No. 21-309

In the Supreme Court of the United States

SOUTHWEST AIRLINES CO.,
Petitioner,

v.

LATRICE SAXON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

For nearly a century, this Court has consistently held that workers who load and unload interstate cargo are "engaged in commerce." *See, e.g.*, *Balt. & Ohio Sw. R.R. Co. v. Burtch*, 263 U.S. 540, 542, 544 (1924); *Puget Sound Stevedoring Co. v. Tax Comm'n of State of Wash.*, 302 U.S. 90, 92 (1937), *overruled on other grounds by Dep't of Revenue of State of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978); *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 218–19 (1982).

The Federal Arbitration Act exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The question presented is whether workers who load and unload interstate cargo are "engaged in foreign or interstate commerce."

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INTRODUCTION

According to Southwest, the question presented in this case is whether workers who load and unload interstate cargo fall within the definition of the term "transportation worker" for purposes of the Federal Arbitration Act. Pet. i, 2. But the words "transportation worker" do not appear anywhere in the statute. *See* 9 U.S.C. § 1. That term is simply this Court's shorthand for the category of workers covered by the Act's exemption for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," *id.* *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Thus, the actual question presented in this case is not the definition of "transportation worker"—a term the statute does not use—but rather whether workers who load and unload interstate cargo are "engaged in commerce."[1] This Court has already answered that question—repeatedly.

In case after case, for nearly a hundred years, this Court has consistently held that cargo loaders are "engaged in commerce." Transporting goods from one state (or country) to another, the Court has explained, includes loading the goods and unloading them. Thus, loading and unloading interstate cargo *is* interstate transportation; it *is* interstate commerce. Workers engaged in loading and unloading, therefore, are "engaged in commerce."

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[1]This Court routinely uses the phrase "engaged in commerce" interchangeably with the phrase "engaged in foreign or interstate commerce." *See, e.g.*, *Circuit City*, 532 U.S. at 117–18. This brief does the same.

Southwest does not mention this case law—let alone explain why this Court should grant certiorari just to answer a question it has already repeatedly answered. Instead, the company tries to portray the decision below as a radical outlier. But it can do so only by misrepresenting what the Seventh Circuit actually held. According to Southwest, the court concluded that "anyone related to interstate commerce" in any way is exempt from the Federal Arbitration Act. Pet. 25 (emphasis omitted). And the court applied this principle to hold that workers who "merely oversee those who prepare goods for travel and occasionally prepare those goods themselves" are exempt. Pet. 21–22. Neither is true.

To the contrary, the Seventh Circuit held that the exemption does *not* apply to any worker who happens to be related to commerce in any way. It applies only to the narrow category of workers who are "actively occupied in the enterprise of moving goods across interstate lines." Pet. 9a. And the Southwest workers at issue here load and unload interstate cargo; they do not "merely oversee" workers "who prepare goods for travel." Pet. 9a–10a.

Thus, the Seventh Circuit's actual decision holds exactly what this Court has repeatedly held for decades: that cargo loaders are "engaged in commerce." There is, therefore, no need for review.

Southwest's attempts to manufacture one fail. First, the company argues that the decision below splits with the Fifth Circuit's decision in *Eastus*. But the plaintiff in that case was not a cargo loader; she supervised ticketing and gate agents. And the decision's analysis rested on an obviously incorrect concession by the plaintiff about the scope of the Federal Arbitration Act's exemption. The analysis in *Eastus*, therefore, does not "directly" apply

here, Pet. 14a—or in any other case. Next, the company extols the Act's liberal policy in favor of arbitration. But as this Court has already explained, the statute's policy cannot overcome its plain text. Finally, Southwest reveals its true concern: It's worried that it will face greater liability in court than it would in arbitration. But certiorari jurisdiction does not exist so this Court can protect companies from liability for their own misconduct. It exists to resolve important, disputed questions of law.

The question presented here has been resolved for nearly a century. This Court need not resolve it again.

STATEMENT

I. Statutory background

"The Federal Arbitration Act requires courts to enforce private arbitration agreements." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (2019); *see* 9 U.S.C. § 2. But there's an exception to this mandate. The Act is emphatic: "[N]othing" in the statute "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.[2]

This Court has repeatedly held that this exemption must be interpreted according to the ordinary meaning of its words—that it may not be construed either more narrowly or more broadly than those words allow. *See*, *e.g.*, *New Prime*, 139 S. Ct. at 539, 543 (2019); *Circuit City*, 532 U.S. at 117–19.

