No. _____

In The Supreme Court of the United States

NANCY AVINA,

Petitioner,

v.

UNION PACIFIC RAILROAD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED*

Does the Railway Labor Act preempt, preclude or otherwise limit, and if so when and in what way, claims under anti-discrimination statutes, such as the Age Discrimination in Employment Act or 42 U.S.C. § 1981?

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* A similar question is presented in *Polk v. Amtrak National Railroad Passenger Corporation*, No. 23-249.

PARTIES

The petitioner is Nancy Avina. The respondent is the Union Pacific Railroad.

RELATED PROCEEDINGS

Avina v. Union Pacific Railroad, No. 4:19-cv-00480-RK, United States District Court for the Western District of Missouri, judgment entered June 15, 2022.

Avina v. Union Pacific Railroad, No. 22-2376, United States Court of Appeals for the Eighth Circuit, judgment entered July 3, 2023.

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Petitioner Nancy Avina respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on July 3, 2023.

OPINIONS BELOW

The July 3, 2023, opinion of the court of appeals, which is reported at 72 F.4th 839, is set out at pp.1a-11a of the Appendix. The July 9, 2021, order of the district court, which is unofficially reported at 2021 WL 2903245, is set out at pp. 12a-37a of the Appendix. The trial transcript of February 9, 2022, which is not reported, is set out in pp. 38a-46a of the Appendix. The May 11, 2022, order of the district court, which is unofficially reported at 2022 WL 2353078, is set out at pp. 47a-84a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 3, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

STATUTES INVOLVED

The statutes involved are set out in the Appendix.

INTRODUCTION

The Railway Labor Act (RLA) provides that certain claims, commonly referred to as "minor disputes," can only be adjudicated by a Board established by the Act. The Eighth Circuit decision in this case deepens and further complicates an already well-established circuit conflict regarding whether, and if so when and in what way, the RLA preempts or precludes claims under anti-discrimination statutes.[1]

Three circuits hold that discrimination claims are not preempted or precluded by the RLA because the rights asserted by such claims are based on independent statutes, and are not created by a collective bargaining agreement (CBA). Two circuits hold that such claims are preempted or precluded when the outcome of the discrimination claim would be conclusively determined by the interpretation of a CBA. Four circuits (including in this instance the Eighth) hold that discrimination claims are preempted or precluded if the resolution of those claims would involve the interpretation of a CBA.

The circuits which hold that discrimination claims can be preempted or precluded by the RLA are in disagreement about what that limitation should be. The First Circuit holds that preemption or preclusion extinguishes the underlying claim. The Fourth Circuit holds that a CBA-interpretation-related claim

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[1] The lower courts often use the term "preempt" or "preclude," depending on whether the claim brought by the plaintiff arises under state or federal law.

survives, but must be litigated before the Board. The Eighth Circuit holds that if a discrimination claim involves the interpretation of a CBA, the federal court lacks subject matter jurisdiction over that claim. The Seventh Circuit stays resolution of a preempted or precluded claim until the Board resolves the CBA interpretation issue. In the Sixth Circuit, resolution of such an interpretation by the Board is an exhaustion requirement.

These interrelated conflicts derive to a significant degree from this Court's own RLA decisions. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), and the decisions which preceded it, set out three different standards. Although those differences did not matter in the cases previously before the Court, they are of great importance in other cases, particularly cases asserting claims under federal and state anti-discrimination statutes. The United States expressed the view in *Hawaiian Airlines* that the RLA does not preclude the assertion of rights created by an independent statute.

The courts of appeals also differ as to whether preemption and preclusion are only claim-processing standards, or whether they remove a claim from the subject matter jurisdiction of the court. The Eighth and District of Columbia Circuits (in an opinion joined by then Judge Kavanaugh) hold this rule is jurisdictional. The Sixth and Ninth Circuits hold that it is not. Whether the rule is jurisdictional determines whether it can be waived by inaction or delay, an important question in cases in which (as here) the objection is not raised until trial.

In most if not all cases in which the lower courts rule that the RLA bars judicial resolution of a discrimination claim, that determination effectively nullifies the right against discrimination. *Hawaiian Airlines* holds that the RLA does not authorize the Board to resolve claims asserting statutory rights, including civil rights claims.

STATEMENT OF THE CASE

Legal Background

The Railway Labor Act establishes mechanisms for resolving certain disputes at unionized rail carriers. Disputes related to the formation of collective bargaining agreements, or efforts to secure them, are referred to as "major disputes." Disputes that "gro[w] out of grievances or out of the interpretation or application of [collective bargaining] agreements" are known as "minor disputes." 45 U.S.C. § 151a. "[M]ajor disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corporation (Conrail) v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989). If a minor dispute cannot be resolved informally, the RLA creates a National Railroad Adjustment Board (NRAB) to adjudicate the dispute. 45 U.S.C. §§ 151 first (a), 151 first (i).[2] Similar

[2] Airlines are subject to a similar regime, except minor disputes are resolved by adjustment boards organized at each carrier. 45 U.S.C. § 184.

carrier-specific adjustment boards may be created by employers and unions under the RLA.

If a claim constitutes a minor dispute under the RLA, it can only be adjudicated by the NRAB, or by a carrier-specific board agreed to by a carrier and the relevant union. For simplicity we (like some lower courts) refer to either simply as "the Board." A federal or state court may not adjudicate a minor dispute. If a lawsuit involves multiple claims, this limitation is applied separately to each claim. If the same facts give rise to several claims, only one of which is a minor dispute, a court can resolve the remaining claims. The jurisdiction of the Board, on the other hand, is defined and limited by statute to minor claims.

Because of the numerous federal and state laws, and state common law claims, related to employment relations, there has been and continues to be a large volume of litigation in the lower courts regarding which claims are and are not minor disputes. This Court has addressed the definition of a minor dispute in a series of decisions. The Court summarized those decisions, and set out standards derived from them, in *Hawaiian Airlines, Inc. v. Norris*.

Decisions beginning in 1931 established that claims to enforce rights created by statute, rather than to enforce rights arising under a CBA, are not limited by a CBA. In *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 258 (1931), the Court rejected out of hand an argument that the RLA limited the ability of a state to protect workers by regulating the number

of employees required to operate certain equipment. *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), held that the RLA does not limit negligence claims under the Federal Employers Liability Act (FELA), because the FELA "provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement...." 480 U.S. at 565. The FELA, the Court explained, was not devised to provide remedies for CBA violations, but is an independent "statutory basis for the award of damages to employees injured through an employer's or co-worker's negligence." *Id*.

