17 transportation commerce. So I don't see the
18 difference.

19 MR. DVORETZKY: Well, I don't think
20 that the Commerce Clause cases like Puget Sound
21 are really instructive for the question here for
22 a couple of reasons.

23 One, in Puget Sound, the Court was
24 relying on Haverty for the notion that -- for
25 the notion that seamen included stevedores.

1 Haverty, as this Court later recognized in
2 Chandris and Wilander, was wrongly decided. And
3 the -- the -- as the Court reiterated in
4 Chandris and Wilander, the fundamental -- the
5 fundamental characteristic of seamen is
6 predominantly spending time on the ship.

7 And as the Court noted in Chandris and
8 Wilander, in Haverty, which, again, is the case
9 that Puget Sound relies on, the Court was using
10 seamen not in its common -- common understanding
11 to include stevedores.

12 In addition to that, Puget Sound
13 relied on Burtch, which is a FELA case, and FELA
14 for a number of reasons is -- is not instructive
15 here as well. The statutory text is different.
16 The decisions interpreting FELA were by their
17 very terms atextual and rather purposive --

18 JUSTICE SOTOMAYOR: The phrase is --

19 MR. DVORETZKY: -- looking at the
20 broad purpose of FELA.

21 JUSTICE SOTOMAYOR: -- "except for
22 workers engaged in foreign and interstate
23 commerce."

24 If we define cargo handlers as
25 involved in interstate commerce and seamen and

1 longshoremen were also considered involved in
2 commerce, maybe not interstate because there's
3 no question most ships, not all, but virtually
4 all travel in interstate commerce, why doesn't
5 the same apply here, that cargo handlers do as
6 well?

7 MR. DVORETZKY: Because the -- the
8 commerce cases like Puget Sound are not
9 answering the same question that is at issue
10 here. They are not interpreting the statutory
11 term "engaged in foreign or interstate
12 commerce," which, as this Court said in Circuit
13 City, is a term of art.

14 They are also, in -- they -- they are
15 answering a different question. They're talking
16 about what is the full extent of Congress's
17 commerce power and how does that interact with
18 the state's authority.

19 The Court said in Circuit City that
20 the scope of Section 1, the Section 1 exemption,
21 does not reach the full extent of Commerce
22 Clause power. That's simply the wrong question
23 under Circuit City.

24 And so, when the Court is saying in
25 these cases like Puget Sound that stevedores are

1 a part of interstate commerce, they're doing so
2 in a very different context that's not
3 instructive here.

4 JUSTICE GORSUCH: Counsel, let's say I
5 -- I agree with everything you just said, but I
6 still have a question about folks who unload
7 cargo from interstate commerce and bring it into
8 the state.

9 Now what evidence is there that
10 railroad workers who did that were or were not
11 covered by this statutory language? And, if
12 they were covered by it, do you lose?

13 MR. DVORETZKY: Well, if -- if I may
14 -- if I may just clarify the question. When
15 you're asking if they're covered by --

16 JUSTICE GORSUCH: You can try.

17 (Laughter.)

18 MR. DVORETZKY: If they're -- if
19 you're asking about the statutory language --

20 JUSTICE GORSUCH: Yes.

21 MR. DVORETZKY: -- are you referring
22 to whether they are covered by the Section 1
23 exemption?

24 JUSTICE GORSUCH: Yes.

25 MR. DVORETZKY: Okay. So, again,

1 railroad employees, if you just read it in
2 isolation, could mean any number of things. But
3 --

4 JUSTICE GORSUCH: I -- I know -- I
5 know you like to talk about people who travel,
6 okay? And I'm saying put that aside.

7 What about the fellow who unloads
8 cargo that's come in interstate commerce from
9 the railroad and then hands it off to a carrier
10 locally, that person, and if that person was
11 exempted by the act, then why isn't the same
12 person unloading cargo from a plane in the same
13 position?

14 MR. DVORETZKY: Well, Justice Gorsuch,
15 I don't think that person was exempted by
16 Section 1 --

17 JUSTICE GORSUCH: That's my question.

18 MR. DVORETZKY: That -- that -- that's
19 why I wanted to --

20 JUSTICE GORSUCH: What -- what
21 evidence do you have of that?

22 MR. DVORETZKY: Well, so that's why I
23 wanted to clarify exactly what statute we're
24 talking about.

25 I don't think that person was exempted

1 by Section 1 because railroad employees can be
2 used any number of different ways. And if you
3 look, for example --

4 JUSTICE GORSUCH: I understand that.
5 I'm talking very specifically and historically,
6 in 1925, what evidence do you have?

7 MR. DVORETZKY: I -- I would look at
8 the Hours of Service Act and the Boiler
9 Inspection Act. I would look at the Erdman Act.
10 These are all statutes in which Congress used
11 railroad employees to mean something less than
12 everybody who works for the railroad.

13 Likewise, in United States versus
14 American Trucking --

15 JUSTICE GORSUCH: Did those things
16 specifically deal with the class of workers I'm
17 talking about, or are they just acknowledging
18 that, of course, the back-office accountant
19 sitting in New York is not engaged in interstate
20 commerce?

21 MR. DVORETZKY: Well, I -- I -- I
22 think those -- those statutes are actually
23 narrowing the class of railroad employees to --
24 to exclude far more than just the back-office
25 accountant. They --

1 JUSTICE GORSUCH: I'm talking about
2 the very particular class of workers that we
3 have at issue here, and -- and what evidence do
4 you have one way or the other with respect to
5 them, not -- not other people who do other
6 functions that have nothing to do with
7 interstate commerce?

8 MR. DVORETZKY: Well, I -- I -- I
9 don't think we have either evidence or a
10 definition either way as to Section 1.

11 What we have, though, is statutory
12 context in which the term "railroad employees,"
13 first of all, can be used to mean less than all
14 railroad employees.

15 Second of all, it comes alongside the
16 word "seamen," not maritime employees. So that
17 shows us that Congress was not trying to exempt
18 everybody who works for a particular employer
19 but, rather, a specific class.

20 We have "engaged in foreign or
21 interstate commerce," which, as this Court said
22 in *Circuit City*, colors the understanding of
23 seamen and railroad employees.

24 We also have the language "class of
25 workers," which suggests, again, that we are

1 focusing on what workers do, namely, they -- the
2 workers in particular have to be engaged in
3 foreign or interstate commerce rather than
4 sweeping --

5 JUSTICE GORSUCH: Okay. I'm going to
6 take all that as, no, I don't have any evidence
7 of the past, unless I'm misunderstanding
8 something, and then I'll ask you this question
9 if that's the case.

10 Why wouldn't we naturally understand
11 someone who is loading and unloading cargo from
12 interstate commerce to be involved in interstate
13 commerce within the meaning of this -- this Act,
14 narrowly, as a class of persons?

15 MR. DVORETZKY: Because such an
16 individual -- that would be a -- a sweeping
17 interpretation of Section 1.

18 JUSTICE GORSUCH: Well, you can call
19 it sweeping. You can call it narrow. Whatever
20 adjective or adverb you want to attach to it,
21 why wouldn't that be an appropriate reading of
22 this statute, counsel?

23 MR. DVORETZKY: Because the statutory
24 structure and text here suggests that Congress
25 had in mind a narrower understanding based on

1 all of the other cues that we are talking about.

2 If Congress meant -- rail -- "railroad
3 employees" can be read one of two ways.

4 "Seamen" can only be read one way. And so,
5 therefore, the understanding of seamen ought to
6 help the Court understand which understanding of
7 railroad employees is the right one.

8 In Neal versus Clark, for example, the
9 Court looked at the word "fraud." Fraud
10 standing on its own can mean either positive
11 fraud or implied fraud.

12 The Court read it to mean positive
13 fraud because it was used in the statute
14 alongside the word "embezzlement."

15 JUSTICE KAVANAUGH: What do you --

16 MR. DVORETZKY: So --

17 JUSTICE KAVANAUGH: -- do with -- keep
18 going. I'm sorry, keep going.

19 MR. DVORETZKY: Well, no, I was just
20 going to say so too here, railroad employees can
21 be read either way in isolation but should be
22 informed by seamen.

