No. 23-51

In the Supreme Court of the United States

NEAL BISSONNETTE and TYLER WOJNAROWSKI,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC; C.K. SALES CO., LLC; and FLOWERS FOODS, INC.,

Respondents.

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

BRIEF OF ILLINOIS, CALIFORNIA, COLORADO, 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 PETITIONERS

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INTERESTS OF AMICI CURIAE

Illinois, California, Colorado, the District of Columbia, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington ("amici States") submit this brief in support of petitioners to urge reversal of the court of appeals, which incorrectly held that the exemption in Section 1 of the Federal Arbitration Act ("FAA") for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, applies only to workers employed by a company in the transportation industry.

Amici States have an interest in ensuring that disputes involving transportation workers are resolved in public and transparent proceedings that allow States to monitor such disputes and respond as necessary, as opposed to private and confidential arbitration proceedings. The lower court's narrow reading of the Section 1 exemption interferes with this interest because when workers are subject to arbitration agreements—which typically include confidentiality provisions—it is more difficult for States to gather information about the pervasiveness of unlawful practices and any potential disruptions to the transport of goods.

By contrast, the interpretation of the FAA exemption espoused by petitioners—which would cover all transportation workers, regardless of their industry—supports the States' efforts to ensure smooth functioning of commerce within their borders and to protect their residents from unlawful working conditions. Accordingly, amici States urge the Court to reverse the

lower court's decision holding that only transportation workers employed by companies in the transportation industry are exempt from the FAA.

SUMMARY OF ARGUMENT

At issue in this case is whether the FAA requires transportation workers like petitioners—truck drivers who deliver products from warehouses to retail stores for a baked-goods company—to raise claims against their employer in private arbitration proceedings or whether they fall within the scope of the FAA's Section 1 exemption for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The lower court concluded that petitioners could not avail themselves of the exemption because the company that employs them is not in the "transportation industry." Pet. App. 40a. But as petitioners explain, Pet. Br. 17, 33-34, this conclusion conflicts with the plain text of the FAA and this Court's decision in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), which expressly rejected the theory that the Section 1 exemption is tied to any particular industry. Amici States write separately, however, to highlight two aspects of this issue that are directly relevant to their experience and interests.

First, amici States know from their enforcement experience that the addition of a transportation-industry requirement into the FAA's Section 1 exemption would undermine Congress's intent to resolve arbitrability in a summary fashion. As noted, the lower court here would apply the exemption only in cases where the company employing the workers at issue is part of the "transportation industry." Pet. App. 40a. But to decide whether such a requirement has been satisfied,

and thus whether a complaint must be arbitrated, courts would be required to determine which entity to treat as the workers' employer for purposes of the Section 1 exemption and whether that entity belongs to the so-called transportation industry. As shown by amici States' experience enforcing many labor and employment laws that call for similar inquiries, answering these questions requires resolving difficult and time-consuming factual disputes. That is not what Congress intended when, with the FAA, it directed that arbitrability questions be resolved quickly so that the parties may turn to the merits.

Second, in amici States' experience, efficient access to information involving the transportation of goods within state borders is critical to ensuring States are able to monitor the smooth operation of commerce within their borders and ensure safe and lawful workplace conditions for their residents. These interests are furthered by allowing transportation workers to resolve complaints in public proceedings. When workers are subject to the FAA, they must maintain confidentiality and present their claims in private proceedings. If exempted from the FAA, however, workers may bring their claims in more transparent and public fora, such as a federal or state court.

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

ARGUMENT

I. In Amici States' Experience, A Transportation-Industry Requirement Would Unduly Complicate The FAA's Section 1 Exemption And Delay Resolution Of Arbitrability.

States enforce a wide range of labor and employment protections, including state laws addressing the timely payment of wages, minimum wage rates, unemployment insurance, employment discrimination, workers' compensation, and occupational safety.[1] Based on this enforcement experience, amici States know that the lower court's transportation-industry requirement would complicate the FAA's Section 1 exemption and require a threshold inquiry at the arbitrability stage that is beyond what Congress intended.

