No. 21-309

In The
Supreme Court of the United States

SOUTHWEST AIRLINES CO.,

Petitioner,

v.

LATRICE SAXON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR AMAZON.COM, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE*

Amicus curiae offers a wide selection of products for sale through its website Amazon.com, mobile applications, and physical retail locations. One of the ways it fulfills customer orders is by contracting with independent providers of local delivery services. These contracts include arbitration agreements, which have prompted significant litigation over the statutory provision now before the Court, Section 1 of the Federal Arbitration Act (FAA). See 9 U.S.C. 1.

Two courts of appeals have found amicus's agreements exempt from the FAA and unenforceable. *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020), cert. denied, 141 S. Ct. 2794 (2021), reh'g denied, 141 S. Ct. 2886 (2021); *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), cert. denied, 141 S. Ct. 1374 (2021). Like the Seventh Circuit below, the First and Ninth Circuits hold that the FAA's conception of engaging in foreign or interstate commerce encompasses more than transporting goods or passengers across national or state lines. See Pet. App. 10a; *Waithaka*, 966 F.3d at 13; *Rittmann*, 971 F.3d at 909. Also like the court below, these courts mistakenly rely on this Court's century-old interpretation of now-superseded language in the Federal Employers'

* In accordance with this Court's Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for both parties have provided written consent to the filing of this brief.

Liability Act (FELA). Pet. App. 16a-19a; *Waithaka*, 966 F.3d at 19-23; *Rittmann*, 971 F.3d at 912-913.

Amicus has a strong interest in correcting these misconceptions about the FAA exemption. The *Waithaka* and *Rittmann* cases remain pending putative class and collective actions when plaintiffs in both cases should have completed individual arbitrations long ago. In these cases and many others, amicus's efforts to enforce its arbitration agreements have spawned costly motions practice and appeals—just to determine where the disputes should proceed. See, *e.g.*, *Waithaka*, 966 F.3d 10; *Rittmann*, 971 F.3d 904; *Harper* v. *Amazon.com Servs., Inc.*, 12 F.4th 287 (3d Cir. 2021); *Champion* v. *Amazon.com LLC*, No. 18-cv-5222 (N.D. Cal. Sept. 12, 2019), vacated and remanded, No. 20-17482 (9th Cir. Jan. 21, 2021); *Jackson* v. *Amazon.com, Inc.*, No. 20-cv-2365, 2021 WL 4197284 (S.D. Cal. Sept. 15, 2021), appeal filed, No. 21-56107 (Oct. 13, 2021); *Miller* v. *Amazon.com, Inc.*, No. 21-cv-204, 2021 WL 5847232 (W.D. Wash. Dec. 9, 2021), appeal filed, No. 21-36048 (Dec. 22, 2021).

This Court recognizes that "complexity and uncertainty" around the enforceability of an arbitration agreement are antithetical to the goals of arbitration. *Cir. City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001). But that is what amicus and many other contracting parties face, day in and day out, under the status quo. Based on its experience litigating these questions, amicus urges the Court to provide clear and definitive guidance about the scope of the exemption. Lower courts and contracting parties need simple and certain

rules here—not just for airplane cargo loaders, but for transportation workers of all sorts.

SUMMARY OF ARGUMENT

Respondent portrays this case as presenting a "single question" about "workers who load and unload interstate cargo." Br. in Opp. 13. That is far too narrow a way to look at it. Although two courts of appeals have addressed that fact pattern, there has been a boom in litigation over the FAA exemption during the past few years. Courts across the country have struggled to apply the exemption's residual clause to a wide range of workers in the transportation industries.

They have often reached diverging results. The Fifth and Seventh Circuits, of course, split over airplane cargo loaders and unloaders. Separately, the Eleventh Circuit parted ways from the First and Ninth Circuits over local drivers like amicus's contractors, who make intrastate deliveries of goods shipped in from out of state. Some courts have disagreed over rideshare drivers for companies like Uber and Lyft. But there have also been many cases with unique fact patterns. All this litigation consumes enormous judicial and party resources. The Court can, and should, end it by adopting a workable test for separating the exempt from the non-exempt. Without such a test, confusion and litigation over threshold arbitrability issues will continue indefinitely, as roles in the transportation sectors of our economy continue to evolve.

Fortunately, there is a solution. This Court has already recognized that the FAA exemption is confined to transportation workers. When one turns from this starting point to the critical statutory language, "class of workers engaged in foreign or interstate commerce," 9 U.S.C. 1, it becomes clear that engaging in "foreign or interstate commerce" is limited to those who are engaged to perform foreign or interstate transportation—transportation that inherently crosses national or state boundaries. See *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337, 1350 (11th Cir. 2021); *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting). Any other interpretation reads "foreign or interstate" right out of the statute.