23 JUSTICE KAVANAUGH: And on workers
24 engaged -- "class of workers engaged in foreign
25 or interstate commerce," what do you do with the

1 Burtch case, which I realize is about FELA but
2 is dealing with similar language, "engaged in
3 commerce," and the Court said "it is too plain
4 to require discussion that the loading or
5 unloading of an interstate shipment by the
6 employees of a carrier is so closely related to
7 interstate transportation as to be practically a
8 part of it," which was, applying, of course, as
9 you know, the Shanks test, closely related test,
10 to reach a conclusion, and that's 1924 when the
11 Court says that.

12 So what do we do with that?

13 MR. DVORETZKY: So two points, Justice
14 Kavanaugh, one textual, the other
15 methodological.

16 Let me actually start with the
17 methodological point. You mentioned Shanks. In
18 Shanks, the Court said that it was interpreting
19 FELA not in a technical legal sense or --
20 speak -- or it was "interpreting interstate
21 commerce not in a technical legal sense but in a
22 practical one better suited for the occasion."

23 Shanks by its terms is not a textual
24 opinion. It's a purposive opinion. The --

25 JUSTICE KAVANAUGH: Right. So we're

1 left -- I mean, I don't know if you listened to
2 the last case, but a similar situation where the
3 Court has a precedent interpreting the language.

4 And the question's whether -- I think,
5 whether we should think that precedent makes
6 sense with the exact or very similar language in
7 another contemporaneous statute. And I guess
8 I'll let you keep going on that.

9 MR. DVORETZKY: Well, so Shanks took
10 one methodological approach, which was an
11 atextual one.

12 At the same time, in Circuit City, the
13 Court said the way to think about "engaged in
14 foreign or interstate commerce" is with
15 reference to the Gulf Oil and ABM cases, which
16 rejected the kind of closely connected standard
17 that Shanks adopted.

18 In addition to that -- I said I had
19 two points. That's the methodological. The
20 textual differences between FELA and Section 1
21 are also important. Obviously, FELA does not
22 have the kind of language that we have in
23 Section 1 about seamen and railroad employees
24 and a residual clause.

25 It doesn't use the word -- it doesn't

1 use the word "foreign or interstate commerce" in
2 the same way. It talks about a common carrier
3 engaged in trade or commerce.

4 JUSTICE KAVANAUGH: Between any of the
5 several states?

6 MR. DVORETZKY: Right. But it -- but
7 it doesn't have the same --

8 JUSTICE KAVANAUGH: And that sounds
9 like interstate.

10 MR. DVORETZKY: It -- it's not the
11 same repetition of "foreign or interstate" that
12 we have here in the residual clause.

13 In addition to that, FELA focuses
14 first and foremost on the employer's business.
15 It talks about every common carrier by railroad
16 while engaging in commerce. So that is focusing
17 on the employer in a way that the Section 1
18 exemption is not.

19 And, lastly, when FELA gets to
20 employees, it talks about them in their
21 individual capacity, whereas the FAA addresses
22 classes of workers.

23 So, textually, there are a number of
24 differences here. And, methodologically, again,
25 when the Court was looking at FELA, it wasn't

1 doing so textually. It was doing so in a
2 purposive way. And Gulf Oil and ABM, which also
3 interpreted contemporaries of the FAA using
4 language like "engaged in foreign or interstate
5 commerce," they had a much narrower
6 understanding of what those words meant.

7 JUSTICE KAVANAUGH: But it's also
8 interesting the Court just says it's "too plain
9 to require discussion" that loading and
10 unloading is -- you know, it's, like, so obvious
11 to the Court in 1924 that loading and unloading
12 is practically part of the interstate commerce.

13 MR. DVORETZKY: It -- it --

14 JUSTICE KAVANAUGH: That suggests an
15 understanding of the terms as of 1924.

16 MR. DVORETZKY: Only in the context of
17 a test that itself said that FELA was "so broad
18 that it covered a vast field about which there
19 could be no discussion." That's a quote from
20 the Carr test. And --

21 JUSTICE GORSUCH: Well, if you want to
22 look more directly to the FAA, what do we do
23 about wharfage, which Section 1 speaks about as
24 "agreements relating to wharfage or any other
25 matter in foreign commerce?"

1 Wharfage contracts, as I understand
2 them, not being an expert in this area, have to
3 do with the loading and unloading of cargo. And
4 if that is considered in interstate or in
5 foreign commerce for purposes of Section 1, what
6 -- what -- what do I do about that? That seems
7 a rather specific textual clue.

8 MR. DVORETZKY: So the reference to
9 wharfage comes up in the definition of maritime
10 transactions, not in the definition of commerce.
11 Congress in Section 1 was separating out
12 maritime --

13 JUSTICE GORSUCH: It says "wharfage or
14 any other matters in foreign commerce." That's
15 what it says.

16 MR. DVORETZKY: It -- it does, but it
17 says that in the first part of Section 1
18 defining maritime transaction --

19 JUSTICE GORSUCH: I understand that.

20 MR. DVORETZKY: -- before it gets to
21 commerce.

22 JUSTICE GORSUCH: But it -- it -- it
23 considers a wharfage agreement to be a matter in
24 -- in foreign commerce.

25 MR. DVORETZKY: So --

1 JUSTICE GORSUCH: Do you wish to
2 address that?

3 MR. DVORETZKY: I do, and I disagree
4 with that grammatical understanding of the
5 statute as well because, if you look at
6 everything that come -- if you look at the words
7 that come after wharfage, for example, "supplies
8 furnished vessels or repairs to vessels" --

9 JUSTICE GORSUCH: "Or any other
10 matters" --

11 MR. DVORETZKY: Well --

12 JUSTICE GORSUCH: -- "of foreign
13 commerce."

14 MR. DVORETZKY: -- "supplies furnished
15 vessels or repairs to vessels" are not something
16 that you can think of as being in foreign
17 commerce, which -- which suggests that "in
18 foreign commerce" is really just modifying
19 matters rather than characterizing everything
20 that came before.

21 It doesn't -- it doesn't make sense to
22 think of a -- a repair to a vessel as being in
23 foreign commerce. And if it did, what would
24 that mean? That everybody somehow associated
25 with the repair by virtue of -- of repairing a

1 vessel was in foreign commerce? That's a pretty
2 sweeping understanding of -- of foreign
3 commerce --

4 JUSTICE GORSUCH: I -- I understand
5 your argument.

6 MR. DVORETZKY: -- contrary --
7 contrary to what Congress was doing in the rest
8 of the -- when it actually got to defining
9 commerce by specifying seamen, by repeating
10 "foreign or interstate" where it didn't need to
11 in order to underscore the significance there of
12 border crossing.

13 JUSTICE KAVANAUGH: Picking up on the
14 question on railroad employees that Justice
15 Gorsuch was asking, I think your theory is that
16 because "seamen" doesn't include everyone
17 involved in shipping, we should interpret
18 "railroad employees" not to interpret everyone
19 who's involved in loading and unloading the
20 railroad, the cars as well. Is that my --

21 MR. DVORETZKY: That's part -- that is
22 part of it, yes.

23 JUSTICE KAVANAUGH: And why not just
24 rail -- read "railroad employees" to mean
25 railroad employees?

1 MR. DVORETZKY: Well, so, first of
2 all, "railroad employees" doesn't have to mean
3 all railroad employees. And, in fact, it
4 typically doesn't. Even in the RLA, when it
5 refers to employees, it's not talking about
6 everybody who works for the railroad.

7 Management is excluded. The RLA and
8 the Transportation Act both distinguish between
9 employees -- subordinate officials and railroad
10 -- and -- and management. And so just looking
11 at the term "railroad employees," the most
12 natural reading of that isn't everybody who
13 works for the railroad.

14 In addition to that, in Section --

15 JUSTICE KAGAN: And are -- and are you
16 acknowledging that if railroad baggage handlers
17 are covered, then you lose? There's no way to
18 separate those two out, is there?

19 MR. DVORETZKY: I think there is a way
20 to separate those two out. Even if railroad
21 baggage handlers are covered, that doesn't tell
22 you that Congress meant to exempt the entire
23 airline industry.

24 JUSTICE KAGAN: Well, I mean, we may
25 or may not be talking about the entire airline

1 industry, but at least airline ramp workers and
2 airline ramp supervisors. If railroad baggage
3 handlers are covered, is there any possible way
4 that air -- airline ramp workers would not be
5 covered?

