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**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

HENRY D. LEDERMAN
DOMINIC J. MESSIHA
Counsel of Record
JENNIFER TSAO
LITTLER MENDELSON, P.C.
2049 Century Park East, Suite 500
Los Angeles, CA 90067
(310) 553-0308
dmessiha@littler.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Air Liquide Industrial U.S. LP is a subsidiary of American Air Liquide Holdings, Inc., which is a publicly held corporation that owns 10% or more of Air Liquide Industrial U.S. LP's stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. The Parties' Choice of Law Clause Adopting the FAA Is Not Tantamount to Conferring Jurisdiction on the Trial Court 2

II. *Circuit City* Does Not Resolve the Circuit Split Regarding Whether the Section 1 Transportation Worker Exemption Applies to Employees Outside the Transportation Industry 8

III. The Court of Appeal Could Not and Did Not Make a Factual Finding That Air Liquide is in the Transportation Industry 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

ABF Freight System, Inc. v. International Brotherhood of Teamsters, 728 F.3d 853 (8th Cir. 2013)....................................10

American Postal Workers Union v. U.S. Postal Service, 823 F.2d 466 (11th Cir. 1987)............................10, 11

Ballance v. Forsyth, 62 U.S. 389 (1858) 6

Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956) 7

Biller v. Toyota Motor Corp., 668 F.3d 655 (9th Cir. 2012)......................................5

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 6, 8

Cronus Invs., Inc. v. Concierge Servs., 107 P.3d 217 (Cal. 2005)..4

Davis v. EGL Eagle Global Logistics L.P., 243 F. App'x 39 (5th Cir. 2007)..................................7

DirecTV v. Imburgia, 136 S. Ct. 463 (2015).................................... 1, 3, 4, 5

Discover Bank v. Super. Court, 36 Cal.4th 148 (2005)..3

Flast v. Cohen, 392 U.S. 83 (1968) 5

Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008) 4, 6

TABLE OF AUTHORITIES – Continued

Page

Harden v. Roadway Packages Sys.,
249 F.3d 1137 (9th Cir. 2001)................................7, 9

Hill v. Rent-A-Center, Inc.,
398 F.3d 1286 (11th Cir. 2005).............................9, 13

In re Van Dusen,
654 F.3d 838 (9th Cir. 2011)......................................7

International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC,
702 F.3d 954 (7th Cir. 2012)................................8, 12

Jones v. United States,
127 F.3d 1154 (9th Cir. 1997)..................................12

Kowalewski v. Samandarov,
F. Supp. 2d 477 (S.D.N.Y. 2008) 11

Lenz v. Yellow Transportation,
431 F.3d 348 (8th Cir. 2005)................................9, 10

Maryland Casualty Co. v. Realty Advisory Board,
107 F.3d 979 (2d Cir. 1997) 11

Mason-Dixon Lines, Inc. v. Local Union No. 560,
443 F.2d 807 (3d Cir. 1971) 7

Mortensen v. Bresnan Communications, LLC,
722 F.3d 1151 (9th Cir. 2013)....................................5

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 4

Palcko v. Airborne Express, Inc.,
372 F.3d 588 (3d Cir. 2004) 7, 9

Palmore v. U.S.,
411 U.S. 389 (1973) 5

TABLE OF AUTHORITIES – Continued

Page

Pietro Scalzitti v. International Union of Operating Engineers, 351 F.2d 576 (7th Cir. 1965) 11

Renard v. Ameriprise Financial Services, Ltd., 778 F.3d 563 (7th Cir. 2015) 5

Rodriguez v. Am. Techs., Inc., 39 Cal. Rptr. 3d 437 (Cal. App. 2006) 4

Southland Corp. v. Keating, 465 U.S. 1 (1984) 4, 6

United States v. Gypsum Co., 333 U.S. 364 (1948) 12

Weinberger v. Bentex Pharms., Inc., 412 U.S. 645 (1973) 5

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 11

STATUTES

9 U.S.C. § 1 ....*passim*

9 U.S.C. § 2 6

INTRODUCTION

Garrido does not dispute that the first question presented by the Petition should be resolved by this Court: whether the decision below conflicts with the mandate in *DirecTV v. Imburgia* (*Imburgia*), 136 S. Ct. 463 (2015). *Imburgia* directs that ordinary contract law principles apply to arbitration contracts and that contracting parties' choice to apply the FAA to govern their dispute must be enforced.