This interpretation yields a clear and workable test. For a class of workers to be exempt from the FAA, foreign or interstate commerce must be the very thing that the class of workers are engaged to do and in fact do. It must be not merely incidental to their work, but a central part of it. See, *e.g.*, *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020) (Barrett, J.) ("To show that they fall within this exception, the plaintiffs had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong."). Because "foreign or interstate commerce" is limited to cross-boundary transportation, that is the type of foreign or interstate commerce that must be central to—and the very aim of—what the class of workers do. And because courts widely recognize that classes of workers, like the enumerated classes of seaman and railroad employees, are defined at the nationwide level to avoid

regional differences based on where the workers operate, the residual clause requires transporting goods or people long distances. Interstate transportation workers like long-haul truckers are exempt, but local transportation workers like delivery drivers or airplane cargo loaders are not.

Although respondent tries to claim the mantle of the statute's ordinary meaning, she asks the Court to go beyond the text of the FAA. She stakes much of her case on the test this Court developed for FELA, a remedial statute that provides relief for injured railroad workers. But there are three glaring problems with this strategy. First, significant textual differences between the two statutes make the FELA case law a poor source of guidance. Second, the Court expressly based its FELA test on FELA's purposes, which are radically different from the FAA exemption's purposes. And third, the FELA test was hopelessly unpredictable—so much so that Congress rewrote the statute to ditch it. "This is not what we should aspire to for the FAA." *Rittmann*, 971 F.3d at 933 (Bress, J., dissenting).

The Court should reject respondent's efforts to broaden the FAA exemption through off-point and defunct case law. It should instead affirm the most natural reading of the statute, limit the residual clause to long-distance transportation workers, and bring much-needed clarity to this issue.

ARGUMENT

A. Contracting Parties Throughout Many Industries Need Clear Guidance From The Court.

While at one level this case raises questions about loading and unloading airplane cargo, its importance stretches much further. Litigation over the meaning of the exemption has skyrocketed in the three years since this Court held that the exemption applies to independent contractors as well as employees. *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539-544 (2019). By amicus's estimate, based on a review of cases since *New Prime* that cite *Circuit City*, there have been roughly 100 federal and state court rulings addressing the exemption over this three-year period.

In *New Prime* itself, the parties agreed that the interstate truck driver there "qualifie[d] as a 'worker[ ] engaged in * * * interstate commerce.'" *Id.* at 539 (quoting 9 U.S.C. 1). But many other parties in many other cases have disagreed over the proper application of this phrase. A survey of the current state of confusion shows why this Court's guidance is so important.

1. Many courts have disagreed over the proper way to categorize particular classes of workers. This case provides an example involving airplane cargo loaders. Compare *Eastus* v. *ISS Facility Servs., Inc.*, 960 F.3d 207, 212 (5th Cir. 2020), with Pet. App. 21a. But the disagreements extend far beyond airport workers operating baggage trucks and conveyor belts.

Another important example involves drivers who use their personal vehicles to make local deliveries, within a specified metropolitan area, of goods that originated out of state. Courts sometimes call these workers "last-mile" or "final-mile" drivers. The First and Ninth Circuits addressed drivers who work through the Amazon Flex program. *Waithaka*, 966 F.3d at 14; *Rittmann*, 971 F.3d at 907. The Eleventh Circuit addressed drivers in the U.S. Pack network. *Hamrick*, 1 F.4th at 1340-1341. In all three cases, plaintiffs argued that because the delivered goods were in the "flow" or "stream" of interstate commerce, they were exempt whether or not the class of local delivery drivers ever cross national or state lines. *Waithaka*, 966 F.3d at 13, 22-23, 26; *Rittmann*, 971 F.3d at 915; *Hamrick*, 1 F.4th at 1343. The drivers' argument prevailed in the First and Ninth Circuits but lost in the Eleventh.

The First Circuit held that "last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers 'engaged in * * * interstate commerce,' regardless of whether the workers themselves physically cross state lines." *Waithaka*, 966 F.3d at 26. A divided Ninth Circuit panel followed suit. *Rittmann*, 971 F.3d at 915.

But the Eleventh Circuit took the opposite approach. *Hamrick*, 1 F.4th at 1349; see also *Nelson* v. *Gobrands, Inc.*, No. 20-cv-5424, 2021 WL 4262325, at *4 n.3 (E.D. Pa. Sept. 20, 2021) (noting the conflict between *Waithaka*, *Rittmann*, and *Hamrick*). It rejected the view that the "exemption is met by performing intrastate trips transporting items which had been

previously transported interstate." *Hamrick*, 1 F.4th at 1349 (quotation marks and alterations omitted). The court instead endorsed the *Rittmann* dissent, "requiring that the class of workers actually engages in the transportation of persons or property between points in one state (or country) and points in another state (or country)." *Id.* at 1350 (citing *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting)).

