No. 21-309

In the Supreme Court of the United States

SOUTHWEST AIRLINES CO.,
Petitioner,

v.

LATRICE SAXON,
Respondent.

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

BRIEF OF ILLINOIS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

SARAH A. HUNGER
Deputy Solicitor General
LYDIA COLUNGA-MERCHANT
Deputy Chief, Workplace Rights Bureau
R. HENRY WEAVER
Assistant Attorney General

KWAME RAOUL
Illinois Attorney General
JANE ELINOR NOTZ*
Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
Jane.Notz@ilag.gov

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Federal Statutes and Congressional Materials:

State Statutes:

Other Authorities:

INTERESTS OF AMICI CURIAE

The States of Illinois, California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia ("amici States") submit this brief in support of Respondent Latrice Saxon to urge affirmance of the court of appeals, which correctly held that the exemption in Section 1 of the Federal Arbitration Act ("FAA") for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, applies to workers like respondent who load and unload interstate cargo.

Amici States have a substantial interest in the proper scope of the FAA's exemption for transportation workers for several reasons. To start, the transportation sector plays a critical role in state economies and infrastructure, and a disruption in rail, airline, or shipping operations has the potential to impact nearly every aspect of commerce within a State. Accordingly, amici States have an interest in ensuring that disputes involving transportation workers are resolved in public and transparent proceedings that allow the States to monitor such disputes and respond as necessary, as opposed to private and confidential arbitration proceedings designed by workers' employers.

Additionally, amici States have a longstanding interest in protecting their residents from unlawful working conditions, which includes ensuring that workers can avail themselves of the appropriate forum when seeking a remedy for unlawful conduct.

Under petitioner's unduly narrow reading of the Section 1 exemption, however, many transportation workers in amici States would be required to raise their claims in private arbitration proceedings that lack the transparency of other fora.

Petitioner's narrow reading of the exemption would also undermine efforts by amici States to protect their residents from unlawful working conditions by investigating and remedying violations of state labor laws. When workers are subject to arbitration agreements—which typically include confidentiality provisions—it is more difficult for amici States to gather information about the pervasiveness of unlawful practices. A decision requiring transportation workers like respondent to arbitrate their claims would thus affect the amount of information that is made publicly available about the working conditions for these employees.

By contrast, the interpretation of the FAA exemption espoused by respondent and the lower court allows amici States to fulfill important interests and duties in a way that benefits their residents and economies. Accordingly, they urge the Court to affirm the lower court's decision holding that transportation workers who load and unload interstate cargo are exempt from the FAA.

SUMMARY OF ARGUMENT

At issue in this case is whether the FAA requires transportation workers like respondent, who load and unload interstate cargo for an airline, to raise claims against their employer in private arbitration proceedings or whether they fall within the scope of the FAA's exemption for "seamen, railroad employees, or any

other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Amici States agree with respondent that such transportation workers fit well within the Section 1 exemption because airline workers are analogous to "seamen" and "railroad employees" and, alternatively, because cargo loaders for airlines are "engaged in commerce." Resp. Br. at 9-10. Amici States write separately, however, to highlight two aspects of this issue that are directly relevant to their state experience and interests.

First, amici States explain how the historical context of the FAA's passage in 1925, including the States' experience during that time, favors respondent's interpretation. In particular, the late nineteenth and early twentieth centuries were marked by labor strife in the transportation industries that inflicted significant economic harm on States and their residents. These conflicts involved not only operational employees who worked on the vehicles themselves, but also employees like longshoremen and shop workers who were responsible for, among other things, loading cargo and performing maintenance on carriers in the rail yards. In response to this strife and the economic disruption it caused, Congress enacted a series of transportation-specific statutes to promote peaceful resolution of these disputes in public fora. Among other features, the statutes in place at the time of the FAA's passage applied to a broad swath of transportation workers, including those who loaded and unloaded cargo. Accordingly, and contrary to petitioner's suggestion otherwise, Pet. Br. 46-48, this historical context shows that when Congress ex-

empted transportation workers from the FAA, it intended that exemption to cover workers like respondent who load and unload interstate cargo.

Second, amici States have an interest in providing stability in the transportation sector and in performing their investigatory and enforcement duties, which are dependent in large part on efficient access to information and the ability to monitor workplace conditions. These interests are furthered by allowing transportation workers to raise claims in public proceedings. When workers are subject to the FAA, they must maintain confidentiality and present their claims on an individualized basis in private proceedings. If exempted from the FAA, however, workers may bring their claims in more transparent and public fora. For some transportation workers, like respondent, that vehicle is a federal or state lawsuit. For others, such as transportation workers who hold the same or similar positions but are subject to collective bargaining agreements, the nonconfidential processes of the Railway Labor Act ("RLA") would govern.

For these reasons and those discussed below, amici States agree with respondent that the lower court's decision should be affirmed.

ARGUMENT

I. Congress Exempted Transportation Workers, Including Workers Who Loaded And Unloaded Cargo, From The FAA In Response To The Widespread Economic And Societal Disruption Caused By Labor Conflicts In The Transportation Industries.