6 MR. DVORETZKY: Yes, absolutely,
7 because even if you -- even if you ask me to
8 assume that railroad baggage handlers are
9 covered, we still have the fact that stevedores
10 are not covered by use of the word "seamen."
11 And so, at that point, we look at those two
12 words and maybe they point in other directions,
13 but how do you resolve that?

14 You still look at "engaged in foreign
15 or interstate commerce," which, under Circuit
16 City, is supposed to be given a narrow
17 construction. You still look at the fact that
18 the -- the Section 1 exemption is focusing
19 particularly on what the workers do rather than
20 on the employer more generally.

21 And, in addition to that, you ought to
22 interpret the Section 1 exemption consistently
23 with -- with the FAA's pro-arbitration purposes.
24 There's no reason to think that when Congress
25 passed this statute in 1925 that it meant to

1 leave a gap to cover a class of workers that
2 would not be covered by any other federal
3 regime for years later.

4 JUSTICE KAGAN: Didn't we say not to
5 do that in New Prime? I thought that that was
6 one of the points of New Prime, is that you
7 don't get to just wave around the FAA's purposes
8 in order to construe the scope of Section 1.

9 MR. DVORETZKY: I think you don't get
10 to use the FAA purposes to contradict the plain
11 language of Section 1. But, here, I think that
12 the language of Section 1 supports us and would
13 be informed by the broader understanding of what
14 Congress was trying to achieve in the FAA, which
15 was to promote rather than undermine
16 arbitration.

17 The -- the purpose of the Section 1
18 exemption that the Court attributed to Congress
19 in New Prime and Circuit City was not an
20 anti-arbitration purpose. It was a purpose to
21 make sure the -- the vast majority of
22 individuals are covered by Section 2, and to the
23 extent that you're saying --

24 JUSTICE KAGAN: Right. But whatever
25 the FAA's general purposes are, we read the

1 exception fairly. Isn't that the proper way to
2 read a statute? There are -- there's a general
3 -- there are general provisions and then there's
4 an exception where they thought that the general
5 provisions of the FAA did not apply, and we read
6 that exception fairly. Isn't that what we're
7 supposed to do?

8 MR. DVORETZKY: Of course, but I would
9 submit that it's a not -- not a fair reading of
10 the exception here where you have a choice
11 between two -- two competing interpretations of
12 "railroad employees" in this context to choose
13 the broader understanding of "railroad
14 employees," given, again, the juxtaposition with
15 seamen, given, again, the focus on engaging in
16 foreign or interstate commerce, and the
17 understanding that Circuit City attributed to
18 that term in this very statute to require direct
19 participation in the movement of goods or
20 services.

21 And, again, when we're looking at what
22 seamen did, I don't think you can just look at
23 railroad employees and ignore what seamen did.
24 I think you have to look at them together.

25 With -- and then, with respect to the

1 argument which we may hear that the -- the
2 entire airline industry is covered by this,
3 again, the statute here doesn't speak in terms
4 of entire industries. It speaks in terms of
5 classes of workers and a focus on the work that
6 they do and, again, juxtaposing railroad
7 employees with seamen.

8 CHIEF JUSTICE ROBERTS: Thank you.
9 Justice Thomas?

10 JUSTICE THOMAS: Thank you, Mr. Chief
11 Justice. Just a couple of questions.

12 The -- you make quite a bit -- you --
13 you suggest that seamen have to actually travel
14 interstate or internationally, right?

15 MR. DVORETZKY: I think seamen as a
16 class, the only understanding of that class is
17 that they traveled interstate or
18 internationally, but, as I was trying to explain
19 to the -- to the Chief Justice at the beginning
20 of the argument, you could have an individual
21 seaman who didn't, yet that person would still
22 qualify as a seaman and fall under the
23 exemption.

24 JUSTICE THOMAS: Well, how would you
25 do that?

1 MR. DVORETZKY: I -- you would look at
2 -- you would look at the class of workers that
3 the individual belongs to, and if -- if the
4 class of workers is that of seamen, then you
5 look at the traditional maritime law
6 understanding of what a seaman was.

7 And cases like Chandris and Wilander
8 tell us that the fundamental characteristic of
9 seamen as a class was working on the vessel and
10 typically crossing borders. But that doesn't
11 mean that if you have an individual seaman who
12 didn't cross borders that they're excluded --
13 that they're excluded from the exemption.

14 JUSTICE THOMAS: So let's just look at
15 tugboat operators as a class. Would they be
16 considered seamen?

17 MR. DVORETZKY: I think they would.

18 JUSTICE THOMAS: Why? They don't
19 travel internationally.

20 MR. DVORETZKY: They -- they don't,
21 but, nonetheless, they -- they satisfy the --
22 the basic conditions for the test under Chandris
23 and Wilander. They spend the predominant amount
24 of their time on a vessel, and the vessels that
25 they spend time on, move or are capable of

1 moving people or goods across -- across water.

2 The fact that they don't do so
3 internationally doesn't exclude them from the
4 class of seamen, given what the definition is
5 for "seamen" under this Court's case law and
6 under maritime law.

7 JUSTICE THOMAS: Okay. Give me again
8 your limiting principle for railroad employees
9 as a class.

10 MR. DVORETZKY: Railroad employees are
11 those who ride the rails. They're the people on
12 the train who move goods or people on the train.

13 Typically, that's going to be across
14 borders, but, as with the discussion we were
15 just having about seamen, you could have a
16 railroad -- you could have railroad employees
17 who don't cross borders as well.

18 JUSTICE THOMAS: So there -- there
19 used to be a train that ran just from Savannah
20 to Atlanta and back. Now it's a railroad. It's
21 a train. It has employees.

22 So I'm -- I'm trying to understand why
23 the employees on that dedicated intrastate train
24 would be treated differently from your class of
25 either internationally traveling or interstate

1 traveling employees?

2 MR. DVORETZKY: Justice Thomas,
3 because the employees who work on the train
4 between Savannah and Atlanta are not their own
5 class. The class of workers is still railroad
6 employees. And, typically, railroad employees
7 cross borders, but there are some, as in your
8 example, who don't. That doesn't make them part
9 of a different class.

10 JUSTICE THOMAS: So you're basically
11 saying you have a definition of a class that
12 includes international or interstate travel and
13 that you may have exceptions to that. Isn't
14 that kind of an odd way to create a class?

15 MR. DVORETZKY: I -- I -- I don't
16 think it is because I think that's what followed
17 --

18 JUSTICE THOMAS: Why wouldn't it be
19 the opposite -- that's what I'm asking -- that
20 the class is broader than those who travel
21 internationally or nationally?

22 MR. DVORETZKY: I -- I -- I think I
23 would point you, again, to the use of the word
24 "seamen" in the statute. Seamen sometimes cross
25 borders and sometimes didn't, but Congress in

1 the statute didn't distinguish between those
2 different types of seamen. It just talked about
3 seamen as a general class.

4 And so, when you're talking about
5 railroad employees, you're also talking about
6 them as a general class whether the particular
7 railroad employee goes from D.C. to New York or
8 from Atlanta to Savannah.

9 JUSTICE THOMAS: So one last question,
10 and this is back to what Justice Gorsuch alluded
11 to, and that is wharfage. I'm having some
12 difficulty understanding your argument there
13 because that seems to suggest that as a part of
14 the maritime transaction that we're talking
15 about, it would include wharfage agreements, you
16 know, basically, shore agreements.

17 And you were giving -- I -- I don't
18 understand what your answer was to him.

19 MR. DVORETZKY: Justice Thomas, I
20 think the answer is that wharfage is part of
21 maritime transactions. But Section 1 separately
22 defines maritime transactions from commerce, and
23 the Section 1 exemption that we're talking about
24 here today is an exemption from the definition
25 of commerce, not from the definition of maritime

1 transactions.

2 JUSTICE THOMAS: Okay. Finally, if --
3 let's just move away from wharfage a section --
4 a second. What would you do with drayage that
5 continues a journey of, say, a container from
6 the airport if it's a FedEx/UPS container or if
7 it's intermodal and it comes in on a container
8 ship, but then it's taken 2- or 300 miles away?