These appellate decisions are just the tip of the iceberg. Courts have had to address many types of transportation workers over the past few years. That includes drivers who deliver meals and other items from local restaurants, *Wallace*, 970 F.3d at 799, drivers who deliver groceries from local grocery stores, *e.g.*, *Young* v. *Shipt, Inc.*, No. 20-cv-5858, 2021 WL 4439398, at *1 (N.D. Ill. Sept. 27, 2021); *O'Shea* v. *Maplebear Inc.*, 508 F. Supp. 3d 279, 282 (N.D. Ill. 2020), and drivers who make same-day deliveries of items that, by necessity, are kept in stock locally, *Bean* v. *ES Partners, Inc.*, 533 F. Supp. 3d 1226, 1236 (S.D. Fla. 2021). Meanwhile, there have been a dozen or so cases addressing "ride-share" drivers, who use their own cars through companies like Uber and Lyft to drive passengers around town. See, *e.g.*, *Singh* v. *Uber Techs., Inc.*, No. 16-cv-3044, 2021 WL 5494439, at *7-8 (D.N.J. Nov. 23, 2021) (collecting cases), appeal filed, No. 21-3234 (Dec. 1, 2021). Although most courts have held that these drivers are not exempt from the FAA, a few have disagreed. See *ibid.*

2. Although courts often disagree over how to classify particular classes of workers, the more

fundamental disagreement is over what test to use. Courts generally agree, at the broadest level, that the exemption turns on whether foreign or interstate commerce is a central part of the workers' activities when those workers are viewed as a class. See, *e.g.*, *Wallace*, 970 F.3d at 800; *Hamrick*, 1 F.4th at 1346; *Capriole* v. *Uber Techs., Inc.*, 7 F.4th 854, 865 (9th Cir. 2021); *Cunningham* v. *Lyft, Inc.*, 17 F.4th 244, 252 (1st Cir. 2021). They also agree that the class is viewed at a nationwide level, so that the exemption does not vary based on accidents of geography. See, *e.g.*, *Capriole*, 7 F.4th at 862; *Osvatics* v. *Lyft, Inc.*, 535 F. Supp. 3d 1, 15 (D.D.C. 2021). Otherwise, the FAA would treat drivers who live and work in the District of Columbia, near state lines, differently than drivers who perform the same work in Dallas—contrary to the statute's objective of providing a consistent federal arbitration standard.

But despite agreement on these points, courts disagree strongly over what constitutes being engaged in foreign or interstate commerce in the first place. Two courts of appeals endorse petitioner's position and limit such engagement to personally moving goods or passengers across state or national lines. *Eastus*, 960 F.3d at 212; *Hamrick*, 1 F.4th at 1350-1351. But other courts of appeals, like the court below, have determined that a class of workers can engage in foreign or interstate commerce without moving goods or passengers across state or national borders. Pet. App. 10a-11a; *Waithaka*, 966 F.3d at 26; *Rittmann*, 971 F.3d at 915;

Palcko v. *Airborne Express, Inc.*, 372 F.3d 588, 593-594 (3d Cir. 2004).

The latter approach, however, creates serious line-drawing problems—as some of these courts recognize. *Waithaka*, 966 F.3d 10, 25-26; *Rittmann*, 971 F.3d at 918. In the Ninth Circuit, for example, an important factor when delivered items originate out of state is whether those items are in "continuous" transportation across multiple states. *Rittmann*, 971 F.3d at 916. If there is a meaningful break between the interstate and intrastate segments of the transit, the intrastate portion does not constitute interstate commerce. *Ibid.* But working out what such factors mean in practice requires case-by-case adjudication and has led to inconsistent and strange results.

One recent decision addressed the continuous-transportation issue in the context of newspaper delivery. *Reyes* v. *Hearst Commc'ns, Inc.*, No. 21-cv-3362, 2021 WL 3771782 (N.D. Cal. Aug. 24, 2021), appeal filed, No. 21-16542 (Sept. 20, 2021). The company argued that the newspaper transit was not continuous because local deliverers sort and repackage the papers after they arrived at in-state warehouses, ostensibly breaking any continuity between the interstate and intrastate legs of the shipment. *Id.* at *1-3. But the district court did not think that this break was enough, and so it held that the paper route was interstate commerce. *Id.* at *3.

Another defendant tried this argument in the context of food delivery. *Carmona* v. *Domino's Pizza, LLC*,

21 F.4th 627, 630 (9th Cir. 2021). Again, courts accept that drivers who deliver pizzas *from* Domino's Pizza to customers are not exempt from the FAA, even if they deliver prepackaged items, like bottled soft drinks, that have traveled from out of state. See, *e.g.*, *Simeon* v. *Domino's Pizza LLC*, No. 17-cv-5550, 2019 WL 7882143, at *3-4 (E.D.N.Y. Feb. 6, 2019); *Rittmann*, 971 F.3d at 916; *Wallace*, 970 F.3d at 802. But the question in *Carmona* was about drivers who make deliveries *to* Domino's Pizza from in-state supply centers or warehouses. 21 F.4th at 628-629. The company argued that these intrastate deliveries were not interstate commerce because warehouse employees would "reapportion, weigh, package, and otherwise prepare the goods" for local delivery and "transformed" raw materials into new items like pizza dough. *Id.* at 628, 630. But not even that was enough to break the continuity of interstate transportation, and the court held that these intrastate drivers were exempt from the FAA. *Id.* at 630.

