

No. 20-1077

In The
Supreme Court of the United States

—◆—
AMAZON.COM, INC.,
and AMAZON LOGISTICS, INC.,

Petitioners,

v.

BERNARD WAITHAKA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

—◆—
SUPPLEMENTAL BRIEF FOR THE PETITIONERS

—◆—
RICHARD G. ROSENBLATT
MORGAN, LEWIS &
BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Petitioners

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
SUPPLEMENTAL BRIEF FOR THE PETI- TIONERS	1
CONCLUSION.....	4

TABLE OF AUTHORITIES

	Page
CASES	
<i>Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.</i> , 140 S. Ct. 1198 (2020)	3
<i>Eastus v. ISS Facility Servs., Inc.</i> , 960 F.3d 207 (5th Cir. 2020).....	1, 2
<i>Rittmann v. Amazon.com, Inc.</i> , 971 F.3d 904 (9th Cir. 2020)	2, 3
<i>Saxon v. Sw. Airlines Co.</i> , ___ F.3d ___, 2021 WL 1201367 (7th Cir. Mar. 31, 2021)	1, 2, 3
<i>Saxon v. Sw. Airlines Co.</i> , No. 19-cv-403, 2019 WL 4958247 (N.D. Ill. Oct. 8, 2019).....	1
STATUTES	
Federal Arbitration Act, 9 U.S.C. 1 <i>et seq.</i>	1, 2, 3
Federal Employers’ Liability Act, 45 U.S.C. 51 <i>et seq.</i>	2, 3

**SUPPLEMENTAL BRIEF
FOR THE PETITIONERS**

Petitioners submit this brief under Supreme Court Rule 15.8 to notify the Court of *Saxon v. Southwest Airlines Co.*, ___ F.3d ___, 2021 WL 1201367 (7th Cir. Mar. 31, 2021). *Saxon* confirms, and magnifies, the circuit split over whether intrastate transportation workers are exempt from the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*

The Seventh Circuit held in *Saxon* that loading and unloading airplanes counts as interstate commerce under the exemption. 2021 WL 1201367, at *1, *8. In so holding, it refused “to follow the Fifth Circuit,” *id.* at *6, which has held that “loading and unloading airplanes” is *not* interstate commerce. *Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207, 212 (5th Cir. 2020); see Pet. 12-13.

The *Eastus* court tied that holding to the trial court ruling the Seventh Circuit just reversed. 960 F.3d at 211 (citing *Saxon v. Sw. Airlines Co.*, No. 19-cv-403, 2019 WL 4958247, at *1 n.2, *7 (N.D. Ill. Oct. 8, 2019)). In the Fifth Circuit’s view, airline “workers who load or unload goods that *others* transport in interstate commerce” are not exempt from the FAA because they are not “engaged in an aircraft’s actual movement in interstate commerce.” *Id.* at 212 (emphasis added). Their “[l]oading or unloading” simply “prepares the goods for or removes them from transportation” that others perform. *Ibid.* The court also stressed that the FAA expressly exempts “seamen,” a category that excludes the

land-based “longshoremen” who load and unload ships. *Id.* at 211-212. Because the FAA exempts “seamen,” it does not exempt “longshoremen” or similar sorts of workers. *Ibid.*

In *Saxon*, the Seventh Circuit could not reconcile its holding with *Eastus*. To be sure, it noted that the *Eastus* worker had conceded that longshoremen are not exempt from the FAA. *Saxon*, 2021 WL 1201367, at *6. But *Eastus* did not turn on the worker’s willingness to concede that point. On the contrary, the Fifth Circuit drew its own conclusion that the exemption “does not apply to longshoremen.” *Eastus*, 960 F.3d at 211. That is why the court not only mentioned the concession but called it a “proper[.]” one. *Id.* at 212. Nor is there merit in *Saxon*’s suggestion that the two airline workers differ in some relevant way. Both workers supervised other employees and personally handled luggage as needed. See *Saxon*, 2021 WL 1201367, at *1; *Eastus*, 960 F.3d at 208. And both squarely fall within the Fifth Circuit’s holding that the exemption does not cover “loading and unloading airplanes.” *Eastus*, 960 F.3d at 212.

The court simply disagreed with *Eastus* because it “addressed little of the history” that the Seventh Circuit deemed important. *Saxon*, 2021 WL 1201367, at *6. Much of that “history,” however, involves the Federal Employers’ Liability Act (FELA), ch. 149, 35 Stat. 65 (1908). See *Saxon*, 2021 WL 1201367, at *6-7. While some circuits use FELA precedent to construe the FAA exemption, petitioners have shown why that practice is unsound. Pet. 18-20; see also *Rittmann v.*

Amazon.com, Inc., 971 F.3d 904, 931-933 (9th Cir. 2020) (Bress, J., dissenting), cert. denied, No. 20-622 (Feb. 22, 2021). So the Fifth Circuit was right to ignore FELA.

But in any event, such stark disagreements between the circuits call out for this Court’s resolution. Otherwise, lower courts—and the countless parties who bargain for an alternative to litigation—will continue to find it is no “easy task” to apply the exemption under the current state of the law. *Saxon*, 2021 WL 1201367, at *1.

And this case is an excellent vehicle. See Pet. 22. It is a better vehicle, in fact, than *Saxon* would be if the unsuccessful party there were to seek this Court’s review. Because Justice Barrett sat on the original Seventh Circuit panel, see *Saxon v. Sw. Airlines Co.*, No. 19-3226 (7th Cir. July 8, 2020), ECF No. 36, it is doubtful the full Court could consider that case. Cf. *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., respecting the denial of certiorari) (“Because the full Court is unable to hear this case, it makes a poor candidate for our review.”).

After *Saxon*, there is no denying the split between the circuits. They fundamentally disagree over how to tell when intrastate workers are exempt from the FAA. By any measure, that is an exceptionally important question, and one this Court has never addressed. See Pet. 20-21. It should do so here.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RICHARD G. ROSENBLATT
MORGAN, LEWIS &
BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

APRIL 2021