And the ordinary meaning of those words, this Court has determined, exempts those classes of workers—like

[2] Unless otherwise specified, internal quotation marks, citations, and alterations are omitted throughout this brief.

seamen and railroad employees—that are "engaged in commerce." *Circuit City*, 532 U.S. at 116. In other words, the statute exempts transportation workers. *Id.* at 109.

The historical and statutory context in which the statute was enacted is essential to understanding Congress' concern with transportation workers and why it specifically exempted them. Beginning in the late nineteenth century, labor disputes in the transportation industry had repeatedly crippled interstate commerce and endangered the public.

During the Pullman Strike of 1894, for example, tens of thousands of workers went on strike, violence broke out in several cities, and the railroad system was paralyzed. See A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Polit. Econ. 540, 541–42 (1901); Almont Lindsey, The Pullman Strike 239–40, 254 (1942). In 1921, a nationwide strike by sailors and longshoremen shut down ports for weeks. *See* David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism 1865–1925 403 (1987). And in 1922, 400,000 railroad shopmen refused to work—a strike that again paralyzed rail transportation, shut down industries that couldn't get fuel or raw materials, and threatened the destruction of the entire west coast fruit crop, left to rot without transportation to market. Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev., no. 6 (Dec. 1922) at 2, 6.

And these were not the only incidents of labor unrest. The early twentieth century saw over a hundred strikes in the railroad industry alone. See Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 273 (2003).

Labor unrest was not limited to workers involved in freight transportation; workers involved in passenger transport went on strike as well. In the Pullman Strike, for example, the strikers were railroad employees who worked on sleeping cars. Winston, *The Significance of the Pullman Strike*, at 541. Yet the effect of the strike was not limited to these cars. It "affected a large part of the railways from the Mississippi valley to the Pacific," so fully cutting off the city of Chicago from supplies that "the city was for days threatened with famine." *Id.*

Nor were the labor strikes—or their potential to cripple the economy—limited to those transportation workers whose job was to personally move goods or passengers across state lines. Strikes that threatened to bring American commerce to a halt included, for example, strikes by longshoremen—port workers who load and unload ships—and railroad shopmen—workers who build, maintain, and repair trains. *See, e.g.*, Montgomery, The Fall of the House of Labor at 403; Gadsby, *Strike of the Railroad Shopmen* at 2.

To mitigate this ongoing strife, Congress enacted dispute resolution statutes governing transportation workers that it hoped would obviate the need for strikes. The statutes in force when the Federal Arbitration Act was passed applied broadly to all transportation workers in the industries they governed—not just those involved in transporting goods, but passengers too; and not just those who personally moved goods or passengers from one place to another, but all those who were integral to that effort. *See infra* pages 6–7.

To govern the maritime industry, for example, Congress passed the Shipping Commissioners Act, which authorized shipping commissioners to resolve disputes

between a "master, consignee, agent, or owner" of a ship "and *any* of his crew." Shipping Commissioners Act of 1872, ch. 322, § 25, 17 Stat. 262, 267 (emphasis added). The statute applied broadly to "every description of vessel navigating on any sea or channel, lake or river"—not just vessels that shipped goods. *See id.* § 65. And "every person (apprentices excepted) [] employed or engaged to serve *in any capacity* on board" a vessel was to be considered "a 'seaman'" subject to the statute—not just those workers personally involved in navigation. *See id.* (emphasis added); *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 348 (1991) (explaining that the terms "[m]ember of a crew" and "seaman" were often, at the time, used interchangeably, and that neither term was limited to those who actually navigated the ship, but rather included anyone "employed on board a vessel in furtherance of its purpose"—including, for example, cooks, surgeons, fishermen, carpenters, waiters, and cabin attendants).

The Transportation Act of 1920, which governed dispute resolution in the railroad industry, was similarly broad. Transportation Act of 1920, Pub. L. No. 66-152, § 1, 41 Stat. 456. The Act imposed a "duty" on "all carriers and their officers, employees, and agents to exert every reasonable effort" to ensure that labor disputes did not cause "any interruption to the operation of any carrier." *Id.* § 301 (emphasis added). To that end, the statute created a federal Railroad Labor Board to resolve labor disputes, with the goal of preventing the unrest that had previously gripped the industry. *See id.* §§ 304, 307; *Ry. Emps.' Dep't, A.F.L. v. Ind. Harbor Belt R.R. Co.*, Decision No. 982, 3 R.L.B. 332, 337 (1922).

