No. 24-935

In the
Supreme Court of the United States

FLOWERS FOODS, INC., ET AