No. 15-1336

In the Supreme Court of the United States

AIR LIQUIDE INDUSTRIAL U.S. LP,

Petitioner,

v.

MARIO GARRIDO, in his individual capacity, and on behalf of all others similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Two

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

If the Court grants certiorari, as urged by Petitioner Air Liquide Industrial US LP ("Air Liquide"), it will be compelled to answer the following four questions:

1. Whether contracting parties can privately confer a trial court with authority under the Federal Arbitration Act ("FAA") to enforce an arbitration agreement involving a "transportation worker" when Congress, in § 1 of the FAA, mandates that trial courts shall have no such authority.

2. Whether *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), employs a conjunctive test that requires a truck driver who is "actually engaged in the movement of goods in interstate commerce" to additionally be employed by an employer in the "transportation industry" to qualify as a "transportation worker" excluded from FAA coverage under § 1.

3. Whether evidence demonstrating that Air Liquide is registered with the Department of Transportation and employs over 1,000 truck drivers to carry out its "primary business" of transporting goods to customers in interstate commerce supports the Court of Appeal's factual finding that Air

Liquide is "in the transportation industry."

4. Whether a truck driver who transports the goods of his employer to customers in interstate commerce is a "transportation worker" for purposes of the FAA § 1 exemption.

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INTRODUCTION

Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA shall not apply to employment contracts of "transportation workers." 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 110 (2001). In *Circuit City*, the Court held that "transportation workers" include employees "actually engaged in the movement of goods in interstate commerce." 532 U.S. at 112. The § 1 exclusion of "transportation workers" is a Congressional mandate delineating the scope of the FAA and limiting the authority of trial courts to compel arbitration pursuant to the FAA. *Id.* at 109; *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956).

The decision below by the California Court of Appeal held that because Respondent Mario Garrido ("Garrido") is a "truck driver whose responsibility is to move products across state lines," he is "indisputably" the "most obvious" example of a "transportation worker," and thus the FAA cannot apply. In its interlocutory Petition for Writ of Certiorari, Petitioner Air Liquide Industrial US LP ("Air Liquide") raises two arguments concerning the Court of Appeal's application of the § 1 exemption, neither of which necessitates or warrants certiorari.

First, relying on a provision of the Alternative Dispute Resolution Agreement ("ADR") that purports to apply the FAA to the parties' agreement, Air Liquide argues that even though Congress has withheld from trial courts the authority to compel arbitration involving a "transportation worker" under

the FAA, the parties privately conferred the trial court with authority to apply the FAA. While Air Liquide cites FAA policy that contracting parties are generally free to choose the terms of their arbitration agreement, this case does not present that issue. Rather, the issue is whether the parties may privately expand the scope of the FAA, a proposition this Court has already thoroughly addressed and rejected.

The Court has long recognized that private parties cannot confer statutory jurisdiction nor usurp Congress's role in dictating when and how courts shall proceed under a specific statute. The rule is no different for the FAA. The FAA policy of allowing parties to choose the terms of an arbitration agreement is limited by the text of the FAA and does not permit parties to expand the Congressional limitations of judicial power conferred under the FAA. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586-587 (2008). Based on the jurisdictional limitations established by the Court, the few courts that have addressed the specific question of whether parties are able to privately supersede the FAA § 1 exemption by contract have given the same answer as the Court of Appeal below: No.

Second, Air Liquide seeks to overturn *Circuit City's* definition of a "transportation worker." Although it is undisputed that Garrido is "actually engaged in the movement of goods in interstate commerce" (*Circuit City*, 532 U.S. at 112), Air Liquide argues that Garrido must additionally be employed in some undefined "transportation industry." That legal argument rests on the false factual premise that Garrido is not employed in the "transportation

industry." The Court of Appeal expressly found that Air Liquide *is* "in the transportation industry," precluding reversal on the issue absent this Court undertaking a fact-intensive evidentiary analysis of the correctness of the lower court's factual finding (which the Petition itself neither acknowledges nor directly challenges). In any event, no court has adopted Air Liquide's proposed conjunctive test. Every Circuit presented with the issue, including the Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits, has held that a truck driver is a "transportation worker," regardless of the industry of the employer.

In light of the Court's existing precedent directly contradicting Air Liquide's arguments, the need to resolve disputed factual issues even to reach Air Liquide's question presented, and the uniformity of courts addressing the unusual issues Air Liquide presents in its Petition, the Court should deny certiorari.

STATEMENT OF THE CASE

I. Factual Background

1. On June 15, 2009, Air Liquide hired Garrido as a truck driver at its Santa Fe Springs distribution center. (I CT 55.)[1] American Air Liquide Holdings, Inc. ("AALH") is the parent of Air Liquide and offers industrial gases to its customers. (I CT

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[1] Citations to "CT" refer to the Court of Appeal's clerk's transcript with volume and page number.

220.) Air Liquide is the subsidiary whose "primary business" is "supplying" its parent's gases to customers in the United States. (I CT 220, 222.) The Santa Fe Springs distribution center is specifically responsible for "Bulk Distribution" of AALH's gases to "customers throughout the United States." (I CT 220, 227.) Air Liquide employs approximately 1,000 truck drivers to transport AALH's gases to its customers using the interstate highway system. (I CT 220, 223; II CT 238.) Air Liquide is registered with the Department of Transportation ("DOT") and is required, along with all of its employees and all other motor vehicle carriers in the transportation industry, to follow all DOT regulations. (II CT 251-254.)

2. According to Air Liquide, upon being hired as a truck driver, Garrido was required to sign the ADR "[i]n consideration for and as a material condition of employment with Air Liquide." (Pet. App. 70.) Most relevant to Air Liquide's Petition is the provision of the ADR that purports to have the ADR governed by the FAA. Paragraph 2.10 provides in relevant part: "This Agreement, any arbitration proceedings held pursuant to this Agreement, and any proceedings concerning arbitration under this Agreement are subject to and governed by the Federal Arbitration Act, 9 U.S.C. section 1 et seq." (*Id.* 66, ¶ 2.10.)

While the ADR instructs trial courts to apply the FAA in deciding whether to compel arbitration, the ADR provides that the arbitration proceedings are governed by the Federal Rules of Civil Procedure ("FRCP"), with any party able to bring any motion pursuant thereto, except for a motion for class

certification, which is prohibited by the ADR. (*Id.* 66-67, ¶ 2.11.) The ADR's class arbitration prohibition requires that disputes be arbitrated on an individual basis, prevents an employee from asserting any "representative action," and waives the employee's right to a jury trial. (*Id.*)

II. Procedural History

1. On June 5, 2012, Garrido filed the underlying action on behalf of himself and all other Air Liquide truck drivers, alleging violations of California wage and hour laws for missed meal breaks. The Complaint, filed in California state court, alleges, *inter alia*, that Air Liquide: (1) failed to ensure that its truck drivers timely took their off-duty meal periods; (2) prepared and assigned routes that left no time for meal breaks; (3) was aware that its truck drivers were not taking, and could not take, their meal periods; and (4) failed to compensate truck drivers for their missed meal periods, as required by California law. (I CT 10-13.)

On March 15, 2013, Air Liquide filed a motion to compel arbitration claiming that the FAA requires enforcement of the ADR. (I CT 131-149.) On December 30, 2013, the trial court denied Air Liquide's motion on the grounds that the ADR's class arbitration prohibition was unenforceable under *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). (Pet. App. 42-57.) Following the trial court's denial of arbitration, the California Supreme Court held that *Gentry* was preempted by the FAA in cases to which the FAA applies, but stopped short of abrogating *Gentry's* application in cases governed by the

California Arbitration Act ("CAA") when the FAA does not apply. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

2. Relying upon *Iskanian* to argue that *Gentry* is preempted by the FAA, Air Liquide appealed the trial court's denial of arbitration to the California Court of Appeal. (Pet. App. 6-8.) Air Liquide advanced two grounds for its assertion that the FAA applies: (1) the ADR provision calling for application of the FAA supersedes the § 1 exemption and must be enforced; and (2) Garrido is excluded from the definition of a "transportation worker" because, according to Air Liquide, it is not in the "transportation industry." (*Id.*) The Court of Appeal rejected both arguments. *Garrido v. Air Liquide Indus. U.S. LP*, 241 Cal. App. 4th 833, 839-841 (2015), *review denied*, (Feb. 3, 2016).

Citing the uniformity of courts across the country addressing the specific issue, the Court of Appeal held that the ADR is not governed by the FAA "simply because the agreement declares it is subject to the FAA." (Pet. App. 6.) Garrido is "indisputably" a "transportation worker," as defined by *Circuit City*, because he "worked as a truck driver transporting Air Liquide gases, frequently across state lines." (*Id.* 6-7.)

The Court of Appeal dispensed of Air Liquide's "transportation industry" argument on three separate grounds. First, it found the argument to be legally unsupported and concluded that Air Liquide's cited cases (the same cases cited in Air Liquide's Petition)

do not support the proposition that § 1 requires a worker "actually engaged in the movement of goods in interstate commerce" to additionally be employed in the "transportation industry." (*Id.* 7.) "Air Liquide cites to no authority holding that a truck driver whose responsibility is to move products across state lines does not fall under section 1 of the FAA." (*Id.*)

Second, the Court of Appeal found Air Liquide's argument to be factually unsupported. The basis for Air Liquide's assertion that it is not in the "transportation industry" was its claim that the gases it transports to customers in interstate commerce belong to Air Liquide and not a third party. Rejecting the factual basis for this "transporting own goods" argument, the Court of Appeal made a factual finding that Air Liquide, as the DOT-registered subsidiary responsible for distribution of *AALH's* gases to customers, is "involved in the transportation industry." (*Id.*)

Third, the Court of Appeal rejected the legal premise of the "transporting own goods" argument. Following the only two courts to address the specific issue, the Court of Appeal held that even if Air Liquide were transporting its own gases, that fact would be of "little consequence: 'a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party.'" (*Id.* 7-8 (quoting *Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012)).) Because Garrido is a "transportation worker," the court concluded, the FAA could not apply to the ADR. (*Id.* 8.)

The Court of Appeal then proceeded to analyze whether arbitration could be enforced pursuant to the CAA. Because the California Supreme Court's *Iskanian* holding concerning *Gentry* was premised entirely on FAA preemption, the Court of Appeal reasoned that, absent FAA preemption, *Gentry* remained applicable in cases governed solely by California arbitration law. Thus, the Court of Appeal held that the ADR was unenforceable under the CAA. (*Id.* 10-19.)

3. On December 4, 2015, Air Liquide filed a Petition for Review before the California Supreme Court, arguing that the FAA applies for the same two reasons rejected by the Court of Appeal. Air Liquide's Petition for Review did not seek review of the Court of Appeal's application of *Gentry* to the CAA. On February 3, 2016, the California Supreme Court denied Air Liquide's Petition for Review. (*Id.* 60.)

4. On May 2, 2016, Air Liquide filed its interlocutory Petition for a Writ of Certiorari, arguing that the FAA applies to the ADR and seeking review of the same two issues concerning § 1 of the FAA that the California Supreme Court felt unworthy of review. Again, Air Liquide does not seek review of whether *Gentry* applies to the CAA when the FAA does not apply.

REASONS FOR DENYING THE WRIT

Section 1 of the FAA provides that "nothing herein contained 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. The phrase "any other class of workers engaged in foreign or interstate commerce" means "transportation workers." *Circuit City*, 532 U.S. at 110. "Transportation workers" include employees "actually engaged in the movement of goods in interstate commerce." *Id.* at 112.

In its Petition, Air Liquide takes issue with the California Court of Appeal's holding that as a truck driver transporting goods in interstate commerce, Garrido is a "transportation worker," precluding application of the FAA under § 1. Air Liquide advances two grounds for applying the FAA: (1) the ADR provision calling for application of the FAA confers the trial court with FAA jurisdiction and supersedes the Congressional mandate in § 1 excluding employment contracts of "transportation workers" from the FAA's coverage; and (2) the Court of Appeal's factual finding that Garrido is a "transportation worker" for purposes of the § 1 exemption is in error because, according to Air Liquide, it is not in the "transportation industry." (Pet. 10-21.)

Granting certiorari on these issues is both unwarranted and unnecessary because the Court of Appeal's application of the § 1 exemption on the particular facts of this case is supported by well-settled authority from this Court and is not the subject of disagreement among any courts, state or federal.

I. This Court Has Already Held That Private Agreements Cannot Grant Courts Authority That The FAA Withholds

The majority of Air Liquide's Petition is devoted to its argument that the FAA applies because paragraph 2.10 of the ADR purports to apply the FAA. (Pet. 10-16.) This is not a situation where parties are simply choosing which set of procedural rules apply to their arbitration. For that, the ADR calls upon the FRCP. (Pet. App. 60-61, ¶ 2.11.) The provision calling for application of the FAA seeks to instruct a trial court to apply the FAA in deciding whether to compel arbitration. (*Id.* 60, ¶ 2.10.) According to Air Liquide, this contractual provision supersedes the § 1 exemption. (Pet. 13-14.) The Court of Appeal correctly held, consistent with well-established precedent from this Court, that contracting parties cannot grant trial courts authority to enforce arbitration under the FAA when the § 1 exemption applies. (Pet. App. 6.)

1. Section 1 of the FAA is a Congressional mandate that "defines the contracts to which the [FAA] will be applicable." *Bernhardt*, 350 U.S. at 201 (quoting S.Rep. No. 536, 68th Cong., 1st Sess., p. 2); *Circuit City*, 532 U.S. at 117. It is one of "two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act." *Southland*, 465 U.S. at 10-11. Section 2, limiting the FAA's application to agreements "involving commerce," imposes a "further limit" on the FAA's scope. 9 U.S.C. § 2; *In re Van Dusen*, 654 F.3d 838, 843 (9th Cir. 2011). Sections 1 and 2 "are integral

parts of a whole" and "define the field in which Congress was legislating." *Bernhardt*, 350 U.S. at 201; *see Circuit City*, 532 U.S. at 109, 117.

Since only agreements that satisfy both "§§ 1 and 2 [are] brought under federal regulation," a court has no authority to compel arbitration under the FAA unless the agreement satisfies both §§ 1 and 2. *Bernhardt*, 350 U.S. at 201-202; *Van Dusen*, 654 F.3d at 844 (citing *Bernhardt*, 350 U.S. at 199-201); *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001); *see Circuit City*, 532 U.S. at 109; *see also Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 123 (1998) (where Congress sets limitations as to whom a certain statute is applicable and the authority granted to courts thereunder, "it has precluded the judiciary from enlarging either"); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (courts "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop").[2]

Even though Congress has specifically withheld authority from courts to compel arbitration under the FAA for employment contracts of

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[2] Of course, although the FAA withholds authority from courts to compel arbitration in cases excluded from its coverage, courts may have authority to do so under state law. But any such authority is subject to whatever limits state law imposes, and where the FAA itself does not apply, it cannot preempt state law limits on arbitrability. Air Liquide does not contest this. The issue is not raised in its Petition. Nor did Air Liquide raise the issue before the California Supreme Court. Instead, all of Air Liquide's arguments are that the FAA *does* apply.

"transportation workers," Air Liquide is requesting that the Court grant certiorari to resolve whether parties may unilaterally confer authority upon a trial court to compel arbitration under the FAA and supersede the Congressional mandate in § 1. (Pet. 10-16.) The Court need not resolve that question because it has already answered it with a resounding "no."