The 1989 decision in *Consolidated Rail Corp.* (*Conrail*) *v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), put the standard somewhat differently, focusing on the degree to which a claim would be affected by the interpretation of a CBA. "[T]he line drawn...looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement." 491 U.S. at 305.

Finally, in 1989 a footnote in *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989), suggested a third standard. "Minor disputes are those involving the interpretation or application of existing contracts." 491 U.S. at 496 n.4. An earlier decision in *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972), had commented about the

particular claim in that case, which asserted that the plaintiff had been fired in violation of a CBA, "[t]he existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective-bargaining agreement." 406 U.S. at 324.

In 1994 *Hawaiian Airlines* quoted and described three standards. First, it set out the *Norwood* independent-right standard. "[U]nder *Norwood*, substantive protections provided by state law, independent of whatever labor agreement might govern, are not preempted under the RLA." 512 U.S. at 257. "[W]e have held that the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." 512 U.S. at 256. "[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Buell*, 480 U.S. at 565 (quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981)). Second, *Hawaiian Airlines* quoted the conclusive-resolution standard from *Conrail*. "The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]." 512 U.S. at 256 (quoting *Conrail*, 491 U.S. at 305); see 512 U.S. at 263 (quoting *Conrail* conclusive resolution standard). Third, *Hawaiian Airlines* set out a CBA-interpretation standard, relying on *Railway Labor Executives* and *Andrews*. Those decisions, the Court stated, had "defined minor disputes as those involving the interpretation or

application of existing labor agreements." 512 U.S. at 256; see *id*., at 256 ("[m]inor disputes are those involving the interpretation or application of existing contracts") (quoting *Railway Labor Executives Ass'n*, 491 U.S. at 501 n.4 (1989)), 263 ("a state-law claim is preempted where it 'depend[s] on the interpretation' of the CBA") (quoting *Andrews*, 406 U.S. at 324 (1972)).[3]

Further complicating the situation, *Hawaiian Airlines* held that the standard for determining what is a minor dispute under the RLA would (at least usually) be the same as the standard for determining preemption under section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. But the Court referred to two different standards under section 301. The Court described *Lingle v. Norge Div. of Magic Chef, Inc*., 486 U.S. 399 (1988), as holding "that where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is pre-empted." 512 U.S. at 261 (quoting 486 U.S. at 405-06). That resembles the CBA-interpretation standard suggested based on *Railway Labor Executives* and *Andrews*. But *Hawaiian Airlines* also described *Lingle* as holding that "the existence of a potential CBA-based remedy did not deprive an employee of independent remedies available under state law." 512 U.S. at 261. And *Hawaiian Airlines* cited the holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), "that...state-law rights, those that existed independent of the contract would not be...pre-empted."

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[3] This passage in *Andrews* actually referred only to a claim asserting a violation of a CBA, not to state-law claims generally. See 406 U.S. at 324.

512 U.S. at 260. Those passages are similar to the independent-right standard in *Norwood* and *Buell*.

Because the various standards predating and summarized in *Hawaiian Airlines* are different, in the years since that decision litigants have argued over which standard should be applied, and each side has been able to cite or quote a passage in *Hawaiian Airlines* (or an earlier decision of this Court) favorable to its position. Lower courts, in turn, have had to choose among these standards, or to fashion some rule or procedure for reconciling the differences. That is what has occurred in the Eighth Circuit.

Proceedings Below

District Court

Avina, was a long-time employee of the Union Pacific Railroad. She was a member of the Communications Transportation Union, which at all relevant times had a collective bargaining agreement (CBA) with the railroad. In 2017 the company posted a bulletin announcing a vacancy in the position of 1E Material Supervisor. That was a position covered by the CBA, but vacancies were filled at the discretion of the company, not based on seniority. The bulletin directed interested employees to "EMAIL OR FAX RESUME" to a designated company official. PX 91. Avina faxed in her resume, and a company official sent Avina an email thanking her "for [her] interest in the Supervisor 1E position." PX 129. But Avina did not get the promotion. In 2018 another bulletin announced a vacancy for that

position. That second bulletin as well directed interested employees to "EMAIL OR FAX RESUME' to a designated company official. PX 97. Avina did so, but again did not get the promotion.

Plaintiff filed this action in federal district court, alleging a number of discrimination claims. As relevant here, she asserted that in both 2017 and 2018 she had been denied promotion to the 1E Material Supervisor position because of her age and race.[4] 29 U.S.C. § 623; 42 U.S.C. § 1981. After a period of discovery, the defendant moved for summary judgment.

The defendant asserted that Avina had not received either promotion because she had failed to properly apply for them. The defendant did not dispute Avina's assertion that, in response to the bulletins announcing those positions, she had faxed in her resume. But, the defendant argued, Avina did not apply in the manner required by the company. Specifically, the defendant claimed that the only proper manner to apply for the type of position in question was to bid through a company computer application known as iTrakForce.[5] The company insisted that Avina's action in faxing in her resume did not constitute an application.

Plaintiff denied that employees were required to use iTrakForce to apply for the positions at issue; it

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[4] The district court dismissed plaintiff's age discrimination claim regarding the 2017 position on grounds not relevant here.

[5] Defendant's Memorandum of Law Supporting its Motion for Summary Judgment, 5-7, 12, 18, 19, 29, 35, 37, 39.

was sufficient, she argued, to fax in her resume. Plaintiff pointed to deposition testimony by Avina "that there is a specific procedure on bidding for jobs and that it is set out in the Union contract."[6] Plaintiff's summary judgment response contained two lengthy quotations from the CBA itself, which referred only to application by providing the employer with a resume, and made no mention of iTrakForce.[7] The company's reply dismissed Avina's testimony as "conclusory" and "self-serving," but did not respond to address the portions of the CBA which plaintiff had quoted and relied on.[8] The district court denied summary judgment, specifically noting that there was a factual dispute as to the proper method for applying for the promotions at issue. "Defendant argues Avina never applied for the material supervisor position.... However, Avina's testimony is competent and admissible evidence to contradict Defendant's assertions.... A trier of fact is entitled to believe Avina's testimony and disbelieve the assertions of Defendant as to whether Avina applied, the correct process to apply, and consideration of applicants." App. 25a; see App. 29a, 35a.