The statute—and, therefore, the Railroad Labor Board's jurisdiction to resolve disputes—applied to both passenger railroads and those that carried freight. *See* Pub. L. No. 66-152 § 300(1).[3] And it governed "*all*" railroad employees, not just those responsible for actually moving the train. *See id.* § 300 (emphasis added). Thus, the Railroad Labor Board decided disputes between railroads and all manner of railroad employees: not just conductors and engineers, but also shop employees (those who worked building and maintaining railcars), track mechanics, "and baggage and parcel room employees" to name just a few. *See, e.g.*, *Int'l Ass'n of Machinists v. Atchison, Topeka, & Santa Fe Ry.*, Decision No. 2, 1 R.L.B. 13, 22–27 (1920) (Railroad Labor Board decision governing these—and many other—categories of railroad employee).

Of particular relevance, the Board repeatedly held that baggage and freight handlers were railroad employees, subject to the Transportation Act. *See, e.g.*, *Bhd. of Ry. & S.S. Clerks v. N.Y. Cent. R.R. Co.*, Decision No. 1209, 3 R.L.B. 665, 666 (1922); *Am. Fed'n of R.R. Workers v. N.Y. Cent. R.R. Co.*, Decision No. 1220, 3 R.L.B. 687, 688 (1922); *Bhd. of Ry. & S.S. Clerks v. Erie R.R. Co.*, Decision No. 1210, 3 R.L.B. 667, 667–68 (1922);

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[3] The statute defined "carrier" to include "sleeping car compan[ies]," which, of course, run passenger cars; and to include (with limited exceptions not relevant here) "any carrier by railroad, subject to the Interstate Commerce Act." Pub. L. No. 66-152 § 300(1). The Interstate Commerce Act, in turn, applied (again with some exceptions not relevant here) "to any common carrier or carriers engaged in the [foreign or interstate] transportation of *passengers or property* wholly by railroad, or partly by railroad and partly by water . . . ." Act of Feb. 4, 1887, Pub. L. No. 49-104, § 1, 24 Stat. 379 (1887) (emphasis added).

Bhd. of Ry. & S.S. Clerks v. N.Y. Cent. R.R. Co., Decision No. 1232, 3 R.L.B. 705, 706 (1922).

It was against this backdrop that Congress passed the Federal Arbitration Act—a statute that requires courts to enforce private contracts between individual workers and their employers about how they will resolve their disputes. *See* 9 U.S.C. § 2; *New Prime*, 139 S. Ct. at 536. If applied to seamen and railroad employees, the Act would have conflicted with the dispute resolution statutes Congress had already passed to govern those workers. *See Circuit City*, 532 U.S. at 121. But Congress did not just exempt seamen and railroad employees. 9 U.S.C. § 1. As this Court has explained, Congress was concerned with all transportation workers' ability to disrupt commerce. *See Circuit City*, 532 U.S. at 121. So it exempted "*any*" class of workers engaged in commerce, 9 U.S.C. § 1 (emphasis added)—ensuring that Congress (and the executive branch) retained the ability to regulate and resolve disputes in the transportation industry, unhampered by any effort by an employer to substitute its own individualized dispute resolution process.

II. Factual and procedural background

Southwest requires its ramp supervisors to work overtime, but does not pay them for this work. Respondent Latrice Saxon is a ramp supervisor at Southwest Airlines. App. 1.[4] Ramp supervisors load and unload cargo from Southwest planes, as well as supervise others who do the same. *Id.* at 28–29. Despite their title, the majority of ramp supervisors' work is not supervision,

[4] All references to App. are to the appendix filed in the Seventh Circuit. All references to the docket are to the district court docket, case number 19-cv-403 (N.D. Ill.).

but rather personally loading and unloading interstate cargo. App. 2.[5] And that cargo includes not just passengers' luggage, but also airmail and freight (for example, food and beverage products, electronics, machine parts, "and many other goods that are circulated throughout the country"). *Id.* at 3, 28.

Ramp supervisors at Southwest consistently work over forty hours a week, but do not get paid overtime. App. 17. The company requires its ramp supervisors to arrive early to perform work before the start of their official shift and to work through meal breaks. *Id.* at 17–18. But it does not pay them for this work. *Id.* Ms. Saxon, therefore, sued Southwest, on behalf of herself and all other similarly situated workers, for the overtime they are owed under the Fair Labor Standards Act. *See id.* at 22–24; 29 U.S.C. § 207 (requiring overtime compensation "at a rate not less than one and one-half times the regular rate").