Labor strife in the transportation industries regularly froze interstate commerce and damaged state

economies in the late nineteenth and early twentieth centuries. Relevant here, these conflicts involved a wide range of employees, including those who were responsible for loading cargo and performing maintenance on carriers in the rail yards. Congress responded to these disputes with a series of legislative acts that established new public fora for resolution of disputes in the transportation industry. Although some of the initial statutory schemes were limited in scope, Congress soon expanded them to include transportation workers who did not actually transport goods or people across state lines, such as those who load and unload cargo—i.e., workers like respondent.

It was against this legislative and historical backdrop that Congress enacted the FAA but exempted "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from its terms. 9 U.S.C. § 1. Contrary to petitioner's contentions otherwise, Pet. Br. 46-48, this historical context shows that Congress intended to include workers like respondent in the Section 1 exemption. And amici States have an interest in seeing that congressional intent enforced, given the extent to which States suffer when there is disruption in the transportation industry.

A. Labor conflicts in the transportation industries during the late nineteenth and early twentieth centuries caused substantial harm to the States, their residents, and their economies.

The years before the FAA's passage were a time of extreme labor unrest, especially in the burgeoning

transportation industries.[1] Transportation strikes posed a serious threat to States' economies because they prevented other industries from bringing their goods to market and because even a small number of striking workers could disrupt commerce across an entire region. The strikes during this era, moreover, were not limited to operational employees who worked on the carriers and often included workers who loaded and unloaded cargo.

In the Great Railroad Strike of 1877, for example, "the major part of the country's transportation system and thousands of industries dependent on it were brought to a halt."[2] The strike started in West Virginia but quickly spread to Maryland, Pennsylvania, New York, New Jersey, Ohio, Indiana, Kentucky, Missouri, and Iowa.[3] Both operating employees—brakemen, firemen, and others who ran the trains—and railroad shop workers—who built and maintained the railway vehicles—walked off the job.[4] In some cities, the strike spread to other industries; in Chicago, for instance, "lumbershovers," who loaded and unloaded timber from boats, and their supporters gathered in great numbers to blockade the docks.[5] Soon, not only

---

[1] Shelton Stromquist, *A Generation of Boomers: The Pattern of Railroad Labor Conflict in Nineteenth-Century America* 3 (1987).

[2] Philip S. Foner, *The Great Labor Uprising of 1877* 10 (1977).

[3] *Id.* at 189.

[4] David O. Stowell, *Streets, Railroads, and the Great Strike of 1877* 73-74 (1999).

[5] Richard Schneirov, *Chicago's Great Upheaval of 1877*, *in* The Great Strikes of 1877, at 76, 87, 90-92 (David O. Stowell ed., 2008).

the railroads, but also "businesses that were dependent upon the railroads for their supplies—factories, mills, coal mines, and oil refineries—were forced to shut down."[6]

The Great Railroad Strike immediately began to strain States' economies. New York was "cut off . . . from its usual sources of grain and meat in the Midwest," causing prices of meat there to rise by 25 to 50 percent within days.[7] Shortages did not spare Midwestern cities, either. A St. Louis newspaper reported that "[f]lour has gone up to an enormous price."[8] Shipments of corn to Chicago fell precipitously from 1,400 daily carloads to just 94, and Baltimore, New York, Chicago, and Indianapolis reported coal shortages.[9] In addition to this severe economic damage, the strike led to general uprisings across the country, which resulted in more than 100 deaths.[10]

The Knights of Labor, a prominent labor federation, launched another major strike in 1886 on Jay Gould's southwestern railroads, resulting in the "economic paralysis of an entire section of the country."[11] Workers on the single rail bridge across the Mississippi River

---

[6] Foner, *supra* note 2, at 189.

[7] Gerald G. Eggert, *Railroad Labor Disputes: The Beginnings of Federal Strike Policy* 11 (1967).

[8] *Ibid.*

[9] *Id.* at 12.

[10] Foner, *supra* note 2, at 47, 63, 73, 90; Schneirov, *supra* note 5, at 90-93.

[11] Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* 338 (2011).

to St. Louis—including freight handlers, baggage handlers, shop workers, and yard workers—went on strike, shutting down most traffic into the city.[12] Because St. Louis and points west depended on Illinois for their coal supply, shortages quickly worsened, which caused flour mills, brickworks, and other factories to close.[13] In small towns, groceries, flour, and fuel oil became scarce, and residents resorted to wagon trains "to supply the most urgent needs."[14] As the strike continued, Missouri reported that "[t]housands of tons are stopped in transit, and the people are consequently suffering enormous inconvenience, damage and loss," and Kansas explained that "the strike of a few railroad men cripples and stops the business and industry of great masses of our people."[15] A congressional report estimated direct losses to the railroads of about $2.8 million, while stating that losses to the general public "were beyond computation."[16]

This era of railroad unrest culminated in the 1894 Pullman Strike, "one of the most intense and bitterly fought labor disputes in the country's history."[17] As

---

[12] F. W. Taussig, *The South-Western Strike of 1886*, 1 Q.J. Econ. 184, 195, 199 (1887); H.R. Rep. No. 49-4174, pt. 1, at xiii, 513 (1887).