So under current Ninth Circuit doctrine, if a class of workers deliver certain transformed items (pizzas) with untransformed items (bottled drinks) from a pizzeria to a residence, they are not engaged in interstate commerce. But if a class of workers deliver other transformed items (pizza dough) with other untransformed items (mushrooms) from a warehouse to a pizzeria, they are engaged in interstate commerce. What will happen in the next case is anybody's guess.

In contrast, a break-in-continuity argument succeeded before the Ninth Circuit in *Capriole*. The Uber drivers in that case, citing *Rittmann*, argued that

passengers picked up or dropped off at airports were in continuous transit across state lines. *Capriole*, 7 F.4th at 863. But the court found that "even when transporting passengers to and from transportation hubs as part of a larger foreign or interstate trip, Uber drivers are unaffiliated, independent participants in the passenger's overall trip, rather than an integral part of a single, unbroken stream of interstate commerce." *Id.* at 867; see also *Cunningham*, 17 F.4th at 250-251.

The *Federal Reporter* is rapidly filling with cases exploring the concept of continuous interstate transportation. And nothing requires courts to focus on that factor alone, or any other factor thought to be significant in some prior case. Other circuits have devised their own lists of (nonexclusive) factors for applying the exemption. *Singh* v. *Uber Techs. Inc.*, 939 F.3d 210, 227-228 (3d Cir. 2019) (identifying four factors); *Lenz* v. *Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005) (identifying eight factors).

3. Without clear direction from this Court, this litigation is unlikely to slow down anytime soon. As long as workers provide transportation services in a variety of ways, courts will have to make ad hoc judgments about whether those workers seem more like the quintessentially local pizza delivery driver or the quintessentially interstate long-haul trucker. And the sheer volume of these cases shows how important clear direction is.

Parties who have bargained for the "lower costs" and "greater efficiency and speed" of arbitration,

Stolt-Nielsen S.A. v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010), should not have to spend years in litigation over where their dispute belongs. The Court has consistently acknowledged this concern by giving the FAA clear boundary lines. In *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995), the Court adopted a "broad interpretation" of the FAA's general coverage provision in Section 2 because a narrower interpretation would have "create[d] a new, unfamiliar test" for the statute's applicability, "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Ibid.* In *Circuit City*, this Court heeded the same concern when construing the exemption in Section 1. It criticized the employee's construction for trying to introduce "considerable complexity and uncertainty * * * into the enforceability of arbitration agreements in employment contracts," again "breeding litigation from a statute that seeks to avoid it." 532 U.S. at 123 (citation omitted).

Complex tests for the FAA's boundaries are bad for the same reasons that complex jurisdictional tests are bad: they "eat[ ] up time and money as the parties litigate, not the merits of their claims, but which [forum] is the right [forum] to decide those claims." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). "Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Ibid.*; cf. *Grable & Sons Metal Prods., Inc.* v.

Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring) ("Jurisdictional rules should be clear.").

Right now, however, courts and parties in most circuits lack a predictable test for the FAA's exemption. The result is an ever-growing body of one-off decisions whose implications scarcely stretch further than the facts at hand. No one can know, without litigating, whether transportation workers' arbitration agreements are enforceable under federal law.

Consider Raef Lawson, the driver who had promised to arbitrate with amicus in *Rittmann*. He also performed work for "gig economy" companies like Uber, Grubhub, and others. See *Lawson* v. *Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1073 (N.D. Cal. 2018), vacated and remanded on other grounds, 13 F.4th 908 (9th Cir. 2021). But under current Ninth Circuit law, the FAA would hold Mr. Lawson to arbitration agreements with Uber and Grubhub, but not to his Amazon Flex arbitration agreement with amicus. In other words, if someone like Mr. Lawson sought to pursue a claim over food deliveries from local restaurants, whether the FAA would enforce a promise to arbitrate would depend on which company's platform he was using at the time. See *Rittmann*, 971 F.3d at 938 (Bress, J., dissenting). And it took years of litigation, across multiple cases, to arrive at that arbitrary outcome. See *Capriole*, 7 F.4th at 861; *Wallace*, 970 F.3d at 803; *Rittmann*, 971 F.3d at 919 (majority opinion).