Southwest's motion to dismiss. Southwest moved to dismiss Ms. Saxon's claims under the Federal Arbitration Act. *See* Mot. Dismiss, Dkt. No. 14, at 1. As a condition of employment, Southwest imposes an arbitration clause on

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[5] Southwest insinuates otherwise in its petition, repeatedly asserting that ramp supervisors only "occasionally" load and unload cargo themselves. *See, e.g.*, Pet. 15–16. These assertions badly mischaracterize the record. As the Seventh Circuit explained in response to Southwest's similar efforts to misrepresent the record below, Ms. Saxon's declaration shows that ramp supervisors spend most of their time—an estimated three out of five days a week—actually loading and unloading cargo themselves. Pet. 9a–10a; App. 29. And "Southwest offered no evidence to contradict this estimate." Pet. 10a. In any event, as this decision was on Southwest's motion to compel arbitration, the facts must be taken in the light most favorable to Ms. Saxon. *See, e.g.*, *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002).

all employees who are not subject to a collective bargaining agreement, including Ms. Saxon. *See id.* at 3. That clause, Southwest argued, requires that Ms. Saxon arbitrate her overtime claim. *See id.* And, the company contended, it must be enforced under the Federal Arbitration Act. *See id.* at 3–11.

In response, Ms. Saxon argued that the Federal Arbitration Act does not apply. *See* Pl.'s Br. Applicability of Section 1, Dkt. No. 28, at 3. The statute, Ms. Saxon explained, exempts "seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce." *Id.* at 2 (quoting 9 U.S.C. § 1). Because ramp supervisors regularly load and unload interstate cargo, Ms. Saxon argued, they are a class of workers "engaged in . . . commerce" and therefore exempt. *See id.* at 3.

The district court's ruling. The district court held that airline employees who load and unload interstate cargo are not exempt from the Federal Arbitration Act. Pet. 39a. The court did not examine the meaning of the phrase "engaged in commerce" at the time the Federal Arbitration Act was passed. Nor did it examine this Court's case law, which has repeatedly held that workers who load and unload interstate cargo are engaged in commerce. Instead, the court attempted to divine—from a hodgepodge of lower-court cases involving different classes of workers—"rules-of-thumb" about which workers satisfy the "definition of 'transportation worker.'" Pet. 31a.

The court did not explain how its "rules-of-thumb" approach could be reconciled with this Court's mandate in *New Prime* that courts interpret the Federal Arbitration Act according to the ordinary meaning of its terms, *see* 139 S. Ct. at 539. Nor did it explain why the proper approach

to interpreting the Act's exemption was to attempt to define "transportation worker"—a phrase that occurs nowhere in the statute itself—rather than the phrase that actually appears in the Act's text, "class of workers engaged in . . . commerce," 9 U.S.C. § 1.

In any event, according to the district court, the "linchpin" of the "rules-of-thumb" it had gleaned from the smattering of cases it examined is that workers are not exempt unless they personally transport goods. Pet. 31a, 37a. Workers who load and unload those goods, the court held, do not count. *See id.*

The Seventh Circuit's ruling. In a unanimous opinion by Judge St. Eve, the Seventh Circuit reversed. Pet. 21a. Unlike the district court, the Seventh Circuit held that the "inquiry" into which workers are exempt from the Federal Arbitration Act "begins with the text." Pet. 5a. To be "engaged in foreign or interstate commerce," the court explained, is to be "actively occupied in the enterprise of moving goods across interstate lines." Pet. 9a.[6]

And although this line may not always "be easy to draw," the court held that "[w]herever the line may be, . . . ramp supervisors fall on the transportation-worker side of it." Pet. 9a. By loading and unloading interstate

[6] Before the district court, Southwest argued that "commerce" included only the transportation of goods, not people. Pet. 8a. But it "abandoned that theory on appeal." *Id.* And the Seventh Circuit—citing a recent Third Circuit decision holding that commerce encompasses the movement of passengers as well as goods—concluded that it had "no reason to dispute [Southwest's] concession." *Id.* The Court, therefore, "accept[ed] that the movement of goods accompanying people, just as much as the movement of goods alone, is in interstate commerce." *Id.*

cargo, ramp supervisors "are actually engaged in the movement of goods in interstate commerce." Pet. 10a. "Actual transportation," the court explained, "is not limited to the precise moment either goods or the people accompanying them cross state lines." Pet. 10a. To the contrary, "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate, too, is actual transportation." Pet. 10a. "[A]nd those who performed that work were recognized in 1925," when the Federal Arbitration Act was passed, "to be engaged in commerce." Pet. 10a.