[13] Taussig, *supra* note 12, at 202-203.

[14] *Id.* at 204.

[15] Bureau of Labor Statistics and Inspection of Mo., The Official History of the Great Strike of 1886 on the Southwestern Railway System 58, 60 (1886).

[16] H.R. Rep. No. 49-4174, pt. 1, at xxiii (1887).

[17] Eggert, *supra* note 7, at 152.

with earlier disputes, the striking workers included repair shopmen and yard workers, in addition to operational employees.[18] The conflict began as a boycott of the Pullman Palace Car Company, which had its main factories in Chicago, and quickly escalated into "a general strike of railroads in and around Chicago and westward and southwestward to the Pacific Coast."[19] At its peak, 16 percent of Illinois workers were on strike.[20] The strike also turned violent: strikers and their supporters liberally employed sabotage, burning boxcars, derailing trains, and blowing up bridges, and authorities responded with deadly force.[21]

The economic fallout for States was severe. Virtually all traffic on railroads in the West and Midwest was halted for two weeks.[22] Because Chicago was "dependent on large daily shipments of fruit, vegetables, milk, and meat," an "acute shortage" of these staples quickly set in.[23] Eastern cities, though not the strike's location, suffered meat shortages because of the bottleneck in Chicago.[24] As in the 1886 southwestern

---

[18] Susan E. Hirsch, *The Search for Unity Among Railroad Workers: The Pullman Strike in Perspective*, *in* The Pullman Strike and the Crisis of the 1890s, at 49-50 (Richard Schneirov et al. eds. 1999).

[19] Eggert, *supra* note 7, at 160.

[20] Almont Lindsey, *The Pullman Strike* 12 (1942).

[21] *Id.* at 207-209, 254, 258; A. P. Winston, *The Significance of the Pullman Strike*, 9 J. Pol. Econ. 540, 541-542 (1901).

[22] Stromquist, *supra* note 1, at 89.

[23] Lindsey, *supra* note 20, at 209.

[24] Eggert, *supra* note 7, at 13.

strike, small towns were hit hardest of all, with Faribault, Minnesota, West Superior, Wisconsin, and Fargo, North Dakota facing actual famine.[25] Waterborne transport provided no immediate relief, because "longshoremen at Chicago and dockworkers at Duluth struck in sympathy with the railwaymen."[26]

While many of the most infamous labor conflicts occurred on the railways during this era, a number of others involved port workers. Some of the earliest strikes in United States history were on the waterfront, with longshoremen shutting down the port of New York in 1825, 1828, and 1836.[27] And in the early 1900s, the port of New Orleans, which served as an important hub for ocean trade, especially in cotton, suffered a series of riverfront strikes that "paralyzed the flow of commerce."[28] Importantly, these strikes were driven largely by longshoremen—port workers who load and unload vessels but (like respondent) do not themselves travel in commerce.

In October 1907, a general strike of 8000 longshoremen, teamsters, freight handlers, and "screwmen"—workers who stuffed cotton bales into ships' holds—froze the New Orleans port.[29] The strike unified all the various occupations involved in loading and unloading goods at the port, including freight handlers

---

[25] *Ibid.*

[26] *Id.* at 18.

[27] Bruce Nelson, *Divided We Stand: American Workers and the Struggle for Black Equality* 17 (2001).

[28] Eric Arnensen, *Waterfront Workers of New Orleans* 38, 160 (1991).

[29] *Id.* at 162, 197.

on the rail lines.[30] The results were devastating: "Thousands of tons of bananas and citrus fruit were dumped in the river," thousands of workers unconnected with the strikes "were thrown out of work," and "[b]usiness of all kinds suffered tremendously."[31]

Two years later, in 1909, there was a general strike of seamen on the Great Lakes steamships. Twelve thousand workers refused to sail, idling the ports of Chicago, Buffalo, and Cleveland.[32] Their employers hired strikebreakers to mitigate the disruption, but that decision had dire consequences. Piloted by inexperienced crews, ships collided and ran aground twice as often as the previous year.[33]

Finally, there was the Shopmen's Strike of 1922, the same year that the FAA was first introduced in Congress.[34] As the strike progressed, locomotives broke down and were not repaired, leading quickly to nationwide shortages of coal, grain, and fruit.[35] The agricultural commissioner of Idaho estimated that his State suffered $100 million in economic fallout by the

---

[30] Daniel Rosenberg, *New Orleans Dockworkers* 122 (1988).

[31] Oscar Ameringer, *If You Don't Weaken* 201 (1940).

[32] *12,000 Workers on Lake Boats Strike*, N.Y. Times, May 2, 1909, at 2.

[33] Matthew Lawrence Daley, *An Unequal Clash: The Lake Seamen's Union, the Lake Carriers' Association, and the Great Lakes Strike of 1909*, N. Mariner, Spring 2018, at 119, 132.