2. To support its argument that the ADR's attempt to apply the FAA should be enforced, Air Liquide relies exclusively on the FAA policies favoring arbitration and the enforcement of the terms of the parties' agreement discussed in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). (Pet. 10-14.) Air Liquide's reliance on FAA policies is misplaced. In *Imburgia*, it was undisputed that the consumer arbitration agreement fell within the scope of the FAA, thereby triggering application of the FAA policies and preemptive effect. 136 S. Ct. at 466.[3]

Here, in contrast, Air Liquide is circularly applying FAA policies to bootstrap the ADR into FAA coverage as a means of triggering those same policies and preemptive effect. This puts the "cart before the

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[3] In *Imburgia*, Justice Thomas reiterated that he "remain[s] of the view that the [FAA] does not apply to proceedings in state courts" and that "the FAA does not require state courts to order arbitration." 136 S. Ct. at 471 (Thomas, J., dissenting). The continuing disagreement on the Court over this question makes a case coming from a state court a very poor candidate for resolving any significant FAA issue (even assuming that the case, unlike this one, actually presents a significant issue).

horse." The "first question" that must be asked is whether the agreement is of the kind "specified in §§ 1 and 2 of the Act." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967). Answering this question must be done before applying any FAA laws or policies. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (the FAA *creates* a body of federal law and policies "applicable to any arbitration agreement *within the coverage of the Act*" (emphasis added)). If the agreement is not of the kind "specified in §§ 1 and 2 of the Act," the FAA and its laws and policies are inapplicable. *Id.*; *Prima Paint*, 388 U.S. at 401; *Bernhardt*, 350 U.S. at 201; *see Circuit City*, 532 U.S. at 117 (§ 1 "defines the reach of [the FAA]").

Federal courts of appeals, including those cited by Air Liquide in its Petition, are in agreement that FAA policies are inapplicable when a contract does not fall within FAA coverage. *See, e.g.*, *Van Dusen*, 654 F.3d at 844 (FAA policies have "simply no applicability where Section 1 exempts a contract from the FAA;" the trial court "must first consider whether the agreement at issue is of the kind covered by the FAA") (citing *Prima Paint*, 388 U.S. at 401); *Mason-Dixon Lines, Inc. v. Local Union No. 560, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 443 F.2d 807, 809 (3d Cir. 1971) (where the § 1 exemption applies, the trial court must treat the FAA as if it "had never been enacted").

3. Even if FAA policies could apply, their reach does not extend so far to allow a contract that Congress excluded from the authority granted by the FAA to be brought back within the scope of that

authority. Well-settled limitations established by the Court expressly prohibit enforcement of the ADR's attempt to confer FAA authority, supersede the mandatory language in § 1 of the FAA, and usurp Congress's role in dictating when and how trial courts shall proceed under the FAA.

It is axiomatic that any ability parties have to instruct a trial court when or how to proceed, such as deciding whether to compel arbitration, is necessarily limited by the authority that Congress grants to the trial court to so act. "Parties, of course, cannot confer jurisdiction; only Congress can do so." *Weinberger v. Bentex Pharm., Inc.*, 412 U.S. 645, 652 (1973). Congress possesses the "sole power" of investing or withholding jurisdiction for courts to act. *Palmore v. United States*, 411 U.S. 389, 401 (1973).

Arbitration agreements are not immune from the prohibition against privately conferring judicial authority. *See Prima Paint*, 388 U.S. at 404 n.12 (with the passage of the FAA, Congress intended to "make arbitration agreements as enforceable as other contracts, but not more so"). Parties cannot grant a trial court the authority to apply the FAA beyond its Congressionally-defined scope any more than they can confer subject-matter jurisdiction upon a federal court[4], contract for a district court to issue an advisory

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[4] *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

opinion[5], confer statutory authority upon a district court to determine the "new drug" status of a drug[6], contract for a district court to apply an otherwise inapplicable criminal statute to imprison the losing party in civil litigation[7], or even contract to have their dispute be resolved before this Court[8].

As this Court has already held, the FAA policy of allowing parties to choose the terms of an arbitration agreement does not permit contracting parties to expand the Congressional limitations of judicial power conferred under the FAA. *Hall St.*, 552 U.S. at 585-589. In *Hall Street*, the Court was presented with an arbitration provision purporting to expand a district court's authority to review an arbitration award beyond the statutory grounds listed in §§ 9 and 10 of the FAA. *Id.* at 578-579. The Court held that the parties were powerless to expand the judicial powers conferred under the FAA. *Id.* at 585. The proponent of the expansion attempted to justify the provision by citing, as Air Liquide does here, the

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[5] *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

[6] *Weinberger*, 412 U.S. at 652.

[7] *In re Bonner*, 151 U.S. 242, 255 (1894) (statutory limitations as to scope of court's jurisdiction to order imprisonment "is equivalent to a direct denial of any authority on the part of the court to direct that imprisonment be [ordered] in any cases other than those specified").

[8] *Ballance v. Forsyth*, 62 U.S. 389, 389-390 (1858).

FAA policy allowing parties to choose the terms of an arbitration agreement. *Id.* at 585-586. That policy, the Court held, is limited by the textual features of the FAA. *Id.* at 586. Section 9's language telling a district court that it "must" confirm an arbitration award unless one of the statutory grounds for judicial review is satisfied "carries no hint of flexibility" and leaves "nothing malleable" that would allow private expansion. *Id.* at 587. Because the attempted expansion of the grounds for review was "at odds" with the mandatory language of the FAA, it was unenforceable and invalid, irrespective of the potential deterrent to arbitration caused by the refusal to allow parties unfettered control over arbitration. *Id.* at 589.