Indeed, the Seventh Circuit explained, this Court has repeatedly made clear that "loading and unloading a vessel" is "*itself* interstate or foreign commerce"—and that workers who load and unload interstate shipments are therefore "engaged in . . . commerce." Pet. 10a–11a (emphasis added). "[A]irplane cargo loaders," the court held, are no different.

The court found "further support[]" for its conclusion by examining "the enumerated categories of seamen and railroad employees in § 1." Pet. 12a. The court concluded that, historically, both categories included cargo loaders. Pet. 12a–18a. In fact, the court pointed out, just a year before the Act was passed, this Court had held that it was "too plain to require discussion that" railroad employees responsible for "the loading or unloading of an interstate shipment" are engaged in commerce. Pet. 17a.

The court rejected Southwest's argument that exempting cargo loaders from the Federal Arbitration Act—as its text requires—would be "the start of a slippery slope." Pet. 19a. "The loading of goods into a vehicle traveling to another state or country," the court explained, "is the step that both immediately and

necessarily precedes the moment the vehicle and goods cross the border." Pet. 19a. Simply because those who perform this work are engaged in commerce "does not necessarily mean that the work of [] ticketing or gate agents . . . or others even further removed from that moment qualify too." Pet. 19a.

The Seventh Circuit also dismissed Southwest's concern that its decision would create a circuit split with the Fifth Circuit's decision in *Eastus*—which held that a worker who "supervised and assisted airport ticketing and gate agents" was not exempt from the Federal Arbitration Act. Pet. 14a. The plaintiff in that case was not a cargo loader, and more importantly, the parties in *Eastus* had, for some reason, agreed (incorrectly) that longshoremen—workers who load and unload boats—are not exempt from the Federal Arbitration Act. Pet. 14a. Given that concession, which is absent here, the court held, *Eastus*'s "logic" does not "directly appl[y]." *Id.*

REASONS TO DENY THE PETITION

I. Review is unnecessary because this Court has already answered the question presented.

This case presents a single question: Are workers who load and unload interstate cargo "engaged in commerce"? This Court has already answered that question—several times over.

A. Just one year before the Federal Arbitration Act was passed, this Court held that it was "too plain to require discussion" that a person who loads and unloads interstate cargo is "engaged in interstate commerce." *Burtch*, 263 U.S. at 542, 544. And it has continued to reiterate this conclusion ever since. Over and over again—in multiple contexts over the course of decades—this

Court has made clear that workers are "engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel." *Puget Sound*, 302 U.S. at 92; *see, e.g.*, *id.*; *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 218–19 (1982) (company that loads and unloads ships, "[c]ertainly" was "engaged in commerce").

That's because "the loading and discharge" of cargo "*is* interstate or foreign commerce." *Puget Sound*, 302 U.S. at 92 (emphasis added); *see Joseph,* 330 U.S. at 427 ("The transportation in commerce, at the least, begins with loading and ends with unloading."). Workers who are engaged in loading and unloading, therefore, are engaged in commerce.

Southwest fails to mention this unequivocal case law—or that the Seventh Circuit heavily relied on it, *see* Pet. 10a–11a, 17a–18a. Instead, the company asserts that the decision below was novel, radical even. *See* Pet. 21. But there's nothing groundbreaking about the Seventh Circuit's opinion. It says exactly what this Court has said for decades: Cargo loaders are "engaged in commerce."

This Court need not grant review just to reiterate what it has already repeatedly held, simply because this time it comes up in the context of the Federal Arbitration Act.

B. To the contrary, every indicator of statutory meaning demonstrates that cargo loaders are "engaged in commerce" for purposes of the Federal Arbitration Act, just as they are in every other context.

Start with the text: In the years preceding the Act's passage, this Court had repeatedly—and consistently—held that workers are "engaged in commerce" if they

personally transport interstate goods or passengers or if their work is "so closely related to interstate transportation as to be practically a part of it." *See, e.g.*, *Burtch*, 263 U.S. at 544; *Shanks v. Del., Lackwanna & W. R.R. Co.*, 239 U.S. 556, 558 (1916).[7] And it had specifically held that cargo loaders satisfy this definition. *Burtch*, 263 U.S. at 544. Thus, the ordinary meaning of the phrase "engaged in commerce" at the time the Federal Arbitration Act was passed encompassed workers who load and unload interstate cargo.