Among other questions, courts would need to resolve: (1) which entity to treat as the worker's employer for FAA purposes; and (2) whether that entity belongs to the so-called transportation industry. Neither question is factually or legally straightforward. Accordingly, if this Court were to adopt the lower

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[1] See, *e.g.*, Cal. Lab. Code § 200 *et seq.* (timely wage payment); 820 Ill. Comp. Stat. 115/1 *et seq.* (same); N.Y. Lab. Law § 190 *et seq.* (same); Cal. Lab. Code § 1171 *et seq.* (minimum wage); 820 Ill. Comp. Stat. 105/1 *et seq.* (same); Mass. Gen. Laws ch. 151, § 1 *et seq.* (same); Me. Rev. Stat. tit. 26, § 661 *et seq.* (same); N.J. Stat. Ann. § 34:11-56a *et seq.* (same); 820 Ill. Comp. Stat. 405/100 *et seq.* (unemployment insurance); Me. Rev. Stat. tit. 26, § 1041 *et seq.* (same); N.Y. Lab. Law § 500 *et seq.* (same); Wash. Rev. Code § 50.01.005 *et seq.* (same); 775 Ill. Comp. Stat. 5/2-101 *et seq.* (employment discrimination); Cal. Lab. Code § 3200 *et seq.* (workers' compensation); 820 Ill. Comp. Stat. 305/1 *et seq.* (same); Or. Rev. Stat. § 654.305 *et seq.* (occupational safety); Wash. Rev. Code § 49.17.010 *et seq.* (same).

court's rule, courts would be forced to conduct fact-intensive and complex mini-trials on the question of arbitrability before reaching the merits. And such an approach, as petitioners explain, see Pet. Br. 35-38, is incompatible with the FAA's statutory command to resolve arbitrability questions quickly so that the parties may turn to the merits in the proper forum, *e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (FAA calls for an "expeditious and summary hearing, with only restricted inquiry into factual issues" in order to resolve arbitrability); *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014) (FAA directs courts "to decide quickly—summarily—the proper venue for the case" so that "the parties can get on with the merits of their dispute"). This Court should thus reject the lower court's addition of a transportation-industry requirement to the FAA's Section 1 exemption.

A. To assess whether a worker's employer is in the "transportation industry," courts would need to first engage in significant factual development to determine the identity of the employer for purposes of the FAA.

To start, the lower court's transportation-industry requirement would necessitate an initial finding as to the identity of the worker's employer for FAA purposes in order to measure whether that employer belongs to the transportation industry. In amici States' experience, resolving this question often demands significant factual development inappropriate for the threshold, summary proceedings that Congress envisioned on a motion to compel arbitration. Indeed,

there are extraordinary practical difficulties associated with the lower court's approach.

As an initial matter, administering the lower court's standard would prove difficult because there is no definition of "employer" in the FAA. Nor could courts borrow the definition of "employer" from the underlying causes of action, since the FAA can be invoked in cases raising a wide range of federal and state claims, many of which do not share the same definition of "employer." See*, e.g.*, *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 26-27 (2018) (comparing and contrasting the definitions of "employer" among Title VII, the Age Discrimination in Employment Act, and the Fair Labor Standards Act); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) (contrasting the definitions of "employer" under Title VII and Title IX).[2] Under such an approach, the scope of the Section 1 exemption would vary depending on the happenstance of the claims at issue. In order to apply a consistent transportation-industry requirement, then, federal courts would be called upon to develop a brand-new common law of employer status under the FAA.

But even if there were a readily available definition of employer for purposes of the Section 1 exemption, courts and litigants would still become mired in difficult and fact-intensive questions about the identity of the worker's employer. *E.g.*, *Frey v. Coleman*, 903

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[2] See generally Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 Berkeley J. Emp. & Lab. L. 55, 71 (2021) ("To answer the threshold question of employment, courts have developed tests for each statute to assess worker-employer relationships.").