9 MR. DVORETZKY: Well, I -- I think, if
10 it came in on a ship, at that point -- at that
11 point, it could conceivably fall within the
12 definition of seamen.

13 JUSTICE THOMAS: The drayage would be
14 considered a seamen?

15 MR. DVORETZKY: I -- I think it would
16 if -- if we're talking about moving across
17 water.

18 JUSTICE THOMAS: No, a drayage would
19 be moving to a truck to be hauled.

20 MR. DVORETZKY: Oh, oh, oh. So, no,
21 that -- that would not fall within the Section 1
22 exemption. That would not fall within the
23 Section 1 exemption because it is not part of
24 what the -- the seamen's duties -- well, it
25 would depend, I suppose, who's doing that work,

1 right?

2 I mean, if -- if -- if you have the
3 seamen who are actually the ones unloading the
4 ship, then I think the fact that they carried
5 out some loading or unloading duties would not
6 take them out from the exemption.

7 But, if you have individuals analogous
8 to ramp agents or stevedores, whose primary job
9 it is to be unloading the ship, then, no, under
10 the language of Section 1, they would not be
11 subject to the exemption, just as stevedores
12 were not -- were excluded from -- from the class
13 of seamen.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Breyer?

17 Justice Alito?

18 Justice Sotomayor?

19 Justice Kagan?

20 JUSTICE KAGAN: Railway signal
21 operators, are they railway employees?

22 MR. DVORETZKY: Not within the meaning
23 of Section 1 because they're not riding the
24 train.

25 JUSTICE KAGAN: So, I mean, you know,

1 the train doesn't go unless those signal
2 operators are there going green light/red light,
3 right? But they're not railway employees within
4 the meaning of Section 1?

5 MR. DVORETZKY: Correct, because the
6 test is not how closely related or even how
7 necessary they are to transportation. The test
8 under Circuit City and under the language of
9 Section 1 is whether they actually are doing the
10 foreign or interstate transportation in the way
11 that seamen and railroad workers do.

12 Lots of different people are important
13 for transportation. You might need a travel
14 agent to book your ticket. You wouldn't get on
15 the plane if you don't know how to use a
16 computer without the travel agent.

17 That doesn't mean that the travel
18 agent is a transportation worker just because
19 they were necessary for you to get on that
20 plane.

21 JUSTICE KAGAN: So the -- the test is
22 are you moving?

23 MR. DVORETZKY: The -- the test is are
24 you moving on the -- the ship, the plane, the
25 truck, through the channels of interstate

1 commerce. That is what seamen and railroad
2 employees did.

3 JUSTICE KAGAN: Okay.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: Just -- I -- I
8 mentioned the Burtch precedent, but the other
9 side cites a number of other pre-1925 cases,
10 like Gloucester Ferry, Crutcher, Easton, Texas
11 Transportation, in -- in other fields but in all
12 of them suggesting that loading and unloading is
13 part of interstate commerce. So I don't know --
14 necessarily want you to go one by one, but just
15 what's your response to that?

16 And they -- they say that just
17 reflects -- further demonstrates the common
18 understanding that loading and unloading is part
19 of interstate commerce.

20 MR. DVORETZKY: So I think those cases
21 were answering a different question. They were
22 not interpreting "engaged in foreign or
23 interstate commerce," which the Court said in
24 Circuit City was a term of art that has to be
25 given its plain meaning.

1 Many of those are dormant Commerce
2 Clause cases. So what's going on in those cases
3 is the Court is saying a state, let's say, can't
4 regulate the loading or unloading of cargo
5 because, without the loading or unloading of
6 cargo, the -- the interstate commerce can't
7 happen.

8 And so, in that situation, regulating
9 the loading or unloading is stopping the
10 interstate commerce from happening. That's
11 simply answering a different question than
12 whether the people doing the loading or
13 unloading are themselves engaged in foreign or
14 interstate commerce in the narrow way in which
15 Section 1 uses that term.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Ms. Bennett.

20 ORAL ARGUMENT OF JENNIFER D. BENNETT

21 ON BEHALF OF THE RESPONDENT

22 MS. BENNETT: Mr. Chief Justice, and
23 may it please the Court:

24 If Congress wanted to exempt from the
25 FAA just those workers aboard an instrumentality

1 of commerce crossing state lines, it easily
2 could have said so.

3 Instead, it excluded the employment
4 contracts of seamen, railroad employees, and any
5 other class of workers engaged in foreign or
6 interstate commerce.

7 This Court made clear in *New Prime*
8 that we interpret this exemption just as we
9 would any other statute, by the meaning of its
10 words at the time it was passed. Those words
11 exempt airline employees who load and unload
12 cargo.

13 Southwest can't dispute that by 1925
14 it was blackletter law that the transportation
15 of goods in commerce begins when they're given
16 to a carrier and it only ends when they're
17 received at their final destination.

18 Indeed, this Court had repeatedly held
19 that loading and unloading cargo specifically is
20 part of that transportation, not ancillary to
21 transportation or connected to transportation,
22 but it is itself transportation, that it is
23 itself commerce.

24 And just the year before the FAA was
25 passed, as Justice Kavanaugh pointed out, this

1 Court held that it was too plain to require
2 discussion that a worker who unloaded a train
3 was a railroad employee and that that railroad
4 employee was engaged in interstate commerce.

5 Yet Southwest contends that workers
6 who load and unload airplanes are not part of
7 any class of workers engaged in commerce for
8 purposes of the FAA.

9 There's no support for this contention
10 in the text of the statute. Southwest can't
11 point to even a single example from any time
12 period in which the phrase "engaged in foreign
13 or interstate commerce" has ever been given the
14 meaning it proposes.

15 So, instead, Southwest invokes the
16 statute's purpose. The FAA favors arbitration,
17 Southwest says, so the exemption must be given
18 as narrow a reading as possible regardless of
19 what the text actually means.

20 But this Court rejected that very
21 argument in *New Prime*. And even if we were to
22 privilege purpose over text, on Southwest's
23 interpretation, the exemption would do exactly
24 what *Circuit City* held it was designed to avoid,
25 unsettle developing and existing dispute

1 resolution regimes at the time.

2 I welcome this Court's questions.

3 CHIEF JUSTICE ROBERTS: What about
4 ticket agents? Are they included as transport
5 workers under your approach?

6 MS. BENNETT: Yes, Your Honor, in
7 1925 -- and by ticket agents, I assume you mean
8 people who work for the airline helping --

9 CHIEF JUSTICE ROBERTS: No, the -- the
10 person you, you know, go up and give your ticket
11 to and -- you know.

12 MS. BENNETT: Oh. Yes, Your Honor.
13 In 1925, those people certainly would have been
14 railroad employees. If you look at, for
15 example, Decision Number 2 of the Railroad Labor
16 Board, which is the agency that set wages for
17 railroad employees at the time, you'll see those
18 people listed in the list of -- of employees.
19 Station employees were certainly included.

20 CHIEF JUSTICE ROBERTS: What about
21 somebody who isn't actually -- doesn't take your
22 ticket, doesn't put the little, you know, thing
23 on the -- the bag, but is there at an office for
24 the airline in -- in the airport?

25 MS. BENNETT: I think it would depend

1 on what that person is doing. But -- but what
2 we know about railroad employees, the ordinary
3 meaning was those people who did the customary
4 work of the railroad at the time. And what that
5 meant was that anybody whose function was
6 contributory to the transportation of the
7 railroad rather than, say, negligible or --

8 CHIEF JUSTICE ROBERTS: Well, the
9 general counsel.

10 MS. BENNETT: The general --

11 CHIEF JUSTICE ROBERTS: Whose work is
12 -- is, whatever you just said, supportive of the
13 --

14 MS. BENNETT: Sure.

15 CHIEF JUSTICE ROBERTS: --
16 transportation or whatever.

17 MS. BENNETT: The general counsel is
18 likely not a railroad employee, and the reason
19 for that is because "railroad employees" and --
20 excluded executives. There was really this --
21 as -- as Mr. Dvoretzky pointed out, there is a
22 labor/management divide, just as there is in any
23 other class of workers.