For some legal issues, case-by-case adjudication and unpredictability may not be a terrible result. But

for the enforceability of arbitration agreements, it is disastrous. The Court should take this opportunity to provide definitive and much-needed guidance on the scope of the exemption's residual clause. Courts and parties should not have to keep spending time and energy sorting through each permutation of transportation work in the modern economy. The FAA exemption should not depend on whether drivers who use their personal cars and smartphones to make local deliveries have a person, a package, or a pizza in the back seat.

B. The Best Reading Of The Statute Limits "Foreign Or Interstate Commerce" To Cross-Boundary Transportation.

Of course, the importance of a clear test does not give courts license "to pave over bumpy statutory texts" to achieve results those statutes do not support. *New Prime*, 139 S. Ct. at 543. But here, the clearest statutory test is also the one with the greatest support—by far. As petitioner details (at 14-33), the text, structure, historical context, and purposes of the FAA all show that the exemption's reference to "foreign or interstate commerce" is limited to transportation of goods or persons across state or national lines. Rather than repeat petitioner's discussion, this brief underscores three key points.

1. This Court has already resolved the hardest interpretive question about the words of the residual clause. In *Circuit City*, the Court relied on important

contextual clues to hold that for this statutory provision, engaging in foreign or interstate commerce requires engaging in transportation. 532 U.S. at 109.

The exemption's reference to "commerce" does not encompass all activities within either the traditional or the modern understandings of "commerce." *Id.* at 114. Traditionally, " 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States* v. *Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). And in modern times, the concept has also included activities that have a substantial effect on interstate trade and transportation. *Id.* at 559 (majority opinion). But in *Circuit City*, the Court held that transportation is the only type of foreign or interstate commerce that triggers the FAA exemption. That is why selling electronics that are manufactured all over the world—as the respondent salesperson in *Circuit City* did—does not qualify as engaging in interstate commerce in the relevant sense. See *Cir. City*, 532 U.S. at 109-110.

With that holding in hand, it becomes far easier to interpret the exemption's reference to "interstate commerce." According to *Circuit City*, "commerce" refers to transportation only. The meaning of "interstate" is no mystery: "existing between, or including, different States." *Webster's New International Dictionary of the English Language* 1130 (1st ed. 1909) (*Webster's First*); see also, *e.g.*, 1 *Compact Edition of the Oxford English Dictionary* 1469 (1971) (defining "[i]nterstate" in relevant part as "[l]ying, extending, or carried on between states"). So "interstate commerce," when restricted to

transportation activities as *Circuit City* requires, means "the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state." *Black's Law Dictionary* 651 (2d ed. 1910); see also *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting).

It is no wonder then, that the four dissenters in *Circuit City* understood the majority's holding in these exact terms. They characterized the majority as endorsing the view "that only employees engaged in interstate transportation are excluded by § 1." *Cir. City*, 532 U.S. at 130 (Stevens, J., dissenting). That limitation flows straight from the majority's holding and basic dictionary definitions.

2. This Court should also make clear that the question under the exemption is whether the *class of workers* is engaged in foreign or interstate commerce. Much of the current confusion in lower courts stems from not recognizing this point. Some courts instead ask whether the class of workers is contributing to a *business enterprise* engaged in foreign or interstate commerce.

For example, the First and Ninth Circuits found local delivery drivers exempt based on their role furthering the commercial aims of the businesses that engaged them to perform local activities. *Waithaka*, 966 F.3d at 19; *Rittmann*, 971 F.3d at 917. The Seventh Circuit below likewise stressed that airplane loaders

are "an essential part of the enterprise of transporting goods between states and countries." Pet. App. 11a.

This view conflicts with the text of the statute and basic statutory-interpretation principles. The plain language of the residual clause focuses on the activities in which the "class of workers" engage. As then-Judge Barrett observed, "the first thing we see in the text of the residual category is that the operative unit is a 'class of workers.'" *Wallace*, 970 F.3d at 800. That is a dead giveaway, especially in comparison with the operative unit for Section 2's general coverage provision. There, the statute asks whether the "transaction" between the contracting parties involves commerce. 9 U.S.C. 2. Courts should "presume[ ] that Congress acts intentionally and purposely" when it varies wording in a single statute like this. *Russello* v. *United States*, 464 U.S. 16, 23, (1983). That principle forbids basing the exemption on the nature of the transactions between a cargo loader's airline employer and its customers. The transportation activities in which the "class of workers" themselves engage must constitute "foreign or interstate commerce."

On top of this conflict with the statutory text, relying on the business enterprise's connection to foreign or interstate commerce also conflicts with *Circuit City*. The salesperson at a nationwide electronics retail chain performs an essential part in the business's foreign and interstate commerce. So too does the accountant whom an interstate trucking line employs to keeps its books. Once one opens up the inquiry beyond the activities of the class of workers, there is no stopping

point, and adhering to *Circuit City*'s already-established boundary would seem arbitrary.