F.3d 671, 673 (7th Cir. 2018) (noting in context of employment discrimination action that resolving the question of who employs a worker, "which seems as though it ought to be simple on its face, continues to confound litigants and courts"). Indeed, amici States often encounter situations with multiple possible employers where identifying the actual employer involves a detailed factual investigation and even litigation. And given the prevalence of complex corporate structures and alternative work arrangements (such as with subcontractors or independent contractors), these issues are arising with more frequency in amici States' investigatory and enforcement efforts.[3] Based on this experience—and as evidenced by the complexities in the corporate structure in this case, Pet. Br. 10 n.3—amici States have reason to believe that these issues would also arise under the lower court's transportation-industry standard.

For example, amici States are often confronted with situations where there are several entities in a complex corporate structure that could be considered an employer, an issue that is also likely to arise in the Section 1 context. In such cases, courts often turn to the joint employment doctrine, which traces back to this Court's decision in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), and calls for a detailed inquiry into "the circumstances of the whole activity." *Id.* at 730. Although the inquiry varies across jurisdictions, there is agreement that it is "fact intensive." *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 76 n.13 (2d Cir. 2003); see also, *e.g.*, *Hernandez v. Meridian*

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[3] See Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2, 28-32 (2016).

Mgmt. Servs., LLC, 304 Cal. Rptr. 3d 402, 406-407 (Ct. App. 2023); *Tolentino v. Starwood Hotels & Resorts Worldwide Inc.*, 437 S.W.3d 754, 757 (Mo. 2014). Indeed, the joint employment doctrine typically requires courts and litigants to examine the relationships among all possible employers, including not only the formal legal relationships but also facts concerning shared management or economic interdependence. See, *e.g.*, *Hall v. DIRECTV, LLC*, 846 F.3d 757, 770 (4th Cir. 2017); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007).

A labor enforcement action Maine brought against a complex set of interrelated entities illustrates the resulting difficulties in identifying a worker's employer. See *Dir. of Bureau of Lab. Standards v. Cormier*, 527 A.2d 1297 (Me. 1987). The relevant business was an amusement park named Funtown USA, but as the Maine Supreme Judicial Court summarized, "[t]here is no corporate entity known as Funtown USA." *Id.* at 1298. Instead, there was a constellation of corporations and partnerships all controlled or directed by various members of one family, with the workers at Funtown USA performing different tasks for different entities. *Ibid.* The Maine Bureau of Labor Standards took the case to trial to prove the "intertwined relationships among those entities" in order to establish joint employment. *Ibid.* One important factor was that the entities had "interlocking financial relationships" that amounted to "guarantees to aid financing" and "indirect subsidies." *Id.* at 1299. Needless to say, factual questions about intertwined financial relationships and the particulars of familial control over related entities cannot be quickly evaluated on a motion to compel arbitration.

As another example, many jurisdictions describe the degree of day-to-day control a business exercises over the circumstances that gave rise to the alleged violation as the most important factor to identifying a worker's employer. See, *e.g.*, *Roberson v. Indus. Comm'n*, 866 N.E.2d 191, 200 (Ill. 2007); *White v. W. Commodities, Inc.*, 295 N.W.2d 704, 708 (Neb. 1980); *Dep't of Lab. & Indus. v. Tradesmen Int'l, LLC*, 497 P.3d 353, 362 (Wash. 2021). But control can be disputed, especially when more than one entity is involved. And here, too, courts make their assessment based on the facts on the ground. In Illinois, for example, the inquiry into control "consist[s] of looking at the actual relationship between the employee and the employers, including the employers' ability to exercise control over the employee either directly or indirectly." Ill. Admin. Code tit. 56, § 210.115(c); see also *State Comp. Ins. Fund v. Indus. Acc. Comm'n*, 158 P.2d 195, 197 (Cal. 1945); *Tolentino*, 437 S.W.3d at 758-760; *Yeatts Whitman v. Polygon Nw. Co.*, 379 P.3d 445, 451-454 (Or. 2016); *Swanson Hay Co. v. State Emp. Sec. Dep't*, 404 P.3d 517, 538-539 (Wash. Ct. App. 2017).