24 And so, for that reason, the general
25 counsel likely wouldn't be excluded.

1 JUSTICE KAVANAUGH: In your answers to
2 the Chief Justice, you have two arguments,
3 alternative arguments. Are you distinguishing
4 your broader "all airline workers" from your
5 narrower argument, or am I misreading how you
6 constructed your -- your argument?

7 MS. BENNETT: I think even if the --
8 on the broader argument, what we mean by
9 "airline employees" is a category analogous to
10 "railroad employees."

11 JUSTICE KAVANAUGH: Right. So, on
12 your narrower argument, maybe you can tell me
13 what your narrower argument exactly is as you
14 would articulate it.

15 MS. BENNETT: Sure. So the narrower
16 argument is that cargo loaders were engaged in
17 foreign or interstate commerce in exactly the
18 same way as seamen and railroad employees. And
19 if we start with the phrase "engaged in" -- "in
20 commerce," we know that in 1925 people who
21 loaded and unloaded railroad trains were engaged
22 in foreign and interstate --

23 JUSTICE KAVANAUGH: So on your --

24 MS. BENNETT: -- commerce.

25 JUSTICE KAVANAUGH: Sorry to

1 interrupt.

2 MS. BENNETT: Sure.

3 JUSTICE KAVANAUGH: But, on your
4 narrower argument, just to follow up on the
5 Chief Justice's questions, on your narrower
6 argument, does that bring in then the gate
7 ticket agents, or is that a question for another
8 day, or where does that stand?

9 MS. BENNETT: On the narrower
10 argument, I think that's a much more difficult
11 question, and the question would be -- you know,
12 the -- the narrower argument would be, are those
13 people engaged in foreign or interstate
14 commerce? If we take the -- if we take the
15 class of workers as the job you're doing, then
16 we would look at the flow -- I think we would
17 look at the flow of commerce, and -- and for
18 passengers, that really started when they --
19 they got to the airport and ended when they got
20 to their destination.

21 So likely even on the narrower
22 argument, I would say that ticket agents, people
23 who take your ticket when you get to the
24 airport, are probably included.

25 JUSTICE KAVANAUGH: But we could leave

1 that open?

2 MS. BENNETT: But -- absolutely. You
3 could leave it open. And that's a much more
4 difficult question than cargo loaders. And we
5 know that cargo loaders are engaged in commerce
6 in 1925 because this Court said so.

7 JUSTICE GORSUCH: Can -- can I ask
8 you, though --

9 MS. BENNETT: Sure.

10 JUSTICE GORSUCH: -- you say "arrive
11 at their final destination." You've said that a
12 couple of times now. And -- and that brings to
13 my mind -- and we have a lot of amici here from,
14 like, Lyft and Uber, and -- and Justice Breyer
15 referred to them. I can understand in 1925 that
16 someone who loaded and unloaded a ship might
17 have been involved in -- engaged in commerce. I
18 understand that, the narrower version of that
19 argument. I can get my head around that.

20 I'm not sure I can get my head
21 around -- and maybe you can explain to me
22 whether you think that necessarily includes the
23 last mile from -- from the dock, from -- from
24 the railyard to -- to the consumer.

25 Can you help me there?

1 MS. BENNETT: Sure. So -- so, in
2 terms of Lyft and Uber specifically, you know,
3 what this Court said in, for example, United
4 States v. Yellow Cab and what it says in Knight
5 as well is that the customary understanding of
6 transportation by railroad, by boat, by plane is
7 that it ends -- by final destination for
8 passengers, it ends at the station, your final
9 station, and that the -- the local sort of taxi
10 service afterwards was typically not understood
11 as included in that transportation.

12 And so it's different than, for
13 example -- you know, there -- there were
14 last-mile drivers of goods. There were
15 last-mile railroad workers who took goods on the
16 railroad for the last mile of a journey. This
17 Court has a case called Hancock, for example,
18 that deals with last- and first-mile railroad
19 workers, and in that case, where the -- the last
20 mile is part of a continuous journey, what this
21 Court held is -- is that -- that that last mile,
22 even though it's entirely intrastate, is still
23 part of the continuous journey.

24 So, for workers like Lyft and Uber and
25 other kinds of sort of last-mile drivers, what

1 the question would be is, is it part of this
2 continuous journey in the same way that the
3 railroad worker in Hancock was, or, instead, is
4 it really a separate sort of local kind of
5 transportation?

6 And that's how I would address that --

7 JUSTICE GORSUCH: Okay.

8 MS. BENNETT: -- that question.

9 JUSTICE GORSUCH: And then seamen,
10 help -- help us out with that.

11 MS. BENNETT: Sure.

12 JUSTICE GORSUCH: That is the -- the
13 -- your friend on the other side's strongest
14 argument, that seamen were people who rode the
15 waves and did not include stevedores, and we
16 need to take cognizance of that fact.

17 MS. BENNETT: So -- so two -- two
18 things on that.

19 First is the ejusdem generis analysis
20 is telling us we're looking for a commonality.
21 So we're looking for what is the same between
22 seamen and railroad employees. And -- and at
23 the very least, we know that railroad employees
24 were not necessarily people aboard a vessel.
25 Take the signalman, for example, the cargo

1 loader in Burtch; in Rhodes, the station agent.
2 And so that can't be a commonality between
3 seamen and railroad employees.

4 And even on the -- and even if -- on
5 the stevedores argument itself, a few things.
6 First, Ms. Saxon is not a stevedore. You know,
7 Mr. Dvoretzky said, if you're a seamen who
8 loaded and unloaded, if you're a railroad
9 employee who loaded/unloaded, then you would be
10 exempt. Here, she's an airline employee who
11 loads and unloads.

12 And so regardless of what happens with
13 the separate category of stevedores, certainly,
14 airline employees who load and unload are no
15 different than seamen or railroad employees who
16 do so.

17 JUSTICE GORSUCH: You -- you accept
18 the premise, though, that -- that stevedores
19 were separate from seamen in 1925?

20 MS. BENNETT: Not always, Your Honor,
21 and we have two pieces of evidence that they
22 weren't. So the first is this Court, the year
23 after the FAA was passed, interpreted the word
24 "seamen" in the Jones Act, and what it said is
25 that includes stevedores. And so we know that

1 at least in some contexts seamen did include
2 stevedores where it didn't make sense to make a
3 distinction.

4 And we know particularly in this
5 context, if you look at the hearings on the FAA,
6 there are very few mentions of this exemption in
7 the hearings. But one of them is the reason you
8 would include this exemption is to ensure that
9 stevedores in particular are not subject to the
10 FAA.

11 So it seems quite likely that when
12 Congress used the word "seamen," it was using it
13 in the same way that this Court understood it to
14 be used in the Jones Act at the time, which is
15 to exclude stevedores.

16 JUSTICE ALITO: But whether or not
17 stevedores were considered to be seamen, would
18 you say that everybody who works for a shipping
19 company, a -- an ocean liner company, falls
20 within the exemption?

21 MS. BENNETT: Not everybody, but,
22 certainly, those who do the customary work of
23 the company. So the -- the commonality between
24 seamen and railroad employees is they're both
25 classes of workers. You know, seamen do the

1 customary work of the shipping industry. That's
2 why they're identified. That's the way in which
3 they're engaged in commerce.

4 JUSTICE ALITO: Well, no, a lot of
5 people do the customary work of a -- of a --
6 what's the word I'm looking for -- a maritime
7 company, a company that operates ships, besides
8 seamen. So what was the point of putting in
9 "seamen" if everybody was going to be included?

10 MS. BENNETT: So what seamen and
11 railroad employees both are were commonly
12 understood pre-existing categories of workers.
13 And -- and so Congress identified those
14 categories of workers because they existed in
15 the world.

16 The other -- the other reason is that
17 seamen and railroad employees both already had
18 dispute resolution statutes governing them, and
19 so Congress would have been specifically
20 thinking about them at the time.

21 But -- but we know that Congress
22 didn't mean to limit the exemption to people who
23 were seamen or people who were railroad
24 employees because it also exempted any other
25 class of workers engaged in commerce.

1 JUSTICE ALITO: Who besides executives
2 who works for an airline do you think does not
3 fall within this exemption, or is there no such
4 -- is everybody other than the executives
5 included?