Rather, Garrido contends that parties to a contract may not choose the FAA to control unless the FAA already applies, because doing so would be an invalid attempt to confer jurisdiction upon a trial court. (Opp. 2.) However, Garrido confuses the granting of jurisdiction with the choice to apply a substantive body of law – the FAA – to the enforcement of an agreement. Indeed, this Court's recent decision in *Imburgia* stands for the directly contrary proposition: parties to an arbitration agreement can contract for virtually any law to apply.

Here, the parties' selection of the FAA should have been treated by the California courts with the same deference as any other routine choice of law provision. However, because an arbitration agreement was at issue, a different result ensued. Review is therefore necessary to ensure that the strong federal policy behind the FAA to promote arbitration is not defeated by California state laws applied in a manner that is hostile to arbitration.

Nor do Garrido's arguments in the opposition brief address the importance of the second question presented by the Petition: whether workers who are not employed in the transportation industry, but merely cross state lines in the course of their work, should fall within the FAA's Section 1 "transportation worker" exemption. Instead, Garrido strains to conform the interpretations of the Second, Eighth and Eleventh Circuits to the over-inclusive test employed by the Seventh Circuit and the court below. However, review of the case law reveals the fundamental split in the circuits concerning the large segment of employees who engage in transportation activities incidental to their employer's business. Accordingly, review is also necessary to resolve this separate and independent issue.

ARGUMENT

I. The Parties' Choice of Law Clause Adopting the FAA Is Not Tantamount to Conferring Jurisdiction on the Trial Court.

Garrido contends that parties may not select the FAA unless it already applies to their dispute. According to Garrido, if the FAA does not already apply, selecting it would constitute an invalid attempt to "confer statutory jurisdiction" upon a trial court. (Opp. 2.) Indeed, Garrido argues that the lower courts here were without jurisdiction to enforce the parties' choice of law clause because of the FAA's Section 1 exemption.

Of course, if the FAA already applied, the parties would have no reason to expressly select it – rendering this Court's holding in *Imburgia* and the cases that preceded it mere surplusage. The very purpose of a choice of law clause is for the parties to select a statutory scheme that would ordinarily *not* apply. Otherwise, the choice of law clause would be meaningless and illusory.

Garrido notably fails to address *Imburgia*, which is directly contrary. *Imburgia* confirms that state courts are not just permitted to apply the FAA – they are *mandated* to do so when selected by the parties. There, the parties entered into an agreement that expressly provided the arbitration provision "shall be governed by the Federal Arbitration Act," with the proviso that the entire provision would be unenforceable if the "law of your state" rendered the class action waiver unenforceable. *Imburgia*, 136 S. Ct. at 464, 466. Rather than recognize the FAA's preemptive effect on the California law, the lower state court in *Imburgia* (the same lower court here) applied California's *Discover Bank* rule[1] that rendered class arbitration agreements unenforceable. The lower court reasoned that the parties had intended to incorporate preempted California law into their contract.

On review, this Court held that the contractual language made no reference to invalid state law and must be presumed to take its ordinary meaning of valid state law. *Id.* at 469. In so holding, this Court

[1] *Discover Bank v. Super. Court*, 36 Cal.4th 148 (2005).

made clear that courts cannot make an end run around the arbitral obligations of the FAA, and reinforced that parties retain the power to agree upon whatever legal regime they wish to govern their arbitration agreements, be that "the law of Tibet," "pre-revolutionary Russia," or, as here, the FAA. *Id.* at 468.