The case proceeded to trial, and the parties offered conflicting evidence regarding the proper manner

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[6] Plaintiff's Response to Defendant's Purportedly Uncontroverted Material Facts and Plaintiff's Statement of Material Facts for Trial, 9.

[7] *Id.*, at 9-10.

[8] Reply Supporting Defendant's Statement of Uncontroverted Material Facts and Response to Plaintiff's Statement of Facts, 18, 19, 45, 63, 69, 112, 117.

in which interested employees were to apply for promotion to the 1E Material Supervisor position. The company relied on testimony by company officials regarding the manner in which workers were required to apply. The plaintiff offered her own testimony, that of a local union president, and the text of the CBA itself.

On the fourth day of trial, however, the company for the first time objected to the jury—or any federal judicial forum—deciding whether Avina had applied in the correct manner, or deciding her discrimination claims at all. Rather, the defendant insisted, the plaintiff's discrimination claims were preempted by the RLA, because resolution of those claims would involve interpretation of the CBA. And, it argued, disputes about the interpretation of the CBA included disputes about the nature of an employer's practices and customs (such as how workers should apply for a promotion), because the union had acquiesced in those practices as consistent with the CBA.

Because this argument was first raised in the middle of trial, the judge directed the parties to brief the issue over the weekend. The defendant accurately pointed out that under Eighth Circuit precedent if, as it urged, the RLA preempted plaintiff's discrimination claims, the district court would lack subject matter jurisdiction over those claims.[9] Plaintiff did not dispute that characterization of Eighth Circuit

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[9] Defendant's Trial Brief Regarding Railway Labor Act Preemption, 1, 3; Defendant's Trial Brief Regarding Railway Labor Act Preemption, 1, 3-4.

precedent. Less than a year earlier the Eighth Circuit had held that it "is settled law in this circuit that the RLA divests courts of subject-matter jurisdiction over claims arising out of the interpretation or application of a collective-bargaining agreement between a carrier and its employees." *Richardson v. BNSF Ry. Co.*, 2 F.4th 1063, 1070 (8th Cir. 2021). Defendant correctly stated that "[l]lack of subject matter jurisdiction...cannot be waived. It may be raised at any time by a party to an action...." *Id.*, at 3 n.1 (quoting *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993)). Because, in light of binding Eighth Circuit precedent, the district court could not reject this RLA objection as waived, plaintiff did not ask that court to do so.

The parties' briefs advanced conflicting positions as to the standard for determining preemption under the RLA, each side citing or quoting this Court's opinion. Plaintiff argued that whether a claim is preempted turns on whether the right asserted in the claim was created by a federal or state statute, or was created by a CBA. "The 'minor disputes' that subject [a claim] to RLA arbitration are those that involve duties and rights created or defined by the CBA." Plaintiff's Brief on the Inapplicability of Preemption to The Facts of this Case, 2 (citing and quoting *Buell* and *Hawaiian Airlines*). The defendant argued that under this Court's decisions a claim is preempted if resolving the claim would involve interpreting a CBA. "Minor disputes involve 'the meaning of an existing [CBA] in a particular fact situation.'" Defendant's Trial Brief Regarding Railway Labor Act Preemption, 3 (quoting *Hawaiian*

Airlines, 512 U.S. at 253). "A minor dispute 'relates either to the meaning or proper application of a particular provision [in the CBA] with reference to a specific situation....'" Defendant's Motion for Judgment As A Matter of Law at The Close of Plaintiff's Evidence, 3 (quoting *Conrail*, 491 U.S. at 303).

The trial judge, ruling from the bench, adopted the defendant's interpretation of this Court's opinions. "When you look at the [*Hawaiian Airlines*] case, the emphasis is on where the resolution of a state law claim depends on the interpretation of the CBA, the claim is preempted." App. 42a. The judge concluded that resolution of the dispute about whether Avina had applied in the correct manner would involve interpretation of the CBA, and thus dismissed for lack of jurisdiction her promotion claims regarding the 1E Material Supervisor vacancies. App. 43a-44a.

The trial proceeded with regard to a remaining claim, not relevant here, and the jury deadlocked over that claim. Plaintiff then filed a motion asking the district judge to reconsider her earlier decision dismissing the claims regarding the 1E Materials Supervisor position, and the parties further briefed that issue. The district court issued a lengthy written opinion, reaffirming and further explaining her conclusion that those claims were preempted by the RLA and that the court did not have subject matter jurisdiction over those claims.

The district judge was highly critical of the defendant's action in not raising the RLA preemption issue until the middle of trial.

> The Court is cognizant of Plaintiff's visceral frustration that Defendant "first raised the issue of preemption on...the fourth day of an eight-day trial[,] more than two and a half years after Plaintiff filed her complaint and more than a year after Defendant sought summary judgment accompanied by suggestions that specifically point out the fact that the 1E position is governed by a collective bargaining agreement."

App. 77a n.14 (quoting plaintiff's brief).

> There is no clear reason why the jurisdictional question resolved now was not raised earlier, and Plaintiff's frustration is well taken. An earlier resolution would have reduced the resources spent conducting extensive discovery and an eight-day trial and may have avoided any statute of limitations issue that may arise following this dismissal. The Court does not condone Defendant's decision to raise the issue so late in the proceedings.

App. 77a. But, the court noted, "[l]ack of subject matter jurisdiction...cannot be waived. It may be raised at any time by a party to an action, or by the court sua sponte." App. 50a (quoting *Bueford v. Resolution Trust Corp*., 991 F.2d 481, 485 (8th Cir. 1993)); see App. 68a n.7 ("subject matter jurisdiction...cannot be waived") (quoting *Bueford*).

The district court reiterated its view that under *Hawaiian Airlines* a claim is preempted if resolution of the claim would involve interpretation of a CBA. "[A] dispute is minor, and therefore preempted, if it involves

'the meaning of an existing [CBA] in a particular fact situation.' *Hawaiian Airlines*, 512 U.S. at 253." App. 53a. The court noted that the "[d]efendant urges, under the RLA, a CBA can give rise to implied terms arising from 'practice, usage and custom.' *Hawaiian Airlines*, 512 U.S. at 264 n.10." App. 54a. The conflicting evidence about whether the company required applications for the position at issue to be submitted on iTrakForce was such a dispute about the company's practices. Determination of whether the "defendant require[d] submission (or could...require submission) of the application through iTrakForce...requires interpretation of the CBA." App. 69a.