6 MS. BENNETT: No. So say Southwest,
7 for example, had a credit card points program.
8 I think they maybe do. The people who work for
9 the credit cards point program are not doing the
10 transportation work of Southwest. They're doing
11 something that is, at best, tenuously connected
12 to that, and so they would not fall within the
13 scope of the exemption.

14 JUSTICE ALITO: What about a
15 bookkeeper, somebody who schedules crews?

16 MS. BENNETT: I think somebody who
17 schedules crews is -- would fall within the
18 exemption, and -- and the reason for that is --
19 is because, you know, that person would have
20 been a railroad employee in 1925. They would
21 have been doing the customary work of the
22 railroad.

23 And so, under the test for what counts
24 as a railroad employee that's been in place for
25 a hundred years and is now also employed to --

1 applied to airline employees, that person would
2 also be exempt.

3 JUSTICE KAGAN: How about the people
4 who design or manage the website for Southwest?

5 MS. BENNETT: I think that's a more
6 difficult question, and -- and I will tell you
7 that this question actually does come up
8 occasionally under the Railway Labor Act today.

9 You know, I am aware of one decision
10 at least that says that that's really integral
11 to the transportation of passengers. And so
12 it's possible that that person is an airline
13 employee. If they are, it's really the outer
14 edge of what's at -- in this exemption.

15 Cargo loaders, on the other hand, are
16 the core of what's at this exemption. And --
17 and not only are they -- do we know that they
18 were railroad employees at the time, we also
19 know that they were engaged in commerce at the
20 time.

21 So we not only have -- you know, Mr.
22 Dvoretzky pointed out that Burtch is a FELA
23 case. But I want to note that Burtch does not
24 articulate new principles in the context of
25 FELA. Burtch is relying on, you know, dozens of

1 cases of this Court that all held that
2 transportation has already begun once it's in
3 the hands of the carrier and it doesn't end
4 until it's delivered.

5 It's also relying on cases of this
6 Court that hold that loading and unloading
7 specifically count. So you have Gloucester
8 Ferry, you have Hays, you have a number of these
9 cases in a number of different contexts, all of
10 which hold that loading and unloading
11 specifically are -- are -- people who do that
12 are engaged in commerce.

13 And what Southwest argues is that,
14 well, those cases aren't under this particular
15 statute. But, of course, they're not. This
16 particular statute didn't exist. But this --
17 but Congress, knowing how this Court had
18 interpreted the phrase "engaged in interstate
19 commerce," "engaged in foreign commerce,"
20 nevertheless used those words.

21 And -- and I want to -- I want to note
22 that, you know, Southwest presents the virtue of
23 its test as a bright-line rule. That's
24 essentially Southwest's argument, is that their
25 test is this bright-line rule that will be

1 easily administered.

2 And I think it's worth noting that, in
3 fact, in many cases, that's not true. And it's
4 not just a problem in these novel industries,
5 like Lyft or Uber, which I will say I don't know
6 how Southwest's test would apply there because
7 would it be a percentage of the rides, for
8 example? Would it be a percentage of the
9 people? Would the class of workers be Lyft
10 drivers? Would it be Uber drivers?

11 But even in heartland classes of
12 workers, heartland categories of workers on the
13 railroad and the airline, it is difficult to
14 know how to apply Southwest's test.

15 So, if you take, for example,
16 loadmasters, that's a really key airline
17 function for freight airlines, and what they do
18 is they balance the load of the air -- of the
19 airplane so it doesn't fall out of the sky, and
20 sometimes they're at airports and sometimes they
21 ride on the plane.

22 And sometimes the same person does
23 both. Sometimes those are different people.
24 It's not clear to me on Southwest's test what
25 the category of workers would be. Would it be

1 all loadmasters? Would it be loadmasters on a
2 plane? Would it be Southwest loadmasters?

3 It's not clear to me how you would
4 know on their test whether or not as a class
5 those people are on a vessel engaged in crossing
6 state lines, rather, would it be a percentage, a
7 percentage of each person?

8 And -- and that's true for a number of
9 categories. I haven't just cherry-picked, you
10 know, one particular group of workers that is
11 difficult -- that's particularly difficult.

12 Particularly on the railroad at the
13 time, there were a number of workers who were on
14 and off the train, you know, flagmen, for
15 example, people warning of danger. Some worked
16 on the train. Some didn't. Baggage handlers,
17 some worked on the train and some didn't.

18 And so there are a number of
19 categories of workers that actually would be
20 quite difficult under Southwest's test, and I --
21 and I recognize --

22 JUSTICE ALITO: Would you just say
23 succinctly what your test is?

24 MS. BENNETT: Sure.

25 JUSTICE ALITO: What test you would

1 recommend that we adopt?

2 MS. BENNETT: Sure. Airline employees
3 -- it's the same test that has been in effect in
4 the railroad industry for over a hundred years.
5 Airline employees are those who do the work of
6 the airline. They do the customary work
7 directly contributory to the airline's
8 transportation function.

9 JUSTICE KAGAN: And what's the
10 narrower test if we decide to go that route?

11 MS. BENNETT: Sure. So the narrower
12 test would simply be a -- a class of workers
13 that is engaged -- would be understood to be
14 engaged in foreign or interstate commerce, which
15 at the very least would be people who handle
16 goods while they're in commerce.

17 So anybody who handles goods while
18 they're in transportation from the -- the start
19 of the transportation, when they're given to the
20 carrier, to the end.

21 JUSTICE ALITO: So any -- would --
22 would -- would your test apply to any company
23 that engages in the -- the shipment or
24 transportation of people or goods across state
25 lines?

1 MS. BENNETT: I -- I --

2 JUSTICE ALITO: What -- to what
3 industries would it apply besides the airlines?

4 MS. BENNETT: So it would certainly
5 apply -- you know, I can think of two, I think,
6 major industries that -- that -- that are the
7 same, trucking and -- and bussing. And I -- I'm
8 not -- I can't think of any other industries.
9 Perhaps space travel will take off, and it would
10 apply to that industry. But it -- but it really
11 is, you know, still a narrow test.

12 JUSTICE ALITO: What about a company
13 that ships most of its products across state
14 lines to consumers, let's say?

15 MS. BENNETT: Would it work to --
16 would it apply to the --

17 JUSTICE ALITO: Yeah.

18 MS. BENNETT: So -- so what I would do
19 to answer that question is to look at whether
20 those people would have been engaged in commerce
21 in the same way as railroad employees and seamen
22 at the time.

23 And -- and if you look, in 1925, you
24 know, railroad employees and seamen were really
25 people who worked in industries that shipped

1 goods for the public. So, if we're talking
2 about a company that is shipping its own goods,
3 those people likely wouldn't have been railroad
4 employees or seamen at the time. And,
5 similarly, those people likely won't -- wouldn't
6 be exempt from the statute here.

7 And so -- and so, really, this is
8 still quite a narrow category. You know,
9 "transportation workers" is a narrow class --
10 category of workers, and "workers" themselves is
11 a narrow category of the transactions to which
12 the FAA applies.

13 CHIEF JUSTICE ROBERTS: What about --
14 what about workers for a company like Amazon or
15 something who are obviously shipping goods
16 across state lines? It doesn't sound like a
17 narrow group to me.

18 MS. BENNETT: Well, so I -- I -- you
19 know, I think the way I would look at that is to
20 -- is to look at what they're doing and to see,
21 again, whether that is similar to what seamen
22 and railroad employees did in 1925. So --

23 CHIEF JUSTICE ROBERTS: Well, they're
24 picking -- they get products and put them in a
25 box and then ship them somewhere. That's what

1 they're doing.

2 MS. BENNETT: Sure. So -- so,
3 certainly, you know, retail warehouse workers in
4 1925 would not have been seamen or railroad
5 employees. The only warehouse workers that
6 would have been seamen and railroad employees
7 were people who worked for the transportation
8 company itself who were handling the goods in
9 the warehouse while it was on its journey.

10 So -- so, to -- to the extent that --

11 CHIEF JUSTICE ROBERTS: Well, I
12 thought -- I mean, I meant to hypothesize people
13 who were handling goods in the warehouse and
14 getting them into interstate transportation.
15 They would not be covered or --

16 MS. BENNETT: So -- so the -- I think
17 it would depend on whether they were, you know,
18 retail warehouse workers, which -- which
19 certainly wouldn't have been -- wouldn't have
20 been railroad employees or seamen or engaged in
21 that way, or -- or whether they are, you know,
22 workers akin to the railroad workers at the
23 freight warehouse.