[34] S. 4214, 67th Cong. (1922); H.R. 13522, 67th Cong. (1922).

[35] Colin J. Davis, *Power at Odds: The 1922 National Railroad Shopmen's Strike* 102-103, 129 (1997); Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 1171, 1176 (1922).

strike's end.[36] This strike thus demonstrated how the work stoppage of shopmen—who did not physically transport goods or people across state lines—nonetheless caused great damage to state economies.

B. Congress responded by creating systems of public dispute resolution that covered workers who load and unload cargo, like respondent.

Congress responded to this era of turmoil with a series of laws aimed at facilitating the peaceful reconciliation of grievances among transportation industry employees. These laws for the first time established public—or, at the very least, publicly regulated—dispute resolution systems that applied to a broad swath of transportation workers, including those who load and unload cargo, as explained below. Importantly, it was against this backdrop that Congress enacted the FAA and its exemption for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. That exemption should thus be read to preserve these separate dispute resolution systems rather than erasing them by placing transportation workers like respondent under the aegis of the FAA.

Congress' earliest legislative efforts created the general framework for railway-specific dispute resolution mechanisms. The scope of those statutes, however, was limited to employees defined as "all persons actually engaged in any capacity in train operation or train service of any description." Erdman Act of 1898, ch. 370, § 1, 30 Stat. 424, 424; Newlands Act of 1913,

---

[36] Davis, *supra* note 35, at 163.

ch. 6, § 1, 38 Stat. 103, 104. A court construing this language at the time held that its "common meaning . . . include[d] only engineers, firemen, conductors, switchmen, train hands, and porters" but not "telegraphers" or "station agents and clerks." *Birmingham Tr. & Sav. Co v. Atlanta, B & A R Co.*, 271 F. 731, 742 (N.D. Ga. 1921).[37]

But this approach was short lived, as Congress soon passed the Transportation Act of 1920, ch. 91, 41 Stat. 456, which established the dispute resolution procedures existing at the FAA's passage. Through this legislation, Congress brought all railway disputes under public jurisdiction before new—and public—entities, namely, the Railroad Boards of Labor Adjustment and the Railroad Labor Board. §§ 302-304, 41 Stat. at 469-470. Unlike earlier laws, the Transportation Act expanded coverage to all "employees," and to any "subordinate official," explication of which was delegated to the Interstate Commerce Commission ("ICC"), § 300(5), 41 Stat. at 469. Notably, the Railroad Labor Board held on numerous occasions that baggage and freight handlers were subject to the Transportation Act. *E.g.*, *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. N.Y. Cent. R.R. Co.*, Decision No. 1209, 3 R.L.B. 665, 666 (1922); *see also* Resp. Br. at 15-16.

---

[37] *See also* David A. McCabe, *Federal Intervention in Labor Disputes Under the Erdman, Newlands and Adamson Acts*, 7 Proc. Acad. Pol. Sci. City N.Y. 94, 95 (1917) (noting that the definition included "only engineers, firemen, conductors, trainmen, switchmen and telegraphers," but not "shopmen, car-workers and freight handlers").

In 1926, Congress enacted the Railway Labor Act, which continues to govern transportation disputes in the rail and airline industries today. Ch. 347, 44 Stat. 577 (codified as amended at 45 U.S.C. § 151 *et seq.*). Like the Transportation Act, the RLA created a permanent public body for resolving disputes, called the Board of Mediation. § 4, 44 Stat. at 579. Additionally, the RLA retained the capacious definition of "employee" as "every person in the service of a carrier . . . who performs any work defined as that of an employee or subordinate official in the orders of the [ICC]." § 1, Fifth, 44 Stat. at 577.

Indeed, the definition of employee in the RLA was generally understood as equivalent to the Transportation Act's broad definition.[38] Relevant here, ICC decisions from this era interpreted the RLA broadly to cover, among others, railroad employees involved in baggage handling. *E.g.*, *In re Regulations Concerning Class of Employees and Subordinate Officials To Be Included Within Term "Employee" Under the Railway Labor Act*, Ex Parte No. 72 (Sub-No. 1), 229 I.C.C. 410, 417 (1938) (holding that "red cap" porters who carried passengers' baggage in railway stations were employees under the RLA); *In re Regulations Concerning Class of Employees and Subordinate Officials To Be Included Within Term "Employee" Under the Railway Labor Act*, Ex Parte No. 72 (Sub-No. 1), 136 I.C.C. 321 (1928) (holding that "chief traffic officers," who supervise freight logistics, are employees under the RLA). And in 1936, when Congress expanded the RLA to

---

[38] A. R. Ellingwood, *The Railway Labor Act of 1926*, 36 J. Pol. Econ. 53, 64 (1928).

cover airlines and their employees and subordinate officials, it did not alter the definition of employee. Act of Apr. 10, 1936, ch. 166, § 201, 49 Stat. 1189, 1189 (codified at 45 U.S.C. § 181).