Court of Appeals

On appeal, the parties again disagreed about what RLA preemption standard was established by this Court's opinions. Plaintiff argued that under *Hawaiian Airlines* the RLA does not preempt a claim seeking to enforce a right created by statute.

> The RLA's "mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." [*Hawaiian Airlines*], 512 U.S. at 256 (emphasis added). Stated differently, "'minor disputes' subject to RLA arbitration are those that involve duties and rights created or defined by the CBA." *Id*., 512 U.S. at 258....
>
> According to [*Hawaiian Airlines*], "a state-law cause of action is not pre-empted by the RLA

> if it involves rights and obligations that exist independent of the CBA." 512 U.S. at 260.

Appellant's Brief, 23. The defendant argued, to the contrary, that whether a claim is preempted by the RLA turns on whether or not the claim "can be resolved without interpreting the [CBA] itself...." Brief of Defendant-Appellee, 24 (quoting *Hawaiian Airlines*, 512 U.S. at 262).

The defendant correctly insisted that it was "settled law" in the Eighth Circuit that there is no subject matter jurisdiction over an RLA-preempted claim. *Id*., at 22-23 (quoting *Richardson v. BNSF Ry. Co*., 2 F.4th 1063, 1067 (8th Cir. 2021)). And the defendant correctly argued that "[i]t is black letter law that the question of whether a federal court has subject matter jurisdiction to decide a particular claim...'...cannot be waived.'" *Id*., at 37 (quoting *Bueford*, 991 F.3d at 485). Because, in light of binding Eighth Circuit precedent, the panel could not hold that the defendant had waived this objection by failing to raise it in a timely fashion, plaintiff did not ask the panel to do so.

The Eighth Circuit held, as it has in earlier opinions, that the RLA bars any claim which would involve the interpretation of a collective bargaining agreement, a rule which the court of appeals reasoned that this Court's decision in *Hawaiian Airlines* had established. "[I]f there is any doubt about whether the dispute 'require[s] interpreting any term of a collective-bargaining agreement,' *Hawaiian Airlines*, 512 U.S. at 261 (citation omitted), dismissal is the only option...."

App. 5a. "'[M]inor disputes[]' covers 'controversies over the meaning of an existing collective[-]bargaining agreement in a particular fact situation.' *Hawaiian Airlines*, 512 U.S. at 253 (citation omitted)." App. 4a. The dispute regarding whether the company in practice required that applications be made under iTrakForce, the court held, was a dispute that had to be resolved by the National Railroad Adjustment Board, because the defendant not only contended that it required applications be made in that manner, but also asserted that this claimed practice was "an 'implied' term [of the CBA] that arises from 'established and recognized custom[s],' even if the collective bargaining agreement makes no mention of it." App. 8a (quoting *Brotherhood Ry. Carmen v. Missouri Pacific R.R. Co*. 944 F.2d 1422, 1429 (8th Cir. 1991)).

REASONS FOR GRANTING THE WRIT

I. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER, AND WHEN, THE RLA PREEMPTS OR PRECLUDES DISCRIMINATION CLAIMS

The divergent standards set out in *Hawaiian Airlines* and earlier RLA opinions of this Court have given rise to a complex conflict. The Second, Ninth and Tenth Circuits hold that discrimination claims, which by definition involve a right created by statute, are not preempted or precluded by the RLA, citing and quoting *Hawaiian Airlines* and earlier decisions by this Court. The Fifth and Seventh Circuits hold that the

conclusive-resolution standard, where applicable, precludes or preempts discrimination claims, citing and quoting *Hawaiian Airlines* and earlier cases by this Court. The Fourth, Sixth, Seventh and Eighth Circuits hold that the CBA-interpretation standard can preempt or preclude discrimination claims, also citing and quoting for that different rule *Hawaiian Airlines* and earlier opinions by this Court.

The courts of appeals that hold the RLA can preempt or preclude discrimination claims, moreover, are in disagreement about the consequences of holding that the RLA applies to such a claim. The Fourth Circuit holds that the claimant must litigate the discrimination claim before the Board. The Sixth Circuit holds that a claimant must go to the Board before he or she can pursue a discrimination lawsuit. The Seventh Circuit holds that a plaintiff can file a discrimination lawsuit that might be conclusively resolved by the Board, but will stay the litigation pending action by the Board. In the First Circuit, if a discrimination claim involves the interpretation of a CBA, the RLA extinguishes that claim. The Eighth Circuit holds that the RLA preempts state law claims which would involve the interpretation of a CBA, and (applying the same standard) holds that the RLA precludes federal claims which involve the interpretation of a CBA, and holds that both strip federal courts of subject matter jurisdiction over such claims.

A. Three Circuits Hold That The RLA Does Not Preempt Or Preclude Discrimination Claims

The Second Circuit holds that the RLA does not preempt or preclude claims under the Rehabilitation Act of 1973. 29 U.S.C. § 794; *Bates v. Long Island Railroad Co*., 997 F.2d 1028 (2d Cir. 1993), *cert. denied*, 510 U.S. 992 (1993). The court of appeals expressly rejected a CBA-interpretation standard.

> [The defendant] contends that because appellants' claims require interpretation of the applicable collective bargaining agreement, they are "minor disputes" under the RLA.... While it is true that a [plaintiffs'] discriminatory discharge claims may implicate those portions of their collective bargaining agreements that provide for physical disqualification from employment, it is not true that their exclusive remedy for their allegedly wrongful discharges is arbitration.

997 F.2d at 1034. Although *Bates* was decided prior to *Hawaiian Airlines*, it remains controlling precedent in the Second Circuit. *Urena v. American Airlines, Inc.*, 152 Fed.Appx. 63, 65 (2d Cir. 2005) (citing *Bates* to distinguish between "statutory civil rights" and "claims grounded in the collective bargaining agreement"); *Goss v. Long Island R. Co.*, 1998 WL 538026, at *3 (2d Cir. March 16, 1998) (same); *Prokopiou v. The Long Island Railroad Co*., 2007 WL 1098696, at *4 (S.D.N.Y. Apr. 9, 2007) (citing *Bates* as establishing that a Title VII or other federal civil rights claim is not a minor

dispute); *Adams v. N.J. Transit Rail Operations*, 2000 WL 224107, at *9 (S.D.N.Y. Feb. 28, 2000) (citing *Bates* as holding that federal statutory claims such as those under Title VII are not minor disputes).