That may be why the First and Ninth Circuits tried to blame *Circuit City* for the line-drawing problems that their approach creates. See *Waithaka*, 966 F.3d at 25 (claiming that "the line-drawing conundrum * * * is a product of *Circuit City*"); *Rittmann*, 971 F.3d at 918 (same). But this Court is not to blame. *Circuit City* creates a coherent and straightforward rule, whose application to local transportation workers should pose little difficulty.

Again, the ultimate question is whether "foreign or interstate commerce" is a central—not merely incidental—part of what the class of workers does. See, *e.g.*, *Wallace*, 970 F.3d at 801; *Hamrick*, 1 F.4th at 1346; *Capriole*, 7 F.4th at 865; *Cunningham*, 17 F.4th at 252. Because "foreign or interstate commerce" is limited to cross-border transportation, that sort of transportation must be central to the activities of the class of workers. Cross-border transportation is not a central part, however, of making local deliveries or performing other local activities in a specified U.S. city. Indeed, it is the opposite of what such workers are engaged to do and in fact do. And although some drivers work in cities near state lines that they incidentally cross over from time to time, the exemption creates a national standard that does not define the class of workers in terms of the state or city in which they work. See, *e.g.*, *Capriole*, 7 F.4th at 862; *Osvatics*, 535 F. Supp. 3d at 15. Putting these principles together, cross-border transportation will be central to a class of workers'

activities only if they, as a nationwide class, customarily perform such long-distance transportation—like the interstate trucking in *New Prime*.

3. A third important point in favor of petitioner's interpretation is its compatibility with the FAA's purposes. As detailed already, the FAA's objectives require that its application be clear and predictable. See *supra* Section A.3. Petitioner's interpretation serves that aim far better than respondent's proposal. See, *e.g.*, *Rittmann*, 971 F.3d at 928 (Bress, J., dissenting). In addition, a more "precise reading" of the exemption also serves the FAA's overarching aim, which is "*broadly* to overcome judicial hostility to arbitration agreements." *Cir. City*, 532 U.S. at 118-119 (emphasis added) (quoting *Allied-Bruce*, 513 U.S. at 272-273).

Unable to contest these points, respondent tries to focus on entirely different legislative purposes. She argued in the court below that if a strike by a particular group of transportation workers would cause disruptions in the national economy, courts should include them within the exemption. See Resp. C.A. Br. 28-31; Resp. C.A. Reply Br. 23-27. She claims that doing so is somehow consistent with this Court's observation in *New Prime* that the exemption reflects Congress's wish "not to unsettle" industry-specific alternate dispute resolution regimes for seamen and railroad workers. 139 S. Ct. at 537 (quoting *Cir. City*, 532 U.S. at 121).

There are two main problems with respondent's purposive arguments. First, as *New Prime* itself explains, the exemption creates space for *Congress*, not

the judiciary, to make policy judgments about when strikes might threaten excessive harm to the national economy and when specialized dispute resolution procedures might reduce the risk. Nothing in this Court's FAA cases or general approach to statutory interpretation supports reading the residual clause based on judicial intuitions about those challenging policy issues.

Second, Congress's judgments about which workers should be subject to specialized dispute resolution mechanisms do not match respondent's broad-brush portrayal. As one salient example, Congress chose *not* to make the Railway Labor Act's specialized arbitration procedures mandatory for nonunionized supervisors like respondent. Pet. Br. 8. It would be backwards to bend the language of the residual clause to include respondent based on theories about the importance of specialized procedures that do not even apply to her.

If anything, Congress's judgments in subjecting certain workers to specialized dispute resolution regimes reinforce its preoccupation with *long-distance*, rather than local, transportation work. *Circuit City* emphasized the Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262, and the Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456, which respectively applied to certain seamen and railroad employees. See *Cir. City*, 532 U.S. at 121. Both statutes cut against respondent's view of the FAA exemption.

As for the seamen, Congress quickly amended the Shipping Commissioners Act to exclude local maritime work, including vessels that engaged in trade within

the United States along a single coast. *United States* v. *The Grace Lothrop*, 95 U.S. 527, 532 (1877) (discussing the Act of June 9, 1874, ch. 260, 18 Stat. 64). To fall within the statute's coverage, seamen had to be serving on a vessel traveling between American and foreign ports, or between the Atlantic and Pacific coasts. *Id.* at 533. Voyages within a single state (and even voyages between nearby states) were not covered by the amended statute. See, *e.g.*, *United States* v. *Mason*, 34 F. 129, 129 (C.C.N.D. Cal. 1888) (coastal voyage between San Francisco and San Diego, California); *United States* v. *King*, 23 F. 138, 138 (C.C.S.D. Ala. 1885) (river voyage between Mobile and Montgomery, Alabama). There was no need to place intrastate voyages outside the scope of the FAA because they were already outside the scope of the Shipping Commissioners Act.