Petitioner's primary response to this history is that the RLA is irrelevant because it was passed after the FAA. Pet. Br. at 46. But that position ignores critical context showing that by the time the FAA was enacted, the RLA's passage was "imminent." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). Additionally, the RLA had been contemplated for years prior to its passage in 1926. Indeed, the Transportation Act had "lost the confidence of both the unions and many of the railroads" after the 1922 Shopmen's Strike. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 756 n.12 (1961). President Coolidge called for its replacement as early as December 1923, and the bills that would become the RLA were introduced in the House and Senate in February 1924, a year before the FAA was enacted.[39] In other words, Congress and the major stakeholders were drafting and negotiating the RLA in the midst of the FAA's passage.

Congressional enactments in other transportation industries during this time provide additional examples of how Congress sought to protect interstate commerce by facilitating publicly regulated mediation of disputes for transportation workers, including workers like respondent. For instance, the Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262, required that the shipping commissioner, a public official,

---

[39] S. Rep. No. 69-606, at 2-3 (1926); H.R. 7358, 68th Cong. (1924); S. 2646, 68th Cong. (1924).

"hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew, which both parties agree in writing to submit to him." § 25, 17 Stat. at 267. Just as the term "employee" was not limited to train operators under the RLA, the term "any of his crew" was not limited to those who navigated ships under the Shipping Commissioners Act. Instead, the Act used "crew" and "seaman" synonymously. *See* § 26, 17 Stat. at 267 (detailing arbitration procedures for disputes of "any seaman"); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 348 (1991) ("'Member of a crew' and 'seaman' are closely related terms."). And the Act defined "seaman" to include every person "employed or engaged to serve in any capacity on board" a ship. § 65, 17 Stat. at 277.

Congress also established a system to resolve longshoremen's disputes shortly before the FAA's passage. In 1916, Congress created the United States Shipping Board to fortify America's merchant marine. Shipping Act of 1916, ch. 451, 39 Stat. 728. The Shipping Board, in turn, established the National Adjustment Commission in 1917 to adjudicate labor disputes "arising in loading and unloading of ships" and "railroad freight-handling at water terminals."[40] And at least one of the National Adjustment Commission's rulings was successfully enforced in federal court. *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc.*, 265 F. 397 (E.D. La. 1920) (setting wages for dock workers).

---

[40] Benjamin M. Squires, *The National Adjustment Commission*, 29 J. Pol. Econ. 543, 545-546 (1921).

It was against this backdrop that Congress enacted the FAA in 1925—including that statute's exemption for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. By exempting transportation workers from the FAA in this manner, Congress recognized that it had already set up (and was in the process of setting up) several dispute resolution mechanisms to peacefully resolve conflicts between transportation carriers and their employees—including workers like respondent who load and unload cargo. The exemption should thus be read to leave those separate processes intact. *Circuit City*, 532 U.S. at 121 (Congress exempted transportation workers to avoid "unsettl[ing] established or developing statutory dispute resolution schemes covering specific workers"). Petitioner's view of the exemption ignores this important context and would unduly narrow the scope of workers that the exemption covers.

II. States Have An Interest In Maintaining Transparent Dispute Resolution Procedures For Transportation Workers, Including Workers Like Respondent Who Load And Unload Cargo.

Congress' decision to exempt a broad swath of transportation workers from the FAA reflected its judgment at the time of its enactment that disputes in the transportation sector were not suitable for resolution by private parties and without any regulatory oversight. This judgment still holds true today. Whereas arbitration under the FAA typically occurs in confidential, individualized proceedings, dispute resolution proceedings for exempted transportation

workers are conducted in a more transparent and regulated manner. These regulatory constructs serve important state interests by allowing States to monitor any disputes that may be developing within their borders and more efficiently perform their investigatory and enforcement duties. Petitioner's proposed interpretation of the Section 1 exemption, however, would narrow the class of workers able to pursue remedies through public and transparent processes and limit the amount of critical information flowing to the States.

A. Unlike arbitration proceedings under the FAA, the processes available to exempted transportation workers are transparent.

Determining whether a transportation worker is exempted from the FAA has significant practical implications, including for States, given the differences between the nature and purpose of private arbitration proceedings, on the one hand, and the procedures governing public dispute resolution processes, on the other. Specifically, the public processes allow States to better monitor any burgeoning disputes that might disrupt their economies and perform their investigative and enforcement duties. The confidential nature of private arbitration proceedings, by contrast, does not serve those interests.

As the Court has explained, "[t]he principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (cleaned up). In other words, the FAA focuses on honoring the intent of private parties, and not the public implications of those agreements. To that end,

parties may agree "to arbitrate according to specific rules," *id.*, including that "proceedings be kept confidential," *id.* at 345, or that they proceed on an individualized, as opposed to collective, basis, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

In fact, "the promise of confidentiality" has become "a linchpin" of private arbitration's appeal.[41] The leading arbitration associations not only highlight the confidentiality of their services, but also structure their governing rules to allow parties to elect for nearly complete opacity in the proceedings. For instance, the American Arbitration Association's employment arbitration rules—which Southwest has selected to govern its arbitration proceedings, *e.g.*, Dist. Ct. Doc. 53-1 at 12, 31—provide that the "arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality."[42] Although the rules state that any award issued by the American Arbitration Association "shall be publicly available," there are significant limitations on the information that is provided to the public, including that awards are only made available for a fee, generally do not disclose the names of the parties and witnesses, and may not include any written reasons supporting the award.[43] Arbitrations conducted pursuant to the

---

[41] Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75,* 162 U. Pa. L. Rev. 1793, 1818 (2014).