Saridakis v. United Airlines, 166 F.3d 1272 (9th Cir. 1999), is one of several Ninth Circuit decisions holding that the RLA does not preclude or preempt discrimination claims arising under federal or state law. *Saridakis* quoted the holding in *Hawaiian Airlines* that a minor dispute is one that "does not involve rights that exist independently of the [collective bargaining agreement]." 166 F.3d at 1276 (quoting 512 U.S. at 265). "As with Title VII rights, the rights emanating from the ADA exist independently of any employment rights granted by a CBA.... [A] dispute under the ADA is not minor...." 166 F.3d at 1277. *Saridakis* rejected the employer's argument that ADA claims are transformed into minor disputes if an employer asserts a defense related to the CBA, again quoting *Hawaiian Airlines*. 166 F.3d at 1277. "Although United may be able to introduce and rely upon the CBA...as a part of its defense, under the Supreme Court's recent ruling that would not be enough to render the dispute minor and therefore subject to the RLA's dispute resolution mechanism." *Id*. *Saridakis* pointed out that decisions in other circuits had "found ADA rights independent of the RLA and therefore beyond the scope of what is deemed a minor dispute." 166 F.3d at 1277 n.6.

The Tenth Circuit holds that the RLA does not preempt or preclude discrimination claims, applying an independent-rights standard. "Under the RLA,

while the courts have no jurisdiction to hear airline employee claims based solely upon the contract, the courts do have jurisdiction over claims based upon federal statutes." *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1254 (10th Cir. 1988). "The RLA does not preclude the court's subject matter jurisdiction over an independent cause of action under...42 U.S.C. § 1981." 851 F.2d at 1255. The Tenth Circuit reiterated that rule after *Hawaiian Airlines*. *Adams v. American Airlines, Inc*., 2000 WL 14399, at *7 (10th Cir. Jan. 10, 2000) (quoting *Hawaiian Airlines*) (Title VII claim not barred).

B. Two Circuits Apply The Conclusive-Resolution Standard to Preempt Or Preclude Discrimination Claims

The Seventh Circuit applies a conclusive-resolution standard. *Carlson v. CSX Transportation, Inc*., 758 F.3d 819, 832-34 (7th Cir. 2014) (citing *Hawaiian Airlines* and *Conrail*); *Brown v. Illinois Central Railroad Co*., 254 F.3d 654, 658 (7th Cir. 2001) (citing *Hawaiian Airlines* and *Conrail*; holding ADA claim precluded), *cert. denied*, 534 U.S. 1041 (2001). *Carlson* makes clear that this standard is not satisfied merely by a showing that reliance on or interpretation of a CBA may occur in the course of the resolution of a claim; there must be showing that the CBA would necessarily be conclusive. The defendant in *Carlson* asserted (like the defendant in this case) that it would argue that it had taken the actions in question "pursuant to a collective bargaining agreement rather than for discriminatory...reasons."

758 F.3d at 832. The Seventh Circuit held that was insufficient to show that the CBA would be conclusive. 758 F.3d at 833 (quoting *Hawaiian Airlines*, 512 U.S. at 265-55). *Brown* similarly stressed that the need to interpret that CBA would not be a bar if the correct interpretation was only "relevant but not dispositive...." 254 F.3d at 668. On the other hand, *Brown* also rejected the contention—advanced in that case by the EEOC—that RLA does not affect claims brought to enforce "federal statutes which create rights for individual workers are not precluded by the RLA, simply because they seek to enforce rights which exist independently of the CBA." 254 F.3d at 667.

Brown held that the RLA precludes or preempts a claim if an interpretation of the CBA could conclusively refute the claim at issue, the argument advanced by the defendant in that case.[10] However, unlike any other circuit, the Seventh Circuit holds that if a complaint seeks to enforce a federal or state law right which might be conclusively resolved by an interpretation of the CBA, the federal court is not to dismiss the complaint, but rather should stay proceedings until the Board has resolved the interpretation issue. *Tice v. American Airlines, Inc.*, 288 F.3d 313, 317-18 (7th Cir. 2002) (staying proceedings in a case asserting rights under the Age Discrimination in Employment Act);

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[10] This is broader than the standard in *Conrail*, which is limited to a situation in which the interpretation of the CBA at issue will conclusively resolve the case by either establishing, or refuting, the plaintiff's claim. 491 U.S. at 305.

Van Slyck v. GoJet Airlines, *LLC*, 323 F.R.D. 266, 277 (N.D. Ill. 2018) (staying proceedings regarding claims under the Americans with Disabilities Act and the Family and Medical Leave Act).

The Fifth Circuit also applies a version of the conclusive-resolution standard. Quoting *Conrail*, that circuit holds that "[t]he 'distinguishing feature' of a minor dispute 'is that the dispute may be conclusively resolved by interpreting the [collective bargaining] agreement.'" *Carmona v. Southwest Airlines, Co*., 536 F.3d 344, 348 (5th Cir. 2008). The Fifth Circuit rejected the defendant's suggestion that the RLA precluded a plaintiff's claims whenever interpretation of a CBA would be involved. 536 F.3d at 349-50. The court of appeals recognized that other circuits had held that ADA and Title VII claims create independent statutory rights and thus are not minor disputes, but the Circuit stopped short of adopting that rule. 536 F.3d at 350-51, And in the Fifth Circuit, unlike in the Seventh, a discrimination claim that could be conclusively resolved through arbitration is dismissed, not stayed.