The parties' choice of the FAA does not attempt to confer upon the trial court authority that it does not already have. This Court has repeatedly held that the body of federal substantive law created by the FAA is applicable in both state and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Indeed, the FAA does not require or bestow jurisdiction. *See Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581-582 (2008) ("As for jurisdiction over controversies touching arbitration, the [FAA] does nothing, being 'something of an anomaly in the field of federal-court jurisdiction' in bestowing no federal jurisdiction. . . .").[2]

[2] Garrido's citation to the dissent in *Imburgia* providing Justice Thomas' view that "the [FAA] does not apply to proceedings in state court" does not undermine the analysis here. Petitioner recognizes that the majority view is that the FAA does in fact apply in state court. Moreover, contracting parties in California, *as a matter of state law*, may adopt the FAA to govern their proceedings. *See Cronus Invs., Inc. v. Concierge Servs*., 107 P.3d 217, 229 (Cal. 2005) (parties may "*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law" (italics in original); *Rodriguez v. Am. Techs., Inc*., 39 Cal. Rptr. 3d 437 (Cal. App. 2006) (holding that the state law was overridden by the parties' intent to follow the FAA). Here, the parties expressly adopted the

Rather, because the FAA is a substantive body of law, it may be chosen by the parties to govern their arbitration agreement in the same manner that parties may choose the arbitration law of another state to govern. While *Imburgia* alone would be enough, the circuit courts are also in accord in enforcing the parties' choice of the FAA, and the brief in opposition fails to address the cases raised in the Petition. In *Biller v. Toyota Motor Corporation*, the Ninth Circuit relied on basic California contract interpretation principles in holding that "the plain language" of a clause selecting the FAA "requires that the FAA governs the arbitration proceedings." 668 F.3d 655, 662-663 (9th Cir. 2012).

In *Mortensen v. Bresnan Communications, LLC*, the Ninth Circuit likewise enforced the parties' choice of the FAA. 722 F.3d 1151, 1162 (9th Cir. 2013). And in *Renard v. Ameriprise Financial Services, Ltd.*, 778 F.3d 563 (7th Cir. 2015), the Seventh Circuit held that the district court was "correct to review" the arbitration award under the FAA and that the plaintiff had "no way around this [choice of law] language."

Garrido's cited authorities are inapposite. (Opp. 14-15; *see, e.g.*, *Weinberger v. Bentex Pharms., Inc.*, 412 U.S. 645 (1973) (discussing FDA's jurisdiction to determine status of drug); *Palmore v. U.S.*, 411 U.S. 389 (1973) (discussing whether state court had power to preside over criminal case, and "sole power" possessed by Congress to create tribunals); *Flast v. Cohen*, 392

FAA, and even California state law would require its application in state court.

U.S. 83 (1968) (parties may not contract for district court to issue advisory opinion); *Ballance v. Forsyth*, 62 U.S. 389 (1858) (Supreme Court has no jurisdiction without appeal at lower levels).) None of these cases address the FAA.

Unlike the examples provided, the trial courts here already have the power to enforce choice of law provisions, as well as the FAA. Moreover, unlike *Hall Street*, 552 U.S. at 576, where the parties attempted to expand the scope of judicial review of an arbitration award, here, the contract does not seek to expand or redefine the work of the court; it merely requires the court to apply the substantive body of law contemplated by the parties when enforcing the arbitration agreement.

In addition, none of the cases cited by Garrido suggest that, where parties expressly and unequivocally adopted the FAA to govern their arbitration agreement, the Section 1 exemption prevents its application. Garrido's references to Section 1 and 2 limitations of the FAA laid out in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), are not pertinent because neither case seeks to proscribe the ability of parties to an arbitration agreement to unequivocally adopt the FAA. To the contrary, *Circuit City* and *Southland* emphasize Congress's intent for the FAA to apply broadly.

Garrido's reliance on *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011), is also misplaced. That case supports Air Liquide's Petition. There, the district court ordered arbitration in spite of the truck drivers' claims that they were exempt from FAA coverage pursuant to Section 1. *Id.* On review, the Ninth Circuit denied the employees' writ petition. Indeed, the question at issue in *Van Dusen* was not whether the Section 1 exemption applied, but whether that question could be referred to the arbitrator. The Ninth Circuit declined to disturb the lower court's ruling.[3]

None of the remaining cases cited by Garrido are applicable because those parties did not specifically choose the FAA as they did here. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (agreement designated "New York" state law); *Harden v. Roadway Packages Sys.*, 249 F.3d 1137 (9th Cir. 2001) (no express choice of law provision); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004) (agreement provided for alternative application of "Washington law" if FAA was otherwise inapplicable); *Davis v. EGL Eagle Global Logistics L.P.*, 243 F. App'x 39, 44 (5th Cir. 2007) (agreement designated "Texas law"); *Mason-Dixon Lines, Inc. v. Local Union No. 560*, 443 F.2d 807 (3d Cir.