[42] Am. Arbitration Ass'n, Employment Arbitration Rules and Mediation Procedures, Rule 23 (Nov. 1, 2009), https://bit.ly/3tqVOwP.

[43] *Id.* at Rule 39.

JAMS Employment Arbitration Rules are even less transparent, as those rules require arbitrators to maintain the confidentiality of both the proceedings and the award.[44] Additionally, the arbitrator has authority to issue orders to protect the confidentiality of sensitive information, sanction parties for violating the rules, and exclude nonparties from hearings.[45]

In practice, then, "[a]rbitration is frequently conducted pursuant to confidentiality rules and agreements that can conceal the existence and substance of a dispute, the identities of the parties, and the resolution of the controversy."[46] Indeed, under the arbitration agreement at issue in this case, which would apply to respondent if she were not exempted by section 1 of the FAA, "[a]ll aspects of the [arbitration] program, including the hearing and record . . . of proceedings are confidential and shall not be open to the public." Dist. Ct. Doc. 53-1 at 16, 34.

By contrast, the public dispute resolution procedures for transportation workers exempted from the FAA are considerably more transparent, and the resulting settlements, judgments, or awards are typically made public.

To start, many transportation workers, including those, like respondent, who are not subject to a collective bargaining agreement, can present their claims

---

[44] JAMS Employment Arbitration Rules & Procedures, Rule 26 (June 1, 2021), https://bit.ly/3pszlOL.

[45] *Id.* at Rules 26, 29.

[46] Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 Chi.-Kent L. Rev. 463, 466 (2006).

directly in federal court. *E.g.*, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254-56 (1994). Unlike the FAA, court proceedings are typically open to the public, and filings and decisions are available to all on a public docket. *E.g.*, *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials."). Any judgments entered are available for members of the public (and state regulators) to view, as are transcripts of relevant proceedings and the court's reasoning underlying its decision. When a case settles, the agreements remain accessible "if filed in court."[47] And even if the agreement itself remains private, the docket and "court file must remain accessible to the public." *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992).

Other workers, including rail and airline employees subject to a collective bargaining agreement, pursue certain of their claims not in federal court but through the processes set up by the Railway Labor Act. *E.g.*, 45 U.S.C. § 151, Fifth; *id.* § 181; *Hawaiian Airlines, Inc.*, 512 U.S. at 254-256. These processes are relevant here because the Court's decision in this case will affect workers who are similarly situated to respondent (but who are subject to a collective bargaining agreement) and thus subject to the RLA.

---

[47] Resnik, *supra* note 41, at 1818.

The RLA proceedings, moreover, are consistent with state interests because they occur largely in non-confidential settings and because they are focused on avoiding disruption to transportation operations. Indeed, in contrast with the FAA, which focuses on upholding agreements made between private parties, the "heart" of the RLA is the duty of both "management and labor, to exert every reasonable effort" to come to agreements and settle all disputes "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969) (cleaned up). This purpose—which focuses on the public need for functioning transportation industries—extends both to major disputes, which "concern[ ] the making of collective agreements," and minor disputes, which refer to "grievances arising under existing agreements." *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 242 (1950).

For major disputes, the RLA "established rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation," *Detroit & T. S. L. R. Co. v. United Transp. Union*, 396 U.S. 142, 148-149 (1969), that is overseen by the National Mediation Board, an independent agency consisting of three members, 45 U.S.C. §§ 154, 155; *Bhd. of R.R. Trainmen*, 394 U.S. at 378. According to the National Mediation Board, "97 percent of all mediation cases in the history of the [Board] have been successfully resolved

without interruptions to public service," with a success rate of "nearly 99 percent" since 1980.[48] These processes, in addition to being governed by a public body, generally take place in the public sphere, notwithstanding the private nature of the mediation discussions themselves.[49] Indeed, the National Mediation Board docketed a number of new mediations earlier this year arising out of failed negotiations between a coalition of rail unions and their employers.[50] The existence of these disputes, moreover, was not confidential; on the contrary, there were numerous status reports provided publicly over the course of the two-year negotiation period.[51]

So-called "minor disputes" are subject to different systems of public dispute resolution. Railroad employees have their disputes heard by the National Railroad Adjustment Board, whereas airline employees bring their grievance to carrier-specific adjustment boards. *Consol. Rail Corp. v. Ry. Lab. Executives' Ass'n*, 491 U.S. 299, 304 n.4 (1989); *Int'l Ass'n of*

---

[48] National Mediation Board, Mediation Overview & FAQ, https://bit.ly/36WmNsN.