Amici States' enforcement experience again shows that such assessments often require significant factual development. The New York Department of Labor, for instance, litigated the issue of whether certain app-based couriers were employees for purposes of unemployment insurance. *In re Vega*, 149 N.E.3d 401, 403 (N.Y. 2020). The New York Court of Appeals ultimately determined, after a detailed discussion of the record, that the courier service "exercised control over its couriers sufficient to render them employees." *Id.* at 405. In reaching this decision, the court considered,

among other factors, the parties' evidence about the company's digital platform, how deliveries are assigned to couriers, the compensation structure, and who bears the loss when customers fail to pay for their goods. *Ibid.*

This amount of factual development is not rare. For example, in a case brought by the Washington Employment Security Department, the Washington Court of Appeals listed 20 different indicia that may establish a company's factual control of the employees. *Swanson Hay*, 404 P.3d at 538-539. And in a recent investigation undertaken by Illinois, the State made a finding of joint employment among three different entities building assembly lines based on the "significant control" exercised by all three.[4] Establishing joint control in that investigation required detailed factual investigation, including gathering sworn testimony from multiple employees at the worksite.

Finally, in some contexts, courts must assess whether a parent entity is liable as an alter ego of the direct employer, also known as piercing the corporate veil, to determine employer status. See, *e.g.*, *Turman v. Superior Ct. of Orange Cnty.*, 246 Cal. Rptr. 3d 607, 615 (Ct. App. 2017) (assessing wage claims under the rubric of alter-ego liability). The factors for piercing the corporate veil vary from State to State, but typically courts inquire into the control exercised by one entity over the other and whether that control was

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[4] Press Release, *Attorney General Raoul Announces Settlement with Construction Subcontractors at Rivian Automotive over Unpaid Overtime Wages* (Dec. 21, 2021), https://bit.ly/3sBuUGa.

used to perpetrate a fraud or other wrong.[5] This again is a fact-intensive inquiry that must be resolved at trial if there are plausible allegations of fraud. See, *e.g.*, *Cortlandt St. Recovery Corp. v. Bonderman*, 96 N.E.3d 191, 203 (N.Y. 2018); *Mgmt. Comm. of Graystone Pines Homeowners Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc.*, 652 P.2d 896, 899 (Utah 1982); *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 102 (W. Va. 1986).

These examples, which represent just a fraction of amici States' experience in this area, demonstrate that the lower court's rule would require courts to resolve complicated and fact-bound questions on a motion to compel arbitration. This result would mire the parties in litigation on threshold questions, rather than decide arbitrability in a summary fashion as Congress intended.

B. Determining whether an employer is part of the transportation industry would also introduce complicated factual disputes into the FAA's Section 1 exemption.

Even if it were clear which entity to treat as the employer for purposes of a transportation-industry requirement, there is also no administrable standard for deciding whether that entity belongs to the transportation industry. The lower court set forth a two-part test, which it acknowledged did not derive from prior decisions, that asks whether (1) the industry in question "pegs its charges chiefly to the movement of goods or passengers," and (2) the industry's "predominant source of commercial revenue is generated by that

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[5] 1 *Fletcher Cyclopedia of the Law of Corporations* § 41.

movement." Pet. App. 48a. In addition to lacking legal basis, this proposed test would require significant factual development and be cumbersome for courts to apply.