[3] Garrido also misstates the basis of Swift Transportation's petition to this Court. (Opp. 17, fn. 9.) The only question raised was whether parties can delegate threshold questions related to arbitrability to the arbitrator, and did not relate to the application of the Section 1 exemption as Garrido suggests. (Petition for Writ of Certiorari, *Swift Transportation Co., Inc. v. Van Dusen*, No. 13-936 (February 4, 2014).)

1971) (FAA not specified in agreements, but lower court's order staying action was still proper).

Accordingly, no jurisdictional limitations exist to prevent the parties' selection of the FAA as their choice of law.

II. *Circuit City* Does Not Resolve the Circuit Split Regarding Whether the Section 1 Transportation Worker Exemption Applies to Employees Outside the Transportation Industry.

Air Liquide does not "seek to overturn" *Circuit City*'s construction of the Section 1 exemption, as *Circuit City* did not reach the issue presented here. Rather, Air Liquide asks the Court to clarify the scope of the "transportation worker" exemption by resolving the split regarding whether the exemption should apply to workers who are not employed in the transportation industry, but merely cross state lines, thus bringing the California Court of Appeal in line with *Circuit City*'s narrow interpretation of the exemption.

The Seventh Circuit's holding in *International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC* (*Kienstra)*, 702 F.3d 954 (7th Cir. 2012) (followed by the court below), is distinct from the other circuits, and Garrido's attempt to re-characterize

the holdings of the Second, Eighth and Eleventh Circuits is unavailing.[4]

The Eleventh Circuit was unequivocal in *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286 (11th Cir. 2005), that an employee who delivers his employer's own goods out of state is not a "transportation worker" unless he is employed "within the transportation industry." Garrido's assertion that the court only looked to the industry of the employer if the employee did not transport goods is incorrect.[5] Rather, the Eleventh Circuit held that interpreting the Section 1 exemption to include the transportation activities "incidental to" an employer's business when the employer is not in the transportation industry would lead to an overbroad result. Indeed, it would exclude from the FAA even a pizza delivery person who transports his employer's goods interstate – a result Congress never intended. *Id*. at 1289-1290.

Garrido likewise misreads *Lenz v. Yellow Transportation*, 431 F.3d 348 (8th Cir. 2005). There, the court

---

[4] Plaintiff introduces Third and Ninth Circuit cases, *Palcko*, 372 F.3d 588, and *Harden*, 249 F.3d 1137, to bolster the Seventh Circuit's test. (Opp. 23.) However, the purported agreement of two additional circuit courts still does not resolve the split in authority. Furthermore, *Palcko* and *Harden* do not advance the discussion because they involved employers who were undisputedly common carriers.

[5] While the plaintiff's job title was not that of "driver," as Garrido notes, "plaintiff's job duties involved making delivery of [his employer's] goods to customers out of state in his employer's truck." *Hill*, 398 F.3d at 1288.

stated: "*[b]ecause Lenz works in the transportation industry*, we must determine whether his job duties are so closely related to interstate commerce as to consider him a 'transportation worker' and thus exempt from the FAA." *Id.* at 351 (emphasis added). Thus, Garrido's contention that *Lenz* applied a disjunctive test is directly undermined. *Lenz* would not have evaluated whether the plaintiff was an exempt transportation worker unless he worked in the transportation industry. As to *Lenz*'s dicta that "[i]ndisputably, if Lenz were a truck driver, he would be considered a transportation worker," Garrido misreads this statement to mean that all truck drivers are transportation workers. In fact, plaintiff Lenz worked for a common carrier, and thus this statement merely refers to the unremarkable premise that a truck driver employed in the transportation industry would be a "transportation worker."