That cargo loaders are exempt from the statute is confirmed by looking to seamen and railroad employees, the enumerated categories of exempt workers that precede the exemption's catch-all phrase "any other class of workers engaged in . . . commerce," 9 U.S.C. § 1. Both seamen and railroad employees have long included workers who load and unload interstate cargo. *See* Pet. 14a (explaining work of crew of ship historically included loading and unloading); Pet. 16a (railroad employees included cargo loaders); *Burtch*, 263 U.S. at 544 (holding person who unloaded train was railroad employee); *Puget Sound*, 302 U.S. at 92 (explaining that stevedoring—loading and unloading—was traditionally done by the

[7] Before the Seventh Circuit, Southwest complained that these decisions interpreted the Federal Employers' Liability Act, which today has a broad scope. Appellee's Br. 36. But that Act did not have a broad scope at the time. Instead, it used "almost exactly the same phraseology" that would later be incorporated into the Federal Arbitration Act. *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 453 (3d Cir. 1953). And it had to be narrowly construed, because at the time, Congress's Commerce Clause power was understood to be extremely narrow. *See The Emp.'s Liab. Cases*, 207 U.S. 463, 496, 498 (1908).

ship's crew); *Atl. Transp. Co. of W.Va. v. Imbrovek*, 234 U.S. 52, 62 (1914) (same).

Finally, interpreting the exemption according to its ordinary meaning—as applying to cargo loaders—best effectuates its purpose. Congress had two goals in exempting workers engaged in commerce from the Federal Arbitration Act: It sought to avoid conflicts with pre-existing dispute resolution statutes governing the transportation industry. *See Circuit City*, 532 U.S. at 121. And because of transportation workers' integral role in commerce—and Congress's concern about their ability to disrupt commerce—Congress sought to ensure that it (and the executive) maintained the ability to regulate labor disputes in the transportation industry, unhindered by a statute that otherwise requires the enforcement of whatever dispute resolution agreement an employer might impose on its workers. *See id.*

Exempting cargo loaders fulfills both purposes. *First*, at the time the Federal Arbitration Act was passed, both the maritime and railroad industries were subject to dispute resolution statutes that governed all seamen and railroad employees, including those who loaded and unloaded cargo. *See supra* pages 5–7. And today, the dispute resolution statute that governs unionized railroad and airline employees—the Railway Labor Act—covers cargo loaders. *See Miller v. Sw. Airlines Co.*, 926 F.3d 898, 903 (7th Cir. 2019). If the Federal Arbitration Act did not exempt these workers, they'd be subject to two conflicting dispute resolution schemes—both at the time the statute was passed and now. *Second*, workers who load and unload cargo are integral to the transportation of goods; it's hard to imagine a group of workers whose labor disputes are more likely to disrupt commerce than the workers

responsible for getting those goods onto vehicles in the first place. Exempting these workers from the Federal Arbitration Act, therefore, accords with Congress's purpose of ensuring that it could regulate labor disputes that threatened commerce without fear that the Act would stand in the way.

Thus, the text, history, and purpose of the Federal Arbitration Act demonstrate that this context is no different than any other: Cargo loaders are—as this Court has repeatedly held—"engaged in commerce."

C. Southwest offers no valid explanation for why this Court should grant review to answer a question it has already answered. The company emphasizes that the Federal Arbitration Act "establishes a liberal federal policy favoring arbitration agreements." Pet. 22–23. But the whole point of the Act's exemption for workers "engaged in commerce" is to *exclude* those workers from the reach of the statute—including any policy in favor of arbitration it might establish. And, of course, this Court has already rejected the argument that a policy in favor of arbitration can overcome the text of the statute. *New Prime*, 139 S. Ct. at 543.

Southwest accuses the Seventh Circuit of reading the Act's exemption more broadly "than is supported by the ordinary meaning" of its text, Pet. 23, but its accusation is plainly meritless. The Court of Appeals gave the phrase "engaged in commerce" the same meaning this Court has given it for nearly a century—the same meaning the phrase had when the statute was passed.

Southwest, therefore, resorts to mischaracterizing the lower court's opinion. The Seventh Circuit—after examining the ordinary meaning of the phrase "engaged in commerce" and concluding that it applies to cargo

loaders—confirmed its conclusion by analyzing whether Southwest's ramp supervisors have the same "relationship with interstate or foreign commerce" as seamen and railroad employees. Pet. 20a. That's precisely what this Court has instructed courts interpreting the transportation-worker exemption to do. *See Circuit City*, 532 U.S. at 114. But Southwest seizes on the Seventh Circuit's use of the word "*relationship*" to claim that the court held that the exemption "applies to anyone *related to* interstate commerce" in any way. Pet. 25.