Amici States again have pertinent experience in their capacity as labor enforcers. In addition to those noted above, another factor that many jurisdictions use to assess employer status is "the degree to which the services rendered are an integral part of the putative employer's business." *Schultz v. Cap. Int'l Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006); see also, *e.g.*, *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1, 37 (Cal. 2018); *Legassie v. Bangor Pub. Co.*, 741 A.2d 442, 446 (Me. 1999); *Georgia-Pacific Corp. v. Crosby*, 393 So. 2d 1348, 1350 (Miss. 1981); *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 458 (N.J. 2015). The "integral part of the business" factor is similar to the lower court's proposed "predominant source of revenue" standard in that both require courts to make factual determinations about the company's primary lines of business among the many tasks it performs.

States frequently litigate this inquiry, which the New Jersey Supreme Court has called "elusive." *Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Lab.*, 593 A.2d 1177, 1186 (N.J. 1991). States have argued, for instance, that nursing is integral to the business of a health care staffing agency, *People ex rel. Dep't of Lab. v. MCC Home Health Care, Inc.*, 790 N.E.2d 38, 47-49 (Ill. App. Ct. 2003); that bookkeeping is integral to the business of a general contractor, *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 73 A.3d 1061, 1068 (Me. 2013); and that secretarial work is integral to the business of a private investigator, *In re Barone*, 257 A.D.2d 950, 951 (N.Y. App. Div. 1999). In each

case, the employer disputed the evidence and sought to characterize its line of business more narrowly to avoid employer status. These disputes, which often require substantial factual development, would be commonplace under the lower court's proposed test.

Amici States also confront questions about a business's "predominant source of revenue" under their workers' compensation laws. Some workers' compensation statutes limit mandatory coverage to certain industries or occupations and exclude others.[6] As one example, Illinois law automatically includes transportation work, defined as "[c]arriage by land, water or aerial service," but it excludes most agricultural employers. 820 Ill. Comp. Stat. 305/3(3), (19). In *Hagemann v. Illinois Workers' Compensation Commission*, 941 N.E.2d 878 (Ill. App. Ct. 2010), the Illinois Appellate Court addressed whether a trucker employed by a farm to move grain would qualify for automatic coverage under this statute. *Id.* at 880-881. Although the farm prevailed before the factfinder based on evidence that trucking provided less than a third of its business, *id.* at 880, 882, the court remanded for additional fact-finding about whether trucking was truly "extraneous" to the farm's business, *id.* at 887. These are the kinds of fact-intensive inquiries that the lower court's test would invite.

Finally, the other prong of the lower court's test—whether an enterprise "pegs its charges chiefly to the movement of goods," Pet. App. 48a—will also engender complicated factual disputes. The price charged

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[6] See generally 6 Arthur Larson et al., *Larson's Workers' Compensation Law* §§ 75.01, 77.01.

for *any* tangible good is partly attributable to transportation costs.[7] The lower court would draw a line at the point where transportation costs "chiefly" account for prices. But this question would not be straightforward for courts to answer on a motion to compel arbitration. Beyond the ambiguity of "chiefly," the extent to which transportation costs drive prices in any given case can be challenging to determine.

Here again, amici States' experience is informative because the issue of transportation costs arises in diverse areas of law, several of which involve state statutes or enforcement efforts. For instance, the magnitude of transportation costs helps define the geographic market in antitrust law, an issue that often demands expert economic analysis to resolve. See, *e.g.*, *Fed. Trade Comm'n v. Advoc. Health Care Network*, 841 F.3d 460, 468-470 (7th Cir. 2016) (joint state and federal enforcement action involving geographic market dispute); *Kentucky v. Marathon Petroleum Co. LP*, 464 F. Supp. 3d 880, 891 (W.D. Ky. 2020) (geographic market is "a fact-intensive inquiry" that includes consideration of "transportation costs and challenges such as risk of spoilage, size, or weight"); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 425 (11th Cir. 1984) (high relative transport costs as portion of price limit scope of geographic market).