[49] *E.g.*, U.S. Move Rebuffed In L.I.R.R. Dispute, N.Y. Times (Nov. 8, 1979), https://nyti.ms/3tnxvjF (announcing that talks at the National Mediation Board have failed); Talks on Wages Pressed to Avert L.I.R.R. Strike (Dec. 7, 1979), https://nyti.ms/34a5HXo (discussing last-minute negotiations).

[50] National Mediation Board, Weekly Report January 31-February 4, 2022, https://bit.ly/3HvmCRO.

[51] *E.g.*, Marybeth Luczak, *Next Stop for CBC Union, Railroad Negotiations: Mediation* (Jan. 25, 2022), https://bit.ly/3vvCXDJ; Frank N. Wilner, *Railroads, Labor Trade Contract-Change Demands* (Nov. 4, 2019), https://bit.ly/3HB8M0h.

Machinists, AFL-CIO v. Cent. Airlines, Inc., 372 U.S. 682, 685 (1963). Unlike arbitration proceedings under the FAA, proceedings under the RLA are not confidential. On the contrary, the National Railroad Adjustment Board maintains an online database identifying all pending cases,[52] as well as a search function for closed cases that allows the public to access full party information, case facts, findings, and awards.[53]

Likewise, the "boards" governing airline industry disputes are required by statute to be court-like, adversarial, and public. *IAM v. Cent. Airlines, Inc.*, 372 U.S. 682, 695 (1963) (when Congress created these boards, it intended them "to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice") (internal quotations omitted).[54] Furthermore, many system board decisions can be found online, and hearings are typically not closed to the public.[55]

---

[52] National Mediation Board: Caseload Report, https://bit.ly/3Mhx2Ik.

[53] National Mediation Board: Knowledge Store Award Search, https://bit.ly/3HIQB96.

[54] *See also* Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 Stan. L. Rev. 1485, 1547 n.97 (1990) ("It is not uncommon in a System Board proceeding for both sides to be represented by lawyers, a court reporter to be present, a transcript to be produced, and post-hearing briefs to be filed. In addition, many such System Board proceedings follow standard rules of evidence and adopt a rule of stare decisis.").

[55] *E.g.*, Transport Workers Union Local 555, Arbitration Rulings, https://bit.ly/36iqskk; Agreement By and Between Southwest Airlines Co. and Transport Workers Union of America AFL-CIO Local 555 Representing Ramp, Operations, Provisioning and

B. States are better able to protect their economies and exercise their investigatory and enforcement powers when transportation-industry disputes are resolved transparently.

The procedures associated with RLA and court proceedings are better suited to resolve transportation disputes than arbitrations conducted pursuant to the FAA, in large part because of their transparent and public-facing nature. As demonstrated by the historical events discussed above, *see supra* Section I.A., disruptions in transportation due to unresolved disputes between employers and employees have a significant negative impact on States, their economies, and their residents.

States have a clear interest in avoiding disruption, both within their borders and in neighboring States, since "[a] strike in one State often paralyzes transportation in an entire section of the United States, and transportation labor disputes frequently result in simultaneous work stoppages in many States." *Bhd. of R.R. Trainmen*, 394 U.S. at 381. States also have an interest in preparing for any possible disruptions to their transportation infrastructure, which is made more difficult when disputes are heard in confidential proceedings and resolved by opaque judgments.

The private nature of arbitration proceedings under the FAA can also interfere with States' investiga-

---

Freight Agents, Article 20(L)(10), https://bit.ly/34EbqFd (requiring that there be an agreeable location for hearings and that employees have access to that location).

tory and enforcement duties. Courts have long recognized that the States' traditional police powers extend to regulating working conditions. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397-398 (1937). Accordingly, States have not only established minimum standards on a wide range of working conditions, but also granted state agencies and officials the authority to investigate and enforce violations of those standards.[56] In many States, the legislature has designated multiple agencies or officials as responsible for investigating such violations. In Illinois, for example, both the Illinois Department of Labor and the Illinois Attorney General have the power and duty to investigate potential violations and initiate enforcement actions on behalf of employees and the public. *E.g.*, 15 ILCS 205/6.3(b); 820 ILCS 115/11. Similarly, California has vested several agencies with such authority, including a Labor Commissioner tasked with establishing a field enforcement unit that investigates "industries, occupations, and areas in which . . . there has been a history of violations." Cal. Lab. Code § 90.5(a)-(c).

States utilize this authority to investigate and bring enforcement actions against companies in the transportation industry. In 2021, for instance, the New York Attorney General recovered nearly

---

[56] *E.g.*, Ala. Code § 25-2-2(a); Ark. Code Ann § 11-2-108; Colo. Rev. Stat. 8-4-111(1)-(2); Conn. Gen. Stat. § 31-3; 19 Del. Code §§ 107, 1111; D.C. Code § 32-1306; Ga. Code Ann. § 34-2-3; Kan. Stat. Ann. § 44-636; Ky. Rev. Stat. § 337.340; 26 Me. Rev. Stat. § 42; Md. Lab. Code Ann. § 3-103; Mass. Gen. Laws ch. 149, § 3; N.H. Rev. Stat. Ann. 273:9, 275:51; N.J. Stat. § 34:1A-1.12; N.M. Stat. Ann. § 50-4-8; N.D. Cent. Code, § 34-06-02; Ohio Rev. Code Ann. § 4111.04(A)-(B); Or. Rev. Stat. § 651.060(1); S.D. Codified Laws § 60-5-15; Utah Code Ann. § 34-28-10(1).