Just as parties cannot expand a court's authority under the FAA to review an arbitration award, parties cannot expand a court's authority under the FAA to enforce arbitration. The ADR's attempt to apply the FAA is "at odds" with the mandatory language in § 1 instructing trial courts that "nothing herein contained shall apply to contracts of employment of [transportation workers]." 9 U.S.C. § 1. This Congressional mandate defining the scope of contracts for which courts have authority to compel arbitration under the FAA carries "no hint of flexibility" and leaves "nothing malleable" about the FAA's application to employment contracts of transportation workers. *Hall St.*, 552 U.S. at 587. "This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else." *Id.*

4. In the 91 years since Congress enacted the FAA, the specific issue posed by Air Liquide's first question presented has arisen on only a few occasions, and each court presented with the issue has held the same: Where the § 1 exemption applies, a trial court lacks authority to compel arbitration under the FAA, notwithstanding a contractual provision providing that the agreement is governed by the FAA. *See, e.g.*, *Van Dusen*, 654 F.3d at 844 (holding that private contracting parties cannot confer FAA jurisdiction where § 1 exemption applies)[9]; *Harden*, 249 F.3d at 1139 (holding that FAA does not apply to truck driver despite "contractual provisions that compel arbitration under the FAA"); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 590 (3d Cir. 2004) (holding that FAA does not apply to transportation worker despite arbitration provision that "the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement"); *Davis v. EGL Eagle Glob. Logistics L.P.*, 243 F. App'x 39, 44 (5th Cir. 2007).

Air Liquide fails to cite a single case that even remotely addresses this specific issue. The closest Air Liquide comes is its citations to cases from two state appellate courts (Texas and Georgia) which Air Liquide contends stand for the proposition that the parties' election to apply the FAA obviates the need to

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[9] After the Ninth Circuit reiterated its holding that contracting parties cannot supersede the § 1 exemption in a subsequent appeal, *Van Dusen v. Swift Transp. Co., Inc.*, 544 F. App'x. 724 (9th Cir. 2013), this Court denied certiorari of that issue, 134 S. Ct. 2819 (2014).

determine whether the contract "involves commerce" within the meaning of § 2. (Pet. 12.) Assuming, *arguendo*, that this is a correct statement of the law, the same Texas appellate court Air Liquide relies upon has since distinguished the cases cited by Air Liquide and held that their reasoning does not apply to the § 1 exemption, which "must be analyzed under the FAA itself." *W. Dairy Transp., LLC v. Vasquez*, 457 S.W.3d 458, 463 n.3 (Tex. App. 2014) (citing 9 U.S.C. § 1; *Circuit City*, 532 U.S. at 119).

5. Unable to advance any cognizable legal theory to support its argument that the Court of Appeal should have ignored the § 1 Congressional mandate, Air Liquide is relegated to baselessly claiming that the Court of Appeal was motivated by "hostility to arbitration." (Pet. 16.) The *facts* tell a different story. The Court of Appeal initially *reversed* the denial of arbitration. After holding that the FAA is inapplicable, the initial appellate opinion found the ADR *enforceable under California law*, an argument which the Court of Appeal allowed Air Liquide to advance, over Garrido's objection, for the first time on appeal, in its reply brief. (Pet. App. 41.) It was only when Garrido explained on rehearing that *Gentry* remained applicable to the CAA that the Court of Appeal affirmed the denial of arbitration. (*Id.* 11.) Further belying Air Liquide's brazen speculation into the Court of Appeal's motives, soon after rendering its opinion in this case, the same California appellate panel, Second District, Division Two, refused to apply the § 1 exemption to an independent contractor agreement, adopting a narrow interpretation of "contracts of employment," an issue which does not

apply to this case. *Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233, 1243 (2015).

Given the well-established nature of the applicable jurisdictional limitations preventing application of the FAA, the uniformity from courts around the country addressing the specific and rare issue present here, and the absence of any conflicting authority on the issue, granting certiorari is unnecessary and unwarranted.

II. As A Truck Driver, Garrido Falls Squarely Within *Circuit City's* Definition Of A "Transportation Worker," And There Is No Reason For The Court To Overturn Established Precedent

In *Circuit City*, this Court defined the scope of the FAA § 1 "transportation worker" exemption. 532 U.S. at 109. The phrase "any other class of workers engaged in foreign or interstate commerce" means "transportation workers" and includes "workers 'actually engaged in the movement of goods in interstate commerce.'" *Id.* at 109, 112. It is undisputed that Garrido satisfies *Circuit City's* definition of a "transportation worker." (II CT 230-231.) Because Garrido "worked as a truck driver transporting Air Liquide gases, frequently across state lines," the Court of Appeal found that he "indisputably" represents the "most obvious" example of a "transportation worker." (Pet. App. 6-7.)

Nevertheless, Air Liquide urges the Court to grant certiorari to resolve whether the definition of

"transportation worker" incorporates an additional requirement—namely, that the "transportation worker" also be employed in some undefined "transportation industry." (Pet. 17.) In addition to holding that Air Liquide's proposed conjunctive test is unsupported, the Court of Appeal rejected the factual basis for Air Liquide's argument. It made a factual finding that Air Liquide, being responsible for transporting AALH's gases to customers, is "in the transportation industry." (Pet. App. 7.) The Court of Appeal went on to hold that even if the gases being transported to customers did belong to Air Liquide, an employee transporting his employer's goods in interstate commerce satisfies *Circuit City's* definition of a "transportation worker." (*Id.* 7-8.)