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[7] See Bureau of Transp. Stats., U.S. Dep't of Transp., *Increase in Transportation Consumer Price Index Accounts for Nearly 27% of Year-Over-Year Overall CPI Growth; Lowest Share of Inflation Since February 2021* (Nov. 2, 2022), https://bit.ly/3QRJT7l (price inflation "includes the transportation costs . . . that manufacturers, wholesalers, and retailers pass onto consumers in the prices they charge").

Likewise, state sales tax codes typically include the transportation costs of a good in its taxable base, subject to exceptions for shipment by a common carrier. *Greenman's Trucking, Inc. v. Dep't of Revenue Servs.*, 504 A.2d 568, 569-570 (Conn. App. Ct. 1986). In certain cases, then, States must assess whether the transportation cost has been factored into the price of a good, a question that can be difficult to resolve. See, *e.g.*, *Georgia-Pacific Corp. v. State Tax Assessor*, 562 A.2d 672, 674 (Me. 1989); *Westmoreland Res., Inc. v. Mont. Dep't of Revenue*, 868 P.2d 592, 597 (Mont. 1994); *Affiliated Foods Co-op., Inc. v. State*, 611 N.W.2d 105, 109-110 (Neb. 2000); *Sharp v. Park 'N Fly of Tex., Inc.*, 969 S.W.2d 572, 575-576 (Tex. App. 1998). For example, in Texas, an airport parking business argued that 70 percent of its revenue derived from tax-exempt shuttle transportation services unrelated to its core parking business. *Sharp*, 969 S.W.2d at 575. The Texas Court of Appeals, after "considering the totality of the circumstances" including the details of the business's public advertisements, concluded that the transportation portion was also taxable. *Id.* at 576.

In short, these examples demonstrate that whether a price is "peg[ged]" to "the movement of goods," Pet. App. 48a, is far from straightforward. States' experience once more shows that the lower court's transportation-industry test would embroil courts and parties in complex factual disputes merely to resolve arbitrability.

II. States Have An Interest In Maintaining Transparent Dispute Resolution Procedures For All Transportation Workers.

Amici States also know from their experience that resolving disputes involving transportation workers in arbitration interferes with their interests in ensuring the smooth operation of commerce within their borders and protecting their residents from unlawful working conditions. Whereas arbitration compelled by the FAA typically occurs in confidential proceedings, dispute resolution proceedings for exempted transportation workers are conducted in a more transparent and regulated manner. These transparent proceedings serve important state interests by allowing States to monitor disputes within their borders and more efficiently perform their investigatory and enforcement duties. The lower court's 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 typical 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 to perform their investigative and enforcement duties. The confidential nature of private arbitration proceedings, by contrast, does not serve those interests.

As this 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 their agreements. To that end, parties may agree "to arbitrate according to specific rules," *ibid.*, including that "proceedings be kept confidential," *id.* at 345, or that they proceed on an individualized, as opposed to a 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.[8] The leading arbitration associations not only highlight the confidentiality of their services, but also structure their governing rules to allow parties to elect nearly complete opacity in the proceedings. For instance, the American Arbitration Association's commercial arbitration rules—which respondents have selected to govern their arbitration proceedings, App. 64, 133—provide that the "arbitrator shall keep confidential all matters relating to the arbitration or the award" and "may make orders concerning the confidentiality of

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[8] 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, 1821 (2014).

the arbitration proceedings."[9] The JAMS Comprehensive Arbitration Rules contain a similar provision.[10] A JAMS arbitrator has authority to issue orders to protect the confidentiality of sensitive information, sanction parties for violating the rules, and exclude nonparties from hearings.[11]

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."[12] Indeed, under the arbitration agreement in this case, which would apply to petitioners if they were not exempted by Section 1 of the FAA, the "arbitration proceedings are to be treated as confidential," and no counsel or party may disclose "the substance of the arbitration proceedings or the result, except as required by subpoena, court order, or other legal process." App. 68, 137.

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 typi-

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[9] Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures, Rule 45 (Sept. 1, 2022), https://bit.ly/40FAQuw.