$600,000 in stolen wages from a subcontractor to American Airlines that provided passenger services at JFK Airport.[57] The State's investigation uncovered a years-long practice of failing to reimburse workers for their uniform maintenance and laundry, which resulted in illegal deductions under New York labor laws.[58] Likewise, in 2018, the Massachusetts Attorney General obtained nearly $500,000 in restitution and penalties for 141 former employees of a medical transportation business.[59] The State opened an investigation after receiving complaints from employees and uncovered a systemic failure to pay an appropriate overtime rate.[60]

To be sure, arbitration agreements under the FAA cannot supersede this authority or prevent state investigations into potential violations. *E.g.*, Dist. Ct. Doc. 53-1 at 10 (recognizing that the arbitration agreement does not preclude state or federal claims). But the confidentiality provisions that typically govern arbitration proceedings can make it more difficult for state investigatory and enforcement bodies to become aware of potential systemic violations in their State. Specifically, contractual provisions that require confidentiality affect States' ability to efficiently conduct investigations and determine whether enforcement

---

[57] Press Release, *Attorney General James Recovers $590,000 for Airline Workers Subjected to Minimum Wage Violations* (July 9, 2021), https://on.ny.gov/3HvqQJ6.

[58] *Ibid.*

[59] Press Release, *AG Healey Cites Transportation Company Nearly $500,000 for Misclassification and Overtime Violations* (Sept. 24, 2018), https://bit.ly/3vzqfUA.

[60] *Ibid.*

actions are warranted. As a practical matter, state agencies are often dependent on constituent complaints, third-party information, and publicly available information when determining whether to open an investigation into an employer. Accordingly, when employee grievances, and any resultant awards, are shrouded in secrecy, it is more challenging for state agencies to assess whether the purported violations are occurring on a widespread basis and thus would warrant an investigation or enforcement action. When such matters are resolved in public-facing fora, by contrast, States are better able to track employee claims, search public databases, and identify troubling trends in workplace conditions.

This difficulty is exacerbated by contractual terms that incentivize proceeding exclusively through arbitration and declining to participate in state-level investigations and enforcement actions. For example, the Southwest arbitration agreement at issue here provides that if an employee "chooses to file a charge/complaint with a governmental agency that has investigatory power over some or all claims, [the arbitration proceedings] will be stayed . . . until the government agency resolves the charge/complaint." Dist. Ct. Doc. 53-1 at 11. What this means, in effect, is that if employees seek to have their grievances heard in a time-sensitive manner, they will likely forego filing charges that they would otherwise be entitled to pursue at the state or federal level which, in many circumstances, can be quite substantial. *See Hawaiian Airlines*, 512 U.S. at 256 (explaining that substantive state-law protections independent of the collective bargaining agreement are not preempted). These practices thus not only deprive employees of an

unhindered right to bring grievances and charges simultaneously, but also further limit the information brought to the attention of state regulatory bodies.

For these reasons, States have an interest in maintaining the scope of the FAA exemption as it was understood at the time of its passage, which would have included workers like respondent who load and unload cargo. Narrowing the class of workers who fall within the exemption would not only hinder the States' ability to monitor disputes in the transportation industries, but also make their investigatory and enforcement duties more difficult.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

KWAME RAOUL
Illinois Attorney General
JANE ELINOR NOTZ*
Solicitor General
SARAH A. HUNGER
Deputy Solicitor General
LYDIA COLUNGA-MERCHANT
Deputy Chief,
Workplace Rights Bureau
R. HENRY WEAVER
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
Jane.Notz@ilag.gov

* *Counsel of Record*

MARCH 2022

ROB BONTA
Attorney General of California

PHILIP J. WEISER
Attorney General of Colorado

WILLIAM TONG
Attorney General of Connecticut

KATHLEEN JENNINGS
Attorney General of Delaware

KARL A. RACINE
Attorney General of the District of Columbia

AARON M. FREY
Attorney General of Maine

BRIAN E. FROSH
Attorney General of Maryland

MAURA HEALEY
Attorney General of Massachusetts

DANA NESSEL
Attorney General of Michigan

KEITH ELLISON
Attorney General of Minnesota

MATTHEW J. PLATKIN
Acting Attorney General of New Jersey

LETITIA JAMES
Attorney General of New York

ELLEN F. ROSENBLUM
Attorney General of Oregon

JOSH SHAPIRO
Attorney General of Pennsylvania

PETER F. NERONHA
Attorney General of Rhode Island

THOMAS J. DONOVAN, JR.
Attorney General of Vermont

ROBERT W. FERGUSON
Attorney General of Washington