C. Four Circuits Apply The CBA-Interpretation Standard To Preempt Or Preclude Discrimination Claims

The Sixth Circuit applies both the independent-right and CBA-interpretation standards. A claim is a "minor dispute" if it either seeks to enforce a right created by the collective bargaining agreement, or if resolution of the claim (even though asserting a right

created by federal or state law) would involve interpretation of a CBA. The court of appeals attributes the CBA-interpretation part of its standard to this Court's decision in *Hawaiian Airlines*. *Emswiler v. CSX Transportation, Inc.*, 691 F.3d 782, 792 (6th Cir. 2012) (quoting *Hawaiian Airlines*).[11] But under *Emswiler*, a federal or state law discrimination claim is not completely extinguished if it involves the interpretation of a CBA. Rather, the Sixth Circuit holds, the RLA only imposes an exhaustion requirement; a plaintiff asserting such a claim must first seek relief under the RLA arbitral process before going to court. "If [the plaintiff's disability discrimination claim is preempted by the RLA, then he is required to pursue the RLA-mandated arbitral process *before* bringing his claim to court, and his failure to do so precludes consideration of the merits." 691 F.3d at 792 (emphasis added). The Sixth Circuit holds that the limitation imposed by the RLA is not jurisdictional. 691 F.3d at 790.

The Fourth Circuit utilizes a CBA-interpretation standard, insisting that *Hawaiian Airlines* mandated that test. *Polk v. Amtrak National R.R. Passenger Corp*., 66 F.4th 500, 507 (4th Cir. 2023). That court of appeals also insists that the independent-right standard is not the proper test. "The RLA's rationale has

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[11] Applying that standard, the Sixth Circuit in *Emswiller* held that a state law discrimination claim was a minor dispute, because it would involve interpretation of a CBA. 691 F.3d at 792-93; see *Stanley v. ExpressJet Airlines, Inc.*, 808 Fed.Appx. 351, 356 (6th Cir. 2020), *cert. denied*, 141 S.Ct. 1058 (2021) (claims under Title VII and state anti-discrimination statutes deemed "minor disputes").

little to do with whether a minor dispute arises from a contractual claim or some other cause of action under state or federal law." *Id*. The Fourth Circuit maintains that applying an independent-right standard to pre-empt or preclude statutes such as anti-discrimination laws would nullify the RLA. *Id.* But unlike the other circuits rejecting the independent-right standard, the Fourth Circuit holds that the consequence of applying the RLA to a discrimination claim is that the claim must be brought before the National Railroad Adjustment Board or another board established under the RLA. *Id*.

In *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 3 (1st Cir. 1992), the First Circuit held that the RLA preempts state anti-discrimination law in any case which would involve interpretation of a collective bargaining agreement. "[Plaintiff's anti-discrimination] claim is barred because the resolution of his claim would require interpretation of the collective bargaining agreement." 972 F.2d at 5; see 972 F.3d at 5 (citing CBA-interpretation standard in *Lingle*, 486 U.S. at 409 n.8). The court of appeals rejected the independent-right standard. "[T]he mere fact that [a plaintiff's] cause of action under [state law] is 'independent' of the RLA says nothing about whether such action is preempted by the RLA." 972 F.3d at 3.[12] More recently the First Circuit held that "[w]hile *Lingle* articulated

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[12] See *Nuzzo v. Northwest Airlines, Inc*., 887 F.Supp. 28, 32 (D.Mass. 1995) (state anti-discrimination law claim preempted by RLA, citing *O'Brien*); *Downey v. American Airlines, Inc*., 1992 WL 333969, at *3-*5 (D.Mass. Nov. 2, 1992) (same).

the CBA interpretation test for preemption pursuant to the Labor Management Relations Act,...*Hawaiian Airlines* adopted the test for application to RLA cases raising the same issue. 512 U.S. at 263." In the First Circuit "[s]tate law claims requiring...actual interpretation [are] extinguished." *Adames v. Executive Airlines, Inc.*, 258 F.3d 7, 12 (1st Cir. 2001).

The Eighth Circuit standard, and its reading of *Hawaiian Airlines*, have changed completely over the years since *Hawaiian Airlines* was decided. In decisions between 1994 and 2006, the Eighth Circuit applied the independent-right standard. *Taggart v. Trans World Airlines, Inc*., 40 F.3d 264, 273-74 (8th Cir. 1994) (quoting *Hawaiian Airlines*); *Benson v. Northwest Airlines, Inc*., 62 F.3d 1108, 1115 (8th Cir. 1995); *Pittari v. American Eagle Airlines, Inc*. 468 F.3d 1056, 1060-61 (8th Cir. 2006). But since 2010, the Eighth Circuit has applied the CBA interpretation standard. *Sturge v. Northwest Airlines*, 658 F.3d 832, 837 (8th Cir. 2011) (citing *Hawaiian Airlines*); *Richardson v. BNSF Railway Co*., 2 F.4th 1063, 1067 (8th Cir. 2021); App. 4a-5a. In the Eighth Circuit the RLA bar, when applicable, preempts state law claims and precludes federal law claims.

This change over time of the Eighth Circuit standard is described in *Ratfield v. Delta Air Lines, Inc*., 2023 WL 5178593, at *10-*11 (D. Minn. Aug. 11, 2023). *Ratfield* noted that "initially [the Eighth Circuit] hewed to" the holding in *Hawaiian Airlines* that claims were not barred by the RLA if "the 'only source' of the asserted rights" was state (or federal) law." 2023 WL

5178593, at *9-*10 (quoting *Hawaiian Airlines*, 512 U.S. at 258, 388). But, the court explained, subsequent Eighth Circuit decisions invoked different language from *Hawaiian Airlines* to adopt a different legal standard.

> Courts began to emphasize certain language from *Hawaiian Airlines* to find a broader swath of claims preempted under the RLA. Though the Supreme Court's test rested upon the legal character of the claim, and whether the source of the right existed independently of the CBA, the Court in *Hawaiian Airlines* also cited with approval its precedent analyzing preemption in the context of the Labor-Management Relations Act.... It summarized that authority, explaining that state-law claims are only preempted under the LMRA if they are "dependent on the interpretation of a CBA,"...and "can be 'conclusively resolved' by reference to an existing CBA[.]".... In recent years [decisions in the Eighth Circuit] have seized upon that language—regarding whether a claim is *dependent upon the interpretation of a CBA*—to find claims preempted where analyzing the elements of the plaintiff's claim would require interpreting any term of their CBA.... These cases illustrate how the test for RLA preemption has moved from one based solely upon the legal character of the claim to one that also considers whether any term of the CBA might be implicated by the court's analysis.

Id., at 10 (quoting *Hawaiian Airlines*, 512 U.S. at 262) (emphasis in original). *Ratfield* illustrates the problems that have arisen because of the divergent standards in *Hawaiian Airlines*.