[10] JAMS Comprehensive Arbitration Rules & Procedures, Rule 26 (June 1, 2021), https://bit.ly/3ueL6O9.

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

[12] 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).

cally made public. Indeed, many transportation workers, including petitioners, can present their claims directly in state or federal court. See, *e.g.*, *Fairbairn v. United Air Lines, Inc.*, 250 F.3d 237, 241-242 (4th Cir. 2001). Unlike proceedings under 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 Cal. 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."[13] 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).

B. States are better able to protect their economies and exercise their investigatory and enforcement powers when transportation disputes are resolved in a transparent manner.

The procedures associated with court proceedings are better suited for transportation disputes than arbitrations conducted pursuant to the FAA, in large part because of their transparent and public-facing nature. Disruptions in transportation of goods and

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[13] Resnik, *supra* note 8, at 1818.

people due to unresolved disputes between employers and employees have a significant negative impact on States, their economies, and their residents. *E.g.*, *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969) ("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."). States thus have an interest in preparing for any possible disruptions in transportation—regardless of whether the workers are employed by a company in the so-called transportation industry—which is made more difficult when disputes are heard in confidential proceedings and resolved by opaque judgments.

The private nature of arbitration proceedings pursuant to the FAA can also interfere with States' investigatory 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.[14] In many States, the legislature has

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[14] *E.g.*, Ala. Code § 25-2-2(a); Ark. Code Ann § 11-2-108(1); Colo. Rev. Stat. § 8-4-111(1)-(2); Conn. Gen. Stat. § 31-3; Del. Code Ann. tit. 19, §§ 107, 1111; D.C. Code § 32-1306(a); Ga. Code Ann. § 34-2-3(e); Kan. Stat. Ann. § 44-636; Ky. Rev. Stat. Ann. § 337.990; Me. Rev. Stat. tit. 26, § 42; Md. Code Ann., Lab. & Empl. § 3-103; Mass. Gen. Laws ch. 149, § 3; N.H. Rev. Stat. Ann. §§ 273:9, 275:51(I); N.J. Stat. Ann. § 34:1A-1.12; N.M. Stat. Ann. § 50-4-8(A)-(B); N.D. Cent. Code § 34-06-02; Ohio Rev. Code Ann.

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 Ill. Comp. Stat. 205/6.3(b); 820 Ill. Comp. Stat. 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 regularly exercise this authority to investigate and bring enforcement actions against companies that employ transportation workers. For example, as noted, *supra* p. 9, the New York Department of Labor established in court that app-based delivery drivers were employees entitled to unemployment insurance benefits. See *In re Vega*, 149 N.E.3d at 405. Additionally, the Massachusetts Attorney General obtained restitution and penalties for 141 employees of a medical transportation business who were misclassified as independent contractors and deprived of overtime wages.[15] And the New Jersey Department of Labor and Workforce Development successfully argued that delivery drivers working for a furniture company were not exempt from overtime law under an exception for

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§ 4111.04(A)-(B); Or. Rev. Stat. § 651.060(1); S.D. Codified Laws § 60-5-15; Utah Code Ann. § 34-28-9.

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

"trucking industry employers." *In re Raymour & Flanigan Furniture*, 964 A.2d 830, 841 (N.J. Super. Ct. App. Div. 2009).

Arbitration agreements enforceable under the FAA cannot supersede this authority or prevent state investigations into potential violations. *E.g.*, App. 68, 137 (recognizing that the arbitration agreement does not preclude state or federal enforcement). 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 States. Specifically, contractual provisions that require confidentiality affect States' ability to efficiently conduct investigations and determine whether enforcement 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 complaints, 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.

For these reasons, States have an interest in ensuring that the FAA's Section 1 exemption covers all transportation workers without imposing an artificial transportation-industry requirement. Narrowing the class of workers who fall within the exemption would

not only hinder the States' ability to monitor disputes among transportation workers, but also make the States' investigatory and enforcement duties more difficult.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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