24 And --

25 CHIEF JUSTICE ROBERTS: Oh, so UPS and

1 FedEx and all those things would be covered?

2 MS. BENNETT: That's right. And those
3 people would have been railroad employees in
4 1925. There are at least six decisions of the
5 Railroad Labor Board holding that those people
6 do the customary work of the railroad.

7 It was integral to railroad
8 transportation, just as it is -- is to trucking
9 and plane transportation today, that there is a
10 place for the -- the packages and the shipments
11 to be dropped off and to -- to be stored before
12 they go on their journey.

13 It's integral -- you know, it's a
14 place where they -- they rest in between
15 different legs of their journey. Justice Thomas
16 mentioned intermodal transportation. The
17 freight warehouse was integral to that too.

18 And so, certainly, to the extent that
19 we're talking about, you know, a warehouse that
20 is in the middle of -- of the goods journey,
21 those people would have been railroad employees.

22 JUSTICE BREYER: How -- how do you
23 distinguish -- trucking is in -- you say
24 trucking is in the exemption.

25 MS. BENNETT: Yes, Your Honor.

1 JUSTICE BREYER: Okay. A company does
2 just like the trucking, but they have other
3 parts, and they do their own shipping. That's
4 Amazon. So how -- how -- where -- where -- how
5 does that work?

6 MS. BENNETT: So the way I would
7 address that question --

8 JUSTICE BREYER: And not just Amazon.
9 I mean department stores, dozens.

10 MS. BENNETT: Sure. So -- so I think
11 those people are likely not exempt, and -- and
12 here's why. There was a -- this question came
13 up in 1925, and it usually came up in the form
14 of is this railroad actually a railroad
15 regulated under the Interstate Commerce Act or
16 the Transportation Act, and there was a
17 distinction that was made between railroads that
18 shipped things for the public, and I think
19 that's how we normally understand seamen and
20 railroad employees, and say a coal's internal --
21 a coal company's internal railroads.

22 Coal companies had a lot of railroads
23 and they would take your coal from the place
24 where you mined it to the place where you
25 refined it. And -- and those were not really

1 understood to be railroads in -- in quite the
2 same way, and I don't think those employees
3 would have understood to be railroad employees.

4 And so what we would look at in a
5 company like that is to see, you know, what are
6 those workers doing? Are they really doing the
7 work that is like seamen and railroad employees
8 of -- of shipping goods for the public, or are
9 they really doing their own company's sort of
10 internal work? And that's how I would analyze
11 that question.

12 JUSTICE ALITO: I mean, your argument
13 seems to be -- to shift back and forth. If we
14 look at employees who are engaged in interstate
15 and foreign commerce as we understand those
16 terms today, wow, that includes just about every
17 commercial activity.

18 On the other hand, if we look at
19 seamen, that's pretty narrow, and it may or may
20 not include stevedores. Let's say it -- you
21 know, you throw in stevedores.

22 I don't see how it includes the person
23 in the office who sells the ticket to take the
24 Queen Mary across the Atlantic, unless -- so,
25 unless that's surplusage, working in interstate

1 and foreign commerce has to have a narrower
2 meaning.

3 MS. BENNETT: I don't think that's
4 right, Your Honor, for two reasons.

5 First, it's not surplusage because, as
6 Circuit City tells us, you know, what seamen and
7 railroad employees are doing is saying the way
8 in which you're engaged in commerce is the
9 transportation branch.

10 And so -- and so that serves a
11 function. If it just said, for example --

12 JUSTICE ALITO: If everybody who
13 worked for the Cunard line was covered, what
14 would be the point of -- or that's not a --
15 that's a passenger shipping line.

16 Some commercial shipping line,
17 everybody who worked for that was covered, what
18 would be the point of specifying that seamen are
19 covered?

20 MS. BENNETT: You -- well, a couple
21 reasons. One, if you only had one category, it
22 would be actually very difficult to tell what
23 the commonality was.

24 If it just said railroad employees and
25 any other class of workers, that would make it

1 much more difficult to understand, you know, how
2 that category reflected the -- the other classes
3 of workers we're identifying. And this Court
4 has repeatedly said that we don't apply ejusdem
5 generis if you only have one category.

6 JUSTICE ALITO: Suppose it said
7 seamen, railroad engineers, and others engaged
8 in interstate or foreign commerce.

9 Would everybody who worked for the
10 railroad be covered?

11 MS. BENNETT: No, and the -- I -- I --
12 or potentially not. That would be a much more
13 difficult question, and the reason is what that
14 would be -- that could be indicating to us that
15 we're going job by job.

16 Here, instead, we have seamen and
17 railroad employees, the two classes of workers
18 that had preexisting dispute resolution statutes
19 at the time and were -- and were -- were
20 commonly understood categories.

21 And so -- and so the way in which
22 they're engaged in commerce and the way in which
23 they're similar is that they're -- as a class,
24 the seamen are the people who do the work of the
25 shipping industry. As a class, railroad

1 employees are people who do the work of the
2 railroad industry.

3 And so, if you had railroad engineers,
4 that would shed some doubt on that linkage, and
5 it might suggest that, in fact, potentially,
6 we're looking for a more job-specific approach.

7 Here, it doesn't say seamen, you know,
8 flagmen, railroad conductors. It says seamen
9 and railroad employees. And so we're talking
10 about the classes of workers that are specific
11 to the industry.

12 JUSTICE KAGAN: So would -- would --
13 assume two things for me.

14 MS. BENNETT: Sure.

15 JUSTICE KAGAN: Assume that the term
16 "railroad employees" does include baggage
17 handlers --

18 MS. BENNETT: Mm-hmm.

19 JUSTICE KAGAN: -- so you win that
20 one. But assume "seamen" does not include
21 stevedores, so Mr. Dvoretzky wins that one. And
22 I think he said when this came up, well, then
23 it's one on each side. It doesn't tell you very
24 much of anything.

25 How would -- if -- if you make those

1 two assumptions, how should we approach ramp
2 supervisors?

3 MS. BENNETT: So, if you make those
4 two assumptions, then what we know is that the
5 commonality between seamen and railroad
6 employees cannot be loading and unloading.
7 That's all that tells us, is seamen excludes
8 stevedores.

9 And -- and what we do know that the
10 commonality is, is that they both do the work of
11 the industry. And so, if you look at cargo
12 loaders, they do exactly the same thing.

13 And -- and what the statute itself
14 tells us is that the commonality we're looking
15 for is the commerce-related commonality. So, at
16 the very least, when we're talking about a group
17 of workers who this Court had repeatedly said
18 are themselves engaged in commerce, then -- then
19 it would -- and not only that this Court has
20 said they're engaged in commerce, that they're
21 engaged in commerce just in the same way that
22 seamen are, then we know that at the very least,
23 these people are in the residual clause even if
24 they're not seamen or railroad employees.

25 If what we're looking for is a class

1 of workers engaged in commerce like seamen, like
2 railroad employees, well, this Court has already
3 answered that question in Puget Sound, where it
4 said that stevedores are engaged in interstate
5 commerce just like the crew of a ship.

6 JUSTICE GORSUCH: I have a historical
7 question you --

8 MS. BENNETT: Sure.

9 JUSTICE GORSUCH: -- you -- you
10 probably know the answer to.

11 In -- in 1925, there were alternative
12 dispute resolution mechanisms that Congress had
13 approved for seamen and railroad workers.

14 Did the railroad workers, one, cover
15 anyone who worked for the railroad, or was it
16 more limited and, if so, how?

17 MS. BENNETT: It was limited by -- in
18 exactly the way -- in exactly the test we're
19 proposing applies here. In Railroad Labor Board
20 Decision 982, which was cited in New Prime, what
21 the Railroad Labor Board said is, by "railroad
22 employees," what the -- what Congress must have
23 meant is people who do the "customary work
24 directly contributory to the operation of the
25 railroad."