As for the railroads, the Transportation Act also had a significant carveout—for certain "street, interurban, or suburban electric railway[s]." § 300(1), 41 Stat. at 469. The Railroad Labor Board quickly ruled that this exclusion applied even when the railway carried "interstate freight" or extended through multiple states. *Bhd. of Locomotive Eng'rs* v. *Spokane & E. Ry. & Power Co.*, No. 33, 1 R.L.B. 53, 56-58 (1920). In the Board's view, Congress excluded electric railroads because, unlike steam railroads, they are quintessentially "local" operations. *Id.* at 57. Once again, there was no need to avoid conflict between the FAA and Transportation Act over these local activities because

they were not within the Transportation Act to begin with.

The dispute resolution regimes that Congress created for certain industries before the FAA had complicated particulars and histories. Rather than generalize or hypothesize about what Congress was trying to do with those statutes, and what Congress was therefore trying to do with the FAA exemption, courts should stick with the most natural reading of the exemption's residual clause. If courts face a conflict between the FAA and dispute resolution procedures under a more specialized federal statute, they can resolve the conflict by using normal statutory interpretation methods. See, *e.g.*, *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (discussing how to assess purported conflict between the FAA and other federal statutes); *EC Term of Years Tr.* v. *United States*, 550 U.S. 429, 433-434 (2007) (resolving conflict between two federal statutes using the principle that specific enactments govern more general ones).

Here, however, there is no conflict. Respondent is not covered by a special arbitration statute, and she is not exempt from the FAA.

C. The Court Should Reject Respondent's Misplaced Reliance On History.

Respondent's contrary view tries to wring a lot of meaning out of the historical record. She even argues that this Court has already resolved the question at hand, at least for cargo loaders. Br. in Opp. 13-15. But

her historical argument rests on inapposite cases addressing distinct statutes, like FELA, or the division between state and federal authority over the taxation and regulation of interstate commerce. None of these cases are informative in interpreting the FAA. In fact, this Court has already ruled out an interpretation of the exemption application that would have required detailed study of how the Court construed FELA or the Commerce Clause at the time of the FAA's enactment. *Cir. City*, 532 U.S. at 116-118. And with good reason.

Respondent's reliance on FELA cases illustrates the problem. To start, and as petitioner highlights (at 37), there are notable textual differences between the FAA's residual clause and the relevant FELA provision:

> [E]very common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Act of April 22, 1908, ch. 149, 35 Stat. 65, 65 (codified as amended at 45 U.S.C. 51). While the operative unit of the FAA exemption is the "class of workers," 9 U.S.C. 1, FELA focuses on the relationship between the activities of the individual worker at the time of injury and the broader activities of the rail carrier. FELA, in other words, is "oriented more around the work of the 'common carrier.'" *Rittmann*, 971 F.3d at 931 (Bress, J., dissenting). FELA also lacks the structure and context of the FAA exemption: it has no residual clause after terms like "seamen" that inform its meaning, nor is it an exception to a general coverage provision that provides an important contrast. See *ibid.*

Because of the textual differences, there is no colorable argument here for applying the prior-construction canon of interpretation. That "canon teaches that if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning." *Lightfoot* v. *Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017). The "canon has no application" when, as here, "[t]he language of the two provisions is nowhere near identical." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 (2015); see also Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012) (explaining that while the prior-construction canon seems "peculiar" to a textualist judge, it is reasonable to infer a consistent meaning "when a statute uses the *very same terminology* as an earlier statute—especially in the *very same field*, such as securities law or civil-rights law"

(emphasis added)). Not one phrase in the FAA exemption "mirrors" or is "identical" to any phrase in the FELA provision. FELA does not use "seamen," "railroad employees," "class of workers," or "engaged in foreign or interstate commerce."

The most that can be said for the comparison is that both statutes invoke concepts of performing work in foreign or interstate commerce. But that is hardly reason to think that Congress incorporated this Court's FELA standards into the FAA. The Court's FELA precedents rooted their test in "the evident purpose of Congress in adopting [FELA]." *Shanks* v. *Del., Lackawanna & W. R.R. Co.*, 239 U.S. 556, 558 (1916). With FELA's purposes in mind, the Court determined that the statute "speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion." *Ibid.* Not surprisingly, then, it landed on a legal test that openly expands the statute beyond interstate commerce in the strict sense: "the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Ibid.* To satisfy FELA, then, the activities need not be actual interstate transportation. They need only be related enough. See *Harper*, 12 F.4th at 298 (Matey, J., concurring) (arguing that the *Shanks* test improperly expands the FAA exemption beyond the statute's ordinary meaning).