Given the Court of Appeal's findings and holdings, granting certiorari would require the Court to resolve the following issues: (1) whether *Circuit City* employs a conjunctive test requiring a "transportation worker" also to be employed in the "transportation industry;" if so, (2) the disputed factual issue of whether Air Liquide transports its own goods; and, if so; (3) the extremely fact-specific and rarely-arising issue of whether a company whose primary business is transporting its own goods in interstate commerce is excluded from the "transportation industry," such that its truck driver employees, who transport goods manufactured by their employer in interstate commerce, are excluded from the definition of "transportation worker" under Air Liquide's proposed conjunctive test. No reason exists to grant certiorari to resolve any of these issues, much less all of them.

A. Every Circuit Presented With The Issue Has Held That Truck Drivers Are "Transportation Workers," And There Is No Split Of Authority Over Whether They Must *Also* Be Employed In The "Transportation Industry."

According to Air Liquide, an "irreconcilable split of authority" exists as to whether *Circuit City* employs a conjunctive test requiring that an employee be engaged in transportation in interstate commerce *and* that his or her employer be in the "transportation industry" for the § 1 exemption to apply.[10] (Pet. 17-21.) The Court of Appeal correctly rejected Air Liquide's proposed conjunctive test as entirely unsupported, and correctly found the so-called "irreconcilable split of authority" to be illusory. (Pet. App. 7-8.)

1. Air Liquide's proposed conjunctive test finds no support in *Circuit City*. There, the Court

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[10] In defining the scope of the § 1 residual exemption, this Court agreed with the "transportation worker" definition uniformly applied by every Circuit other than the Ninth Circuit, which had previously interpreted the residual exemption to include "all contracts of employment." *Circuit City*, 532 U.S. at 109. The Ninth Circuit has since followed *Circuit City* and its sister Circuits in holding that § 1's residual exemption applies to "transportation workers." *Harden*, 249 F.3d at 1140. Because all Circuits now apply this "transportation worker" definition, Air Liquide is essentially arguing that the Circuits apply the definition differently. Of course, this is not an appropriate basis to invoke the Court's review. *Kyles v. Whitley*, 514 U.S. 419, 456 (1995).

made it clear that the "transportation worker" exemption applies if the *worker* is "engaged in transportation" (i.e. "the movement of goods"). 532 U.S. at 109, 112. Section 1's focus is on whether the "*person or activities* [are] within the flow of interstate commerce." *Id.* at 118 (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)) (emphasis added). Nothing supports an *additional* requirement that the *employer* must be engaged in some "transportation industry." The word "industry" is entirely absent from *Circuit City*. In fact, the phrase "transportation industry" does not appear in *any* of the Court's opinions discussing the § 1 jurisdictional exemption.

2. Air Liquide strains to find support in lower courts for its proposed conjunctive test because no court has adopted it. It resorts to misleading and inaccurate statements of the law from various Circuits to manufacture its "split of authority." For example, Air Liquide contends the Seventh Circuit holds that "*any* employee" who crosses state lines qualifies as a "transportation worker." (Pet. 17 (emphasis added).) This characterization is patently false. The Seventh Circuit, along with every other Circuit and the Court of Appeal below, requires that employees <u>both</u> be "engaged in the movement of goods" and do so "across state lines" to qualify as "transportation workers." *Kienstra*, 702 F.3d at 957. In *Circuit City*, this Court followed and adopted the Seventh Circuit's definition of a "transportation worker." 532 U.S. at 111, 121 (citing *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997)).

Applying its accepted definition of a "transportation worker," the Seventh Circuit holds that *truck drivers* who cross state lines are "interstate transportation workers within the meaning of § 1 of the FAA as interpreted by *Circuit City*." *Kienstra*, 702 F.3d at 957. The Third and Ninth Circuits are in agreement. In *Palcko*, the Third Circuit held that truck drivers are "transportation workers" excluded from the FAA. 372 F.3d at 593-594. In *Harden*, the Ninth Circuit cited *Circuit City* for the proposition that "the FAA is inapplicable to drivers." 249 F.3d at 1140 (citing *Circuit City*, 532 U.S. 105).

3. Air Liquide contends that the Second, Eighth, and Eleventh Circuits are in disagreement with the Third, Seventh, and Ninth Circuits and the Court of Appeal below and require that in addition to being "actually engaged in the movement of goods in interstate commerce" (*Circuit City*, 532 U.S. at 112), a truck driver must also work in the "transportation industry." (Pet. 18-19.) Air Liquide relies primarily upon *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005), and *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286 (11th Cir. 2005). (Pet. 18-19.) Neither case supports the proposed conjunctive test. As the Court of Appeal's opinion below explains, these cases, neither of which involves a truck driver, simply stand for the proposition that the industry of the employer is relevant when the employee is *not* actually moving goods in interstate commerce. (Pet. App. 7.)