1 JUSTICE GORSUCH: Right.

2 MS. BENNETT: And -- and we know what
3 that means because we have the Railroad Labor
4 Board's orders saying who was in and who wasn't
5 in that -- subsequent to that decision.

6 JUSTICE GORSUCH: The general counsel
7 wasn't in it.

8 MS. BENNETT: The general counsel
9 would not have been. I'm not aware of any order
10 even discussing that because it was well
11 understood that executives would not have been
12 in it. But we do know that cargo loaders are in
13 it. There are six decisions after that decision
14 saying "cargo loaders."

15 We know that, you know, people on the
16 train were in it. We know that people in the
17 yard were -- were in, and we know that people in
18 the station were in. On the other -- who at
19 least -- who worked -- did the transportation
20 work of the -- of the railroad.

21 Yes, Your Honor?

22 JUSTICE KAVANAUGH: Justice Kagan's
23 question raises, I guess, an oddity in the
24 statute here, which I think there are going to
25 be oddities no matter what, but -- which is, if

1 "seamen" doesn't include stevedores, but
2 "railroad workers" does include the people who
3 load and unload, that stevedores nonetheless in
4 your view come in through the residual clause,
5 is that accurate?

6 MS. BENNETT: That's accurate. And we
7 know that Congress didn't mean to limit the
8 exemption to people who actually were seamen or
9 actually were railroad employees because that's
10 why they included the residual clause.

11 JUSTICE KAVANAUGH: That -- that's
12 correct, although it is a little odd to have the
13 seamen as a category and then say actually that
14 doesn't include everyone who's going to be
15 covered within the shipping context, I guess.

16 MS. BENNETT: Potentially, but, again,
17 seamen and railroad employees were the people
18 who had dispute resolution statutes at the time.
19 Stevedores did not.

20 And I'll note that stevedores -- you
21 know, many stevedores were railroad employees.
22 Again, if you look at the wage orders of the
23 Railroad Labor Board, you'll see stevedores
24 listed there.

25 So another potential reason that

1 stevedores aren't listed is because they're, you
2 know, cross-cutting a class of workers, and so
3 that would actually make it difficult to
4 specifically list them. It would be a bit
5 confusing to have listed them.

6 And so, for that reason too, it makes
7 perfect sense that Congress, you know,
8 specifically identified the classes that
9 themselves had dispute resolution schemes and
10 left everybody else to the residual clause.

11 And -- and I just -- to wrap up, I
12 just, you know, want to note that Southwest has
13 offered no evidence at all from any time period
14 either about what the phrase "engaged in
15 interstate commerce" means or the phrase "seamen
16 or railroad employees" means to show that these
17 people who are -- that these -- rather, these
18 words are limited to people who are aboard a
19 vessel crossing state lines.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas, any questions?

24 JUSTICE THOMAS: No questions, Mr.
25 Chief Justice.

1 CHIEF JUSTICE ROBERTS: Justice
2 Breyer?
3 Justice Alito?
4 Justice Gorsuch, anything?
5 Justice Kavanaugh?
6 Thank you, counsel.
7 MS. BENNETT: Thank you.
8 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky,
9 rebuttal?
10 REBUTTAL ARGUMENT OF SHAY DVORETZKY
11 ON BEHALF OF THE PETITIONER
12 MR. DVORETZKY: Thank you, Mr. Chief
13 Justice. A few points in rebuttal.
14 First of all, Ms. Bennett and I agree,
15 of course, that "engaged in foreign or
16 interstate commerce" has to mean engaged in the
17 same way as seamen and railroad employees.
18 With respect to seamen, seamen as a
19 class are not those who did the work of the
20 maritime industry. They did a particular
21 function within the maritime industry, but it's
22 incorrect to -- to say that the commonality that
23 can be extrapolated to the residual clause is
24 simply doing the work of the industry.
25 With respect to railroad employees, I

1 want to give a few specific examples of how
2 railroad employees were understood at the time
3 more -- more narrowly than what Ms. Bennett is
4 suggesting.

5 Justice Gorsuch, you asked about the
6 Transportation Act. Under the Transportation
7 Act, it wasn't all railroad employees. There's
8 a decision from 1922 of the Railway Labor Board
9 in which train dispatchers were excluded from
10 the scope of the Transportation Act because they
11 had a supervisory role, much like, by analogy,
12 ramp agent supervisors have a supervisory role.

13 So even the Transportation Act did not
14 extend all the way to include everybody who in
15 some way contributed to the work of the
16 railroad.

17 The Hours of Service Act from 1907
18 applied by its terms to persons actually engaged
19 in or connection with the movement of any train.
20 That's consistent with our test having to do
21 with being on the -- the plane or the -- or the
22 ship or the train.

23 The Erdman Act and the Newlands Act
24 likewise, that was from 19 -- from 1898,
25 referred to people who served on railcars. And

1 so railroad employees, alongside seamen, ought
2 to be understood narrowly in the way that --
3 that we're suggesting.

4 With respect to administrability, our
5 test is clear. Does the class of workers
6 predominantly work on the plane or the train?
7 The way that would translate to the airline
8 industry is that -- is a distinction between
9 flight crew and ground crew. Flight crew are
10 analogous to seamen. Ground crew are not.

11 That approach is consistent with
12 Circuit City. It's a -- it's a clear rule that
13 will avoid extensive litigation over the scope
14 of the Section 1 exemption. It's also
15 consistent with purpose. You know, Ms. Bennett
16 suggested that the entire trucking industry
17 would be exempt. Of course, there is no federal
18 arbitration regime for the entire trucking --
19 for the -- for the entire trucking industry.
20 And so the Section 1 exemption ought not be
21 construed in a way that creates a gaping hole
22 undermining Congress's purposes in Section 2.

23 The -- the right approach for this
24 Court to follow here, I think, is the one that
25 then Judge Barrett adopted in Grubhub. Her test

1 is that transportation workers are those who are
2 actually engaged in the movement of goods in
3 interstate commerce.

4 It's not enough simply to have a
5 connection to the movement -- connection to the
6 movement of the goods. It's not a goods-focused
7 inquiry under the statute. The statute under
8 the inquiry -- the -- the inquiry under the
9 statute has to do with actually moving the
10 goods.

11 And, again, from -- from Justice
12 Barrett's opinion, the class of workers must
13 themselves be engaged in the channels of foreign
14 or interstate commerce and in the way that
15 seamen in particular were and that railroad
16 employees properly understood in this context
17 were.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:51 p.m., the case
21 was submitted.)

22

23

24

25

Official

<p>1 1 [35] 3:11 4:14 8:6 9:10 11: 20,20 12:22 13:16 14:1 15: 10 16:17 19:20,23 20:17 21:23 22:5,11,17 26:18,22 27:8,11,12,17 33:21,23 34: 21,23 35:10,23 36:4,9 38: 15 73:14,20 1's [1] 3:17 11:43 [2] 1:15 3:2 12:51 [1] 74:20 1898 [1] 72:24 19 [1] 72:24 1907 [1] 72:17 1922 [1] 72:8 1924 [3] 18:10 21:11,15 1925 [16] 14:6 26:25 39:13 41:7,13 43:20 45:6,15 48: 19 51:20 57:23 58:22 59:4 60:4 61:13 67:11</p> <hr/> <p>2 2 [4] 27:22 34:8 41:15 73: 22 2022 [1] 1:11 21-309 [1] 3:4 28 [1] 1:11</p> <hr/> <p>3 3 [1] 2:4 300 [1] 34:8 38 [1] 2:7</p> <hr/> <p>7 71 [1] 2:10</p> <hr/> <p>9 982 [1] 67:20</p> <hr/> <p>A a.m [2] 1:15 3:2 ABM [2] 19:15 21:2 aboard [3] 38:25 47:24 70: 18 above-entitled [1] 1:13 absolutely [2] 26:6 45:2 accept [1] 48:17 accountant [2] 14:18,25 accurate [2] 69:5,6 achieve [1] 27:14 acknowledging [2] 14:17 25:16 across [10] 3:15 8:5 31:1,1, 13 34:16 56:24 57:13 58: 16 62:24 Act [19] 8:24 13:11 14:8,9,9 16:13 25:8 48:24 49:14 52: 8 61:15,16 72:6,7,10,13,17, 23,23 actively [1] 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