That's just not true. The Seventh Circuit expressly—and repeatedly—emphasized that the phrase "engaged in commerce" does *not* encompass just any relationship to commerce. *See, e.g.*, Pet. 6a. Rather, it encompasses only those workers whose relationship to commerce is "analogous" to that of seamen and railroad employees. *Id.* That narrow category, the court held, comprises just those workers who are "actively occupied in the enterprise of moving goods across interstate lines." Pet. 9a. That is precisely the same category of workers Southwest itself says the exemption covers. Pet. 23 (stating exemption should be limited to "workers who take an active role in the movement of goods across state lines").[8] The problem for Southwest is that it was well-understood when the Federal Arbitration Act was passed—just as it is today—that this category of workers includes cargo loaders.

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[8] Even Southwest's description of this Court's own case law is misleading. The company claims (at 23) to draw its definition of "engaged in commerce" from this Court's decision in *Circuit City*. In fact, the word it quotes is taken from a parenthetical in *Circuit City*, quoting a different case interpreting a different phrase in a different statute—"used in commerce." *Circuit City*, 532 U.S. at 116.

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Bottom line: The Federal Arbitration Act, like all statutes, is to be interpreted according to its ordinary meaning. This Court has repeatedly made clear that the ordinary meaning of the phrase "engaged in commerce" encompasses cargo loaders. There is no need to grant review just so it can say so again.

II. There is no split of authority that warrants this Court's review.

A. Southwest also claims (at 13) that the decision below "creates a clear split with the Fifth Circuit regarding identical workers." That's false. For starters, the Fifth Circuit's decision in *Eastus* did not involve "identical workers." Southwest's ramp supervisors spend the majority of their time loading and unloading planes. *See* Pet. 9a–10a. The plaintiff in *Eastus* supervised and assisted "ticketing and gate agents," workers who "ticketed passengers," tagged "baggage and goods," and "placed" them "on conveyor belts" for others to screen and load. *Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207, 208 (5th Cir. 2020).

To be sure, the Fifth Circuit did say that cargo loaders are not exempt from the Federal Arbitration Act. But that conclusion was based on the plaintiff's concession that "longshoremen"—people who load and unload boats—and "delivery-truck loaders are not" exempt from the statute. *Id.* at 212. This concession is obviously wrong. *See supra* page 13–16 (explaining that cargo loaders have always been understood to be "engaged in commerce"); *Puget Sound*, 302 U.S. at 92 (holding longshoremen specifically are "engaged in . . . commerce"); *Int'l Longshoremen's Ass'n*, 456 U.S. at 218–19 (stevedoring company, company that loads and unloads ships, "[c]ertainly" was "engaged

in commerce"). And Ms. Saxon made no such concession here. *See* Pet 14a. The Fifth Circuit's "logic," therefore—resting on an incorrect concession that others are unlikely to make—does not "directly" apply here, or anywhere else. *Id.*

And even if *Eastus* could be characterized as a "clear split" with the decision below, it's a split that's likely to fade away on its own. As the Seventh Circuit pointed out, *Eastus*'s analysis is perplexing. *See* Pet. 15a. The court did not examine the ordinary meaning of the phrase "engaged in commerce." Nor did it examine whether in 1925, the enumerated categories of seamen and railroad employees encompassed cargo loaders. Instead, the court based its analysis on a prior Fifth Circuit decision "expressly disclaiming reliance" on the phrase "engaged in commerce." *Id.*

This approach is in direct contradiction to the approach recently mandated by this Court in *New Prime v. Oliveira*—and, for that matter, ordinary principles of statutory interpretation. *See* 139 S. Ct. at 539 (requiring that the Federal Arbitration Act, like other statutes, be interpreted according to the ordinary meaning of its terms). There's little chance that this analysis will last for long even in the Fifth Circuit, and even less that any other Circuit will adopt it. If, for some reason, it does catch on, this Court can fix the problem then.

B. Unable to demonstrate a meaningful circuit split, Southwest falls back to arguing that this Court should grant review to clear up "confusion" in the Circuits about how to interpret the transportation-worker exemption. Pet. 17. But the company doesn't identify any actual confusion. Southwest notes (at 17–18) that the First and Ninth Circuits have concluded that last-mile drivers are

exempt, while the Seventh and Ninth Circuits have held that local rideshare and food delivery drivers are not.