The Eighth Circuit has repeatedly held, as it did in this case, that the limitation in the RLA is jurisdictional. App. 4a, 5a n.2, 8a n.4; *Richardson v. BNSF Ry. Co*., 2 F.4th 1063, 1067-68 (8th Cir. 2021) ("settled law in this circuit"); *Hastings v. Wilson*, 516 F.3d 1055, 1058 and n.2 (8th Cir. 2008). In *Richardson* Judge Colloton noted that the Eighth Circuit rule conflicts with the Sixth Circuit rule in *Emswiler*. 2 F.4th at 1073-74 (concurring opinion).

The District of Columbia Circuit holds that the RLA limitation is jurisdictional and thus not subject to waiver, expressly rejecting the holding to the contrary in the Sixth Circuit decision in *Emswiler*. *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 235-38 (D.C. Cir. 2013) (opinion joined by Kavanaugh, J.).

D. The Conflict Is Widely Recognized

"Courts are divided over whether RLA precludes a railroad employee from prosecuting a Title VII claim in a court. Some have found that RLA precludes an employee from litigating in a court claims brought pursuant to federal civil rights statutes, including Title VII.... However, the majority of courts considering this issue have held that RLA does not preclude an employee from prosecuting a Title VII or other federal

civil rights claim in a court, and that such a claim(s) does not constitute a 'minor dispute.'" *Prokopiou v. The Long Island Railroad Co.*, 2007 WL 1098696, at *3-*4 (S.D.N.Y. April 9, 2007).

"[C]ourts have long been divided on their approach to the issue of RLA preclusion of discrimination claims, caused in no small way, as one circuit observed, by 'somewhat imprecise and often conflicting language in the cases that discuss' the issue." *Roache v. Long Island Railroad*, 487 F.Supp.3d 154, 167-68 (E.D.N.Y. 2020) (contrasting decisions in the Second and Seventh Circuits) (quoting *Adams v. American Airlines*, 202 F.3d 281, 2000 WL 14399, at *7 (10th Cir. Jan. 10, 2000)).

In *Ratfield v. Delta Air Lines, Inc.*, 2023 WL 5178593 (D.Minn. Aug. 11, 2023), the district court, noting the divergent standards applied by the courts of appeals, commented that "although this Court sees merit in the approaches adopted by the Third, Fifth, Sixth, and Seventh Circuits, the law of the Eighth Circuit Court of Appeals is binding here." 2023 WL 5178953, at *15. "There has been some disagreement among the various courts as to the proper test for determining whether the RLA takes precedence over discrimination statutes." *Malobabich v. Norfolk Southern Corp.*, 2011 WL 1791306, at *2 (W.D.Pa. May 10, 2011) (contrasting decisions applying the independent-right standard with decisions applying the CBA-interpretation standard). The conflict predates *Hawaiian Airlines*. See, e.g., *Middleton v. CSX Corp.*, 694 F.Supp. 941 947 (S.D.Ga. 1988) ("[w]hile the Supreme Court has

reserved the specific question of whether railroad employees must exhaust the remedies outlined in the Railway Labor Act before bringing a § 1981 claim against the employer, ... lower courts have faced the issue and reached conflicting results.").

The lower courts disagree about which standard is the majority rule. Several opinions hold that no preemption or preclusion of discrimination claims is the prevailing view. "[M]ost of the cases addressing whether the RLA preempts claims under federal anti-discrimination statues have held that there is no preemption." *Adams v. American Airlines, Inc*., 2000 WL 14399, at *7. "[A] majority of cases have held that federal statutory claims are not 'minor disputes' within the ambit of the RLA...." *Adams v. New Jersey Transit Rail Operations*, 2000 WL 224107, at *9 (S.D.N.Y. Feb. 28, 2000). "The overwhelming majority of cases have found that federal statutory claims were not 'minor disputes' within the ambit of the RLA and, thus, an independent federal statutory claim could be pursued." *McElveen v. CSX Transp., Inc*., 1996 WL 481105, at *4 (D.S.C. Aug. 21, 1996). But other opinions say the opposite. "[Plaintiff's] argu[ment] that federal civil rights claims are categorically excepted from RLA's dispute-resolution procedures [is] undermined by the weight of authority." *Roache v. Long Island Railroad*, 487 F.Supp.3d 154, 167-68 (E.D.N.Y. 2020). "[N]umerous courts have held that the RLA precludes claims brought pursuant to all manner of federal civil rights statutes...." *Crayton v. Long Island R.R*., 2006 WL 38333114, at *5 (E.D.N.Y. Dec. 29, 2006).

The conflict regarding whether the RLA limitation is jurisdictional is also well recognized.

> [T]here is a conflict in the circuits on whether the RLA's assignment of "jurisdiction" to an adjustment board to resolve disputes arising from interpretation of a collective bargaining agreement deprives a federal district court of subject matter jurisdiction over such a dispute. After *Arbaugh v. Y & H Corp*., 546 U.S. 500, (2006), expressed concern that courts too often mischaracterize non-jurisdictional requirements as jurisdictional, one circuit held that arbitration before an adjustment board under the RLA is mandatory but not jurisdictional, *Emswiler v. CSX Transp., Inc*., 691 F.3d 782, 788-90 (6th Cir. 2012), and another held that the arbitration requirement is jurisdictional. *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 235-38 (D.C. Cir. 2013).

Richardson v. BNSF Ry. Co., 2 F.4th 1063, 1073-74 (8th Cir. 2021) (Colloton, J., concurring). "Courts are split on whether RLA preemption is a matter of jurisdiction because it stems from statutory text and not the Supremacy Clause. The D.C. Circuit characterizes it as jurisdictional, but the Sixth and Ninth Circuits do not." *Ratfield*, 2023 WL 5178593, at *8. "[C]ircuits have divided on the resolution of that issue." *Beckington v. American Airlines, Inc*., 926 F.3d 595, 606 n.7 (9th Cir. 2019). "A circuit split has arisen regarding whether the RLA's mandatory arbitral mechanism is 'jurisdictional' or instead implicates only the court's ability to

reach the merits of the dispute and grant relief." *Locke v. U.S. Airways, Inc*., 2013 WL 5441725, at *2 n.1 (D.Mass. Sept. 27, 2013); see *Giles v. National Railroad Passenger Corp*., 59 F.4th 696, 702 n.3 (4th Cir. 2023) (contrasting decisions in the Sixth and District of Columbia Circuits); *Carlson v. CSX Transportation, Inc.*, 758 F.3d at 831 (contrasting decisions in the Sixth and District of Columbia Circuits).