It is unsurprising that this Court felt free to extend the statute beyond interstate transportation. The

Court has often noted that "FELA is a broad remedial statute," and long ago "adopted a 'standard of liberal construction in order to accomplish [Congress's] objects.'" *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 561-562 (1987) (quoting *Urie* v. *Thompson*, 337 U.S. 163, 180 (1949)); see also *Jamison* v. *Encarnacion*, 281 U.S. 635, 640 (1930) ("[FELA] is to be construed liberally to fulfill the purposes for which it was enacted[.]").

To recap: The Court's FELA test explicitly went beyond interstate transportation and beyond interstate commerce in the "technical" sense because of the statute's apparent purpose. And the Court has long favored broad constructions of FELA to provide relief to injured individuals. Given all this, there is no basis for grafting the same test onto the FAA. The Court has made clear that the FAA exemption should get a "precise" and "narrow" reading—just the opposite of the FELA test. *Cir. City*, 532 U.S. at 118-119.

But respondent's reliance on FELA gets even worse. The Court's FELA test produced decades of litigation and confusion. According to a rough estimate from 1934, there were 207 "cases involving the distinction between interstate and intrastate commerce" under FELA during the statute's first eight years of operation (1908 to 1916), and 545 cases in the next eight (1916 to 1924). Lester P. Schoene & Frank Watson, *Workmen's Compensation on Interstate Railways*, 47 Harv. L. Rev. 389, 407 & n.111 (1934). Then the courts faced over a hundred *more* cases, each over "an activity whose status was uncertain after nearly two

decades of litigation." *Id.* at 407. All this was despite 43 opinions from this Court over the same period that sought to clarify whether particular activities fell within FELA's concept of interstate commerce. *Id.* at 397-398. Those cases, this Court later observed, yielded "much confusion to the railroads, their employees and the courts" and drew "very fine distinctions." *S. Pac. Co.* v. *Gileo*, 351 U.S. 493, 497 (1956). In 1939, Congress amended FELA and made the Court's confusing test obsolete. *Id.* at 497-498.

It would be madness to breathe new life into this precedent now. And the Court should reject respondent's invitation to do so. Nothing in the FAA's text, structure, history, or purposes supports it.

Respondent's reliance on Commerce Clause cases is off base as well. For one thing, as with FELA, many of these cases drew distinctions based on concerns irrelevant to the FAA. Respondent places great emphasis, for example, on cases addressing the taxation of stevedoring, which were eventually overruled, and which had to draw a workable line between states' authority to tax and regulate and the federal government's supreme authority over the same conduct. See, *e.g.*, *Puget Sound Stevedoring Co.* v. *Tax Comm'n of State of Wash.*, 302 U.S. 90, 94 (1937), overruled by *Dep't of Rev. of State of Wash.* v. *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978). Once again, it makes no sense to revive distinctions in off-point and defunct cases.

And in this area, too, the law was much more complicated than respondent suggests. The Court repeatedly recognized, for example, that it is often wrong to think of goods or persons transported across state lines as being in interstate transportation from start to finish. Instead, "there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another state." *Diamond Match Co.* v. *Vill. of Ontonagon*, 188 U.S. 82, 96 (1903). In one case, the Court held that cab drivers were not engaged in interstate commerce when they transported interstate travelers between their hotels and the ferry. *New York ex rel. Pa. R.R. Co.* v. *Knight*, 192 U.S. 21, 28 (1904). Even though the travelers were arriving from or headed out of state, the local transportation services were distinct from the interstate portion of their voyage, "preliminary or subsequent to any interstate transportation" rather than a part of it. *Ibid.* Another case in this vein addressed local transportation that an interstate railroad company provided for customers in a specific city. *ICC* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U.S. 633 (1897). The railroad's customers had contracted for "continuous shipment" of their goods across state lines, with an interstate segment by rail and an intrastate segment, within the city, by cartage over land. *Id.* at 639-640. The Court held that the interstate railway transportation and intrastate land transportation were "separate and distinct" services under Section 4 of the Interstate Commerce Act. *Id.* at 644.

Over the centuries, this Court's cases have drawn many lines between the many activities that contribute to interstate transportation of goods and people. The one constant is that when it comes to transportation, interstate commerce in the strict or "technical" sense means transportation across state lines. The only question is whether it is appropriate, in a particular legal context, to bring additional related activities under the interstate-commerce umbrella. The answer when a court is policing the Constitution's division of power between state and federal levels will differ from the answer when a court is applying FELA's original language or the language of another statute.

Yet when it comes to the FAA exemption, every consideration weighs against stretching the concept of interstate commerce beyond interstate commerce in the technical sense. The statute's text, structure, history, and purposes dictate a narrow, predictable interpretation of foreign or interstate commerce as transporting goods or people across state or national lines. And that long-range transportation must be central to the overall work of a class of workers considered as a nationwide group for that class of workers to be exempt from the FAA. Classes of workers who perform local activities do not satisfy this test, and so the exemption does not apply to them.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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