That does not evidence confusion. It evidences that courts are faithfully applying the ordinary meaning of the phrase "engaged in commerce." It has long been clear that when a good is on a continuous journey from one state or country to another, it is "in commerce" throughout; and every worker that transports that good on its journey—including those responsible for a leg of the journey that's entirely intrastate, like last-mile drivers—is "engaged in commerce." *See, e.g. Phila. & Reading Ry. Co. v. Hancock*, 253 U.S. 284, 285 (1920). Where, however, a good's journey is entirely intrastate from start to finish, like that of a restaurant meal locally delivered, the worker responsible for that journey is not "engaged in commerce." Cases involving last-mile drivers come out differently from cases involving food-delivery workers because these workers have different relationships to commerce. And, in any event, even if there were confusion about last-mile drivers or food-delivery workers, granting certiorari here—a case that involves neither—would not resolve that confusion.

Southwest next asserts (at 19) that there's confusion about workers who load and unload cargo. But the only evidence the company can muster is two district court cases, one of which is from nearly thirty years ago. Pet. 19–20. This Court should not grant certiorari to address "confusion" that arises in one district court case every three decades. And, presumably, now that the Seventh Circuit has thoroughly analyzed the issue, whatever minimal confusion may have existed has been cleared up.

In a last-ditch effort to convince the Court that the decision below is out of step with other Circuits' case law,

Southwest again resorts to mischaracterization. According to the company (at 21–22), the Seventh Circuit exempted from the Federal Arbitration Act all workers who "merely oversee those who prepare goods for travel and occasionally prepare those goods themselves." But that is not what the Seventh Circuit did. The Seventh Circuit held that workers whose main job is to personally load and unload interstate cargo are exempt. *See* Pet. 12a; *id.* at 10a (explaining that because ramp supervisors' work is, in large part, personally loading and unloading cargo, the court "need not consider . . . whether supervision of cargo loading alone would suffice").

That decision is perfectly in line with the only other Circuit cases, besides *Eastus*, to consider similar workers. *See, e.g.*, *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988) (postal workers at central bulk mail processing center are exempt from Federal Arbitration Act); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987) (same). And its analysis accords with virtually every Federal Arbitration Act decision that has applied this Court's recent guidance in *New Prime*. *See, e.g.*, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 910 (9th Cir. 2020) (examining ordinary meaning of phrase "engaged in commerce" at the time Act was passed); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 17 (1st Cir. 2020) (same).[9]

[9] Southwest also asserts (at 21) that the Seventh Circuit is the only court to hold that workers who do not themselves transport goods from one place to another can be engaged in commerce within the meaning of the Federal Arbitration Act. That, too, is false. Indeed, as Southwest itself recognizes in the paragraphs preceding this claim, the Third, Sixth, and Eleventh Circuits have all come to the same conclusion. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593–

III. This case is an unsuitable vehicle to address any confusion there might be about the transportation-worker exemption.

Finally, even if Southwest had raised an issue worthy of this Court's review, this case would be a poor vehicle for deciding it, because any decision by this Court may turn out to be irrelevant to whether the case is ultimately arbitrated. *Cf. Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion."). While seeking review in this Court, Southwest has simultaneously asked the district court to compel arbitration under Illinois law. Mot. Compel Arbitration, Dkt. No. 53, at 1. If the district court concludes that it has not waived that right, and compels arbitration under state law, it won't matter whether the Federal Arbitration Act applies. And any decision from this Court will be irrelevant.

Southwest argues (at 26–28) that if this Court does not step in now, it will be unable to enforce its arbitration program uniformly nationwide. But the arbitration program it wants to enforce mandates *individual* arbitration—each dispute that arises with a worker is dealt with separately. That is, by definition, not uniform. The company asserts—without citing a shred of evidence—that arbitration has allowed it to "achieve[] stability in its relationship[s]" with its workers. Pet. 32. News reports suggest otherwise. *See, e.g.*, Kyle Arnold, *After a year of labor unrest, American and Southwest fall behind in another round of contract negotiations*, The Dallas Morning News (Oct. 27, 2019),

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94 (3d Cir. 2004); *Bacashihua*, 859 F.2d at 405; *Am. Postal Workers Union*, 823 F.2d at 473. No circuit has held otherwise.

https://perma.cc/385Q-LPF3 (noting that Southwest had "reported major disruptions . . . from labor disputes this year"); Dawn Gilbertson, *Southwest workers picket at Sky Harbor*, The Arizona Republic (Aug. 8, 2016), https://perma.cc/P45U-GV6J (multiple categories of Southwest employees picketing the company for "putting shareholders ahead of employees and travelers"); Chris Isidore, *Southwest Airline pilots take to picket lines*, CNN Money (Aug. 24, 2016), https://perma.cc/CT3P-ETFA.

Ultimately, besides lamenting that it may sometimes face liability in court, Southwest does not identify a single actual problem any potential disuniformity will cause—let alone one so severe that the Court must grant review now.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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