Lenz highlights the distinction between employees whose job duties include the actual movement of goods and those only incidentally engaged in the movement of goods. Before engaging

in any discussion of the industry of the employer, the Eighth Circuit, citing the Ninth and Eleventh Circuits, stated: "Indisputably, if [plaintiff] were a truck driver, he would be considered a transportation worker under § 1 of the FAA." *Lenz*, 431 F.3d at 351-52 (citing *Harden*, 249 F.3d at 1140; *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987)). When an employee is not directly responsible for the transportation of goods, however, "[a] more difficult question arises" that requires analysis of the industry of the employer. *Id.* at 352. The Eighth Circuit analyzed the industry of the employer only after it found that, unlike a truck driver, the "customer service representative" plaintiff was not directly responsible for the transportation of goods. *Id.* Indeed, citing the Third Circuit, *Lenz* expressly rejected a conjunctive test that requires an employee both to be engaged in transporting goods in interstate commerce and to be employed in the "transportation industry." *Id.* at 352 n.2 (citing *Palcko*, 372 F.3d at 593-594).

More recently, the Eighth Circuit cited the Seventh Circuit and reaffirmed that "truckers occasionally transporting loads across state border '[are] interstate transportation workers within the meaning of § 1 of the FAA as interpreted by *Circuit City*.'" *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 728 F.3d 853, 859-860 (8th Cir. 2013) (quoting *Kienstra*, 702 F.3d at 957).

In *Hill*, the Eleventh Circuit took the same approach as *Lenz*, analyzing the industry of the employer of an "account manager" who only "incidentally transported goods interstate" to

conclude that the employee was not a "transportation worker." 398 F.3d at 1289. But the Eleventh Circuit employs a different approach for employees engaged in transporting goods on a more than "incidental" basis. Also citing the Seventh Circuit, the Eleventh Circuit holds that "'workers actually engaged in interstate commerce[]' includ[e] bus drivers and truck drivers." *Am. Postal Workers*, 823 F.2d at 473 (citing *Pietro Scalzitti Co. v. Int'l Union of Operating Eng'rs, Local No. 150*, 351 F.2d 576, 578 (7th Cir. 1965)).

The Second Circuit's approach is no different. In *Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979 (2d Cir. 1997), a pre-*Circuit City* case cited but not discussed by Air Liquide, the industry was relevant because the employees were "cleaning employees." *Id.* at 982. But the Second Circuit also stated that it, too, follows the Seventh Circuit's definition of "transportation worker." *Id.* (citing *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co.*, 84 F.3d 988, 993 (7th Cir. 1996)). District courts in the Second Circuit have subsequently held that "transportation workers" include truck drivers. *See, e.g.*, *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 482-483 (S.D.N.Y. 2008).

> If there is one area of clear common ground among the federal courts to address this question, it is that truck drivers—that is, drivers actually involved in the interstate transportation of physical goods—have been found to be "transportation

> workers" for purposes of the residuary exemption in Section 1 of the FAA.

Id. (collecting cases therein).

In sum, no Circuit has engaged in the analysis of the industry of the employer when presented with an employee "actually engaged in the movement of goods in interstate commerce." *Circuit City*, 532 U.S. at 112. The Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits are in agreement with each other, and in fact have cited and relied upon each other in concluding that interstate truck drivers are "transportation workers" excluded from FAA coverage. Without disagreement among the courts regarding whether truck drivers are "transportation workers," there is no need for the Court's review of Air Liquide's proposed conjunctive test. *See Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (denying certiorari for lack of "obvious conflict" among the Circuits).

B. The Court Of Appeal's Factual Finding That Air Liquide Is "In The Transportation Industry" Obviates Any Need To Reach The Legal Issue Air Liquide Invites This Court To Answer.

Even if the Court were to grant certiorari and adopt Air Liquide's unsupported conjunctive test, the Court would still be required to entertain the *disputed* factual basis for Air Liquide's claim that it is not in the "transportation industry." The Court of Appeal found that Air Liquide lacked a factual basis to

support its claim that it should not be considered part of the "transportation industry" because the gases its truck drivers transport to customers belong to Air Liquide. (Pet. App. 7.) In its Petition, Air Liquide still cites no facts to support that claim. (Pet. 7.) Garrido, on the other hand, submitted evidence proving, among other things, that Air Liquide is the subsidiary whose "primary business" is transporting *AALH's* gases *to customers*, that it employs over 1,000 truck drivers, and that it is registered with the DOT as a common carrier. (I CT 220, 222, 223, 227; II CT 238, 251-254.) After analyzing this evidence, the Court of Appeal made factual findings that transportation constitutes a "significant portion" of Air Liquide's business and that Air Liquide is "involved in the transportation industry." (Pet. App. 7.)

Because Air Liquide's proposed conjunctive test does not provide "a legitimate basis for reversal," "this Court has no power to grant certiorari" to address whether to adopt that legal test. *Illinois v. Gates*, 459 U.S. 1028, 1031 (1982). At a minimum, a grant of certiorari is unwarranted because determining whether Air Liquide would prevail under its proffered conjunctive test would require the Court to reverse the Court of Appeal's factual findings and undertake a fact-intensive evidentiary analysis into the specific details of Air Liquide's business, including licenses, DOT filings, corporate structure, and the amount and percentage of resources dedicated to transportation. *See Wearry v. Cain*, 136 S. Ct. 1002, 1011 (2016) ("we generally deny certiorari on factbound questions that do not implicate any disputed legal issue"); S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted

error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

C. The Unusual Question Whether A Truck Driver Transporting His Employer's Goods In Interstate Commerce Is A "Transportation Worker" Would Not Warrant Review, Even If Presented By The Facts.