Furthermore, the Eighth Circuit has not adopted the approach of the Seventh Circuit since *Lenz*. *ABF Freight System, Inc. v. International Brotherhood of Teamsters*, 728 F.3d 853 (8th Cir. 2013), a case reviewing a motion to dismiss the complaint in a collective bargaining case, is not applicable. There was no discussion there of the transportation worker exemption, as it was an easy case brought by employees of two common carriers.

Next, Garrido suggests that the Eleventh Circuit utilizes the same test as the Seventh Circuit merely because an Eleventh Circuit case, *American Postal Workers Union v. U.S. Postal Service*, cites to a Seventh Circuit case as *an example* of the preclusive nature of

the Section 1 exemption. 823 F.2d 466, 473 (11th Cir. 1987) (citing *Pietro Scalzitti v. International Union of Operating Engineers*, 351 F.2d 576, 578 (7th Cir. 1965)). However, neither case purports to conclude that any or all "bus drivers and truck drivers" are transportation workers.

Lastly, the Second Circuit unequivocally held that the Section 1 exemption is limited to workers "in the transportation industry" in *Maryland Casualty Co. v. Realty Advisory Board*, 107 F.3d 979 (2d Cir. 1997). Contrary to Garrido's representation, the approach in the Second Circuit has not changed since. *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477 (S.D.N.Y. 2008) (cited by Garrido) adopted a highly narrow reading of the Section 1 exemption, holding that the employee-drivers who worked for a "vehicle transportation business" were *not* transportation workers because they transported people and not goods.

III. The Court of Appeal Could Not and Did Not Make a Factual Finding That Air Liquide is in the Transportation Industry.

Garrido's assertion that the Court of Appeal made a factual finding that Air Liquide was in the "transportation industry" is incorrect.

The Court of Appeal's function is not to decide factual issues de novo. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). An appellate court does not make a factual determination in a case unless there is a "definite and firm conviction that a

mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948). If the trial court's "account of the evidence is plausible in light of the record viewed in its entirety," then the appellate court "may not reverse" the lower court even if they "are convinced" they would have weighed the evidence differently. *Jones v. United States*, 127 F.3d 1154, 1156 (9th Cir. 1997).

The Court of Appeal did not make any factual findings regarding whether Air Liquide was engaged in the transportation industry. Rather, the Court of Appeal concluded that Garrido was a "transportation worker" within the meaning of the Section 1 exemption based solely on his status as a truck driver who crossed state lines. (App. 7-8.) The Court of Appeal noted that because its gases are sometimes delivered interstate to its customers, Air Liquide was "*somewhat involved* in the transportation industry." Ultimately, the court concluded that the nature of Air Liquide's business was "of little consequence" because it relied on the minority view expressed by the Seventh Circuit in *Kienstra*. (App. 7-8 (emphasis added).)

Finally, to the extent the Court of Appeal commented that Air Liquide was "somewhat involved" in the transportation industry, that was not the equivalent of being "engaged" in transportation for purposes of the Section 1 exemption. Indeed, none of the Second, Eighth or Eleventh Circuit cases apply anything other than a binary standard for determining whether an employer is engaged in the transportation industry. Instead, the court below seemed to apply a sliding scale

analysis with an infinite range of outcomes. Moreover, the court below also noted in the very same passage that Air Liquide transported its own goods (and not the goods of others), which falls expressly outside the ambit of the transportation industry as defined by *Hill*, 398 F.3d 1286.

Accordingly, this Court's review is still needed to address the over-inclusive legal test employed by the Court of Appeal and Seventh Circuit for the FAA's "transportation worker" exemption, and settle the split in legal authority over the appropriate boundaries of the exemption.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

HENRY D. LEDERMAN
DOMINIC J. MESSIHA
Counsel of Record
JENNIFER TSAO
LITTLER MENDELSON, P.C.
2049 Century Park East, Suite 500
Los Angeles, CA 90067
(310) 553-0308
dmessiha@littler.com

Counsel for Petitioner