II. THE EIGHTH CIRCUIT DECISION IS CONTRARY TO THE PREVIOUSLY EXPRESSED VIEWS OF THE GOVERNMENT

The decision of the Eighth Circuit is inconsistent with the interpretation of the RLA urged by the United States in this Court, and advanced by the EEOC in the lower courts. The views of the United States are of particular significance here, because the government agencies for which the Solicitor General speaks include the NRAB.

In its brief in *Hawaiian Airlines*, the government repeatedly urged that the test for whether a claim was preempted by the RLA is whether the claim was asserting a right created by the CBA, or a right created by [in that case] state law. "In *Andrews* the Court held that a railroad employee's state law wrongful discharge claim is subject to the RLA's exclusive arbitral mechanism where the 'source of the employee's right...is the collective-bargaining agreement'...." Brief for the United States as Amicus Curiae Supporting Respondent, *Hawaiian Airlines, Inc. v. Norris*, No.

92-2058, 10. "*Buell*...confirms that when a cause of action is based on substantive rights independent of the collective bargaining agreement, it is not preempted by the RLA even if parallel claims could also have been brought as minor disputes under the RLA." *Id*., at 23. As the government has repeatedly pointed out in other cases, an arbitrator has no authority to enforce state or federal rights outside the scope of a collective bargaining agreement. Brief of the United States as Amicus Curiae, *Barrentine v. Arkansas-Best Freight System, Inc*., 17-19; Brief of the United States as Amicus Curiae, *Alexander v. Gardner Denver*, 7.

The EEOC maintains that under *Hawaiian Airlines* the standard for determining whether a claim is a minor dispute is whether it seeks to enforce an independent statutory right.

> The Supreme Court in *Hawaiian Airlines*..., followed the reasoning of *Buell* to hold that "a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the [CBA]."...The Court in *Hawaiian Airlines* thus reaffirmed that the critical question in deciding whether the RLA requires arbitration is whether the source of the claim is a substantive legal right independent of the CBA.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant, *Brown v. Illinois Central Railroad Co*., 10 n.9 (quoting 512 U.S. at 260). "The determination whether a claim arising under a federal statute is

precluded by the RLA or LMRA does not turn on whether the federal claim required interpretation of a CBA...." *Id*., at 14-15.

III. THE CIRCUIT CONFLICT PRESENTS IMPORTANT PROBLEMS WHICH ONLY THIS COURT CAN RESOLVE

This complex circuit conflict is of manifest importance. Almost every circuit has its own distinctive combination of legal standard regarding preemption or preclusion of discrimination claims and rule as to the consequence of preemption or preclusion. The same claim would be resolved in very different ways depending on the circuit in which it arose. Because of the interstate nature of the railroad and airline businesses, there will often be in personam jurisdiction and venue over the same claim in multiple circuits.

Although the courts of appeals which hold the RLA preempts or precludes discrimination claims disagree about the nature of that limitation, the various limitations are almost always fatal as a practical matter. In the First Circuit, a claim that involves the interpretation of a CBA is expressly extinguished. A holding of preemption under either the conclusive-resolution or CBA-interpretation standards will usually preclude any enforcement of the anti-discrimination statute at issue, because the Board's jurisdiction under the RLA does not include enforcing statutory rights. *Hawaiian Airlines*, 512 U.S. at 254-55. The Sixth and Seventh Circuits require claimants with discrimination claims

to get the Board to resolve related issues regarding the meaning of the relevant CBA. There would often be no way to do that, and such suggestions would be entirely impracticable in cases in which issues about the meaning of a CBA (or CBA-related policies or practices) arise in the middle of trial, as has repeatedly occurred, including in the instant case.[13] In many circuits a defendant can create these insurmountable obstacles merely by positing some colorable dispute regarding the meaning of the text of a CBA, the meaning of the employer's own written policies, or even (as here) the nature of the employer's unwritten customs or practices.

These are not problems that the lower courts can solve. This Court's own RLA decisions set out divergent standards which would regularly yield different results in discrimination cases, as they would in the instant case. It is difficult to fault the courts of appeals because they have selected and applied different passages and standards from *Hawaiian Airlines*. Only the Court can sort this all out.

In the courts below, plaintiff was limited by well-established Eighth Circuit precedent that RLA preemption or preclusion is a jurisdictional bar, a precedent which—as the defendant and the district court pointed out—prevented the lower courts from holding that the

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[13] E.g., *Klotzbach-Piper v. National Railroad Passenger Corp*., 2021 WL 4033071, at *5-*6 (D.D.C. Sept. 3, 2021); *Hamilton v. National Passenger Railroad Corp.*, 2020 WL 6781234, at *4-*5 (D.D.C. Nov. 18, 2020); *Said v. National Railroad Passenger Corp.*, 390 F.Supp.3d 46, 54-57 (D.D.C. 2019).

defendant had waived that issue by failing to raise it for more than two years after the commencement of this action. Since the decision in *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006), this Court has granted certiorari fifteen times to determine whether standards under particular statutes are jurisdictional. E.g., *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023) (Immigration and Naturalization Act); *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023) (Bankruptcy Act); *Wilkins v. United States*, 598 U.S. 152 (2023) (Quiet Title Act); *Boechler v. Commissioner of Internal Revenue*, 596 U.S. ___, 142 S.Ct. 1493 (2022) (Internal Revenue Code). This Court regularly addresses this issue because of the "harsh consequences" of treating a legal rule as jurisdictional, especially the rule that "courts must enforce jurisdictional rules...even in the face of a litigant's forfeiture or waiver." *Santos-Zacaria*, 143 S.Ct. at 1103.

The Court should grant review in this case, both to correct the unduly broad standard for RLA preemption and preclusion that seriously obstructs the rights of railroad and airline employees to be free from unlawful discrimination, and to apply to the RLA "the important distinctions between jurisdictional prescriptions and claim-processing rules." *Reed v. Elsevier, Inc. v. Muchnik*, 559 U.S. 154, 161 (2010).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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