If the Court granted certiorari, adopted Air Liquide's proposed conjunctive test, conducted a fact-intensive evidentiary analysis into whether Air Liquide is in the "transportation industry," reversed the Court of Appeal's factual findings, and found that Air Liquide does transport its own gases, it would still need to resolve at least one additional question: Whether a DOT-registered company employing over 1,000 truck drivers to carry out its "primary business" of transporting its own goods to customers in interstate commerce is outside the "transportation industry."[11] The necessary premise underlying Air Liquide's argument is that a company that transports its own goods to customers in interstate commerce is not in the "transportation industry," but no court has ever adopted that view.

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[11] Such an intensely fact-specific issue for which the Court of Appeal unquestionably applied the correct definition of "transportation worker" is "precisely the type of case in which [the Court is] *most* inclined to deny certiorari." *Kyles*, 514 U.S. at 460 (Stevens, J., concurring) (emphasis in original).

The Court of Appeal correctly rejected this premise. It held that even if Air Liquide transported its own gases in interstate commerce, that fact would be of "little consequence: 'a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party.'" (Pet. App. 7-8 (quoting *Kienstra*, 702 F.3d at 957).) This holding is in agreement with the only courts to have addressed the specific issue and is consistent with the federal regulations for the "transportation industry."

1. Air Liquide fails to cite any authority for the proposition that a company whose primary business is transporting its own goods to customers in interstate commerce is not in the "transportation industry." Air Liquide does not even define the contours of its "transportation industry." Nor does Air Liquide cite any authority to support its argument that a truck driver transporting goods belonging to his or her employer in interstate commerce is not a "transportation worker."

2. The Seventh and Ninth Circuits are the only two appellate courts (besides the Court of Appeal below) to have addressed this highly specific and rare issue. Although the Seventh Circuit uses the "transportation industry" language upon which Air Liquide seizes (*Cent. Cartage*, 84 F.3d at 993), it holds that all truck drivers transporting goods in interstate commerce, even those transporting goods belonging to their employers, are "transportation workers" (*Kienstra*, 702 F.3d at 957-958).

In *Kienstra*, a union filed an action against an employer engaged in manufacturing concrete on

behalf of its truck driver employees. *Id.* at 955. The Seventh Circuit rejected the identical argument Air Liquide advances here—that because the truck drivers transported their employer's goods and not those of a third party, they were not "transportation workers." *Id.* at 957. The proposed distinction, the court held, is "nowhere to be found in … *Circuit City*." *Id.* at 957. "The distinction in fact does not matter: a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party." *Id.* (citing *Circuit City*, 532 U.S. at 112).

The Ninth Circuit, faced with a similar union-filed action on behalf of truck driver employees, held that delivery drivers transporting fountain drinks and other vending products belonging to their employer, Seven-Up/RC Bottling, in interstate commerce were "transportation workers" excluded from FAA coverage under § 1. *Seven-Up/RC Bottling Co. of S. Cal. v. Amalgamated Indus. Workers Union, Local 61, NFIU/LIUNA*, 183 F. App'x 643, 643-644 (9th Cir. 2006).

As the Court of Appeal below and the only other courts that have addressed this rarely-arising issue have explained, the distinction between the truck driver employed by the manufacturer to transport goods to customers and the truck driver employed by a third party to transport those same goods to those same customers is irrelevant. In both cases, the truck driver is "engaged in transportation" of goods to customers and "engaged in commerce." *Circuit City*, 532 U.S. at 109, 112, 118, 130. This Court has had a long-standing view that employees whose

responsibilities include the transportation of goods belonging to their employers have a "direct effect upon interstate and foreign commerce." *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 469-470 (1938).

3. Much like *Circuit City's* definition of "transportation worker," federal regulations do not distinguish between those who transport goods of third parties and those who do not. "All employers and employees" who "transport property or passengers" are subject to and required to follow DOT regulations applicable to the "transportation industry," regardless of whether the goods belong to the employer or to a third party. 49 C.F.R. §§ 390.3(a), 390.5, 392.1. Air Liquide admits that it is registered as a common carrier with the DOT and that it as well as its 1,000 truck driver employees are required to follow DOT regulations.[12] (II CT 251-254.) It follows that whether or not it transports its own goods, Air Liquide is in the "transportation industry." *See* 49 C.F.R. § 392.9b(a) (only commercial motor vehicles in the "transportation industry" are required to be registered with DOT).

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[12] Being admittedly subject to DOT regulations, Air Liquide also falls squarely within the definition of "transportation industry" that the Eleventh Circuit, which Air Liquide heavily relies upon in advocating its proffered conjunctive test, employs for workers not directly engaged in transporting goods. *Hill*, 398 F.3d at 1289 (clarifying that "transportation industries" means companies subject to DOT regulation); *Am. Postal Workers*, 823 F.2d at 473 (Eleventh Circuit follows Seventh Circuit to hold that truck drivers work in the "transportation industries").

Given the uniformity of courts in holding that employees transporting the goods of their employers are "transportation workers," the absence of any conflicting authority, and the infrequency with which this specific issue has arisen, no reason exists for the Court to grant certiorari of either this issue or of Air Liquide's proposed conjunctive "transportation worker" test.

CONCLUSION

For the foregoing reasons, Air Liquide's interlocutory Petition for Writ of Certiorari should be denied.

Respectfully submitted this June 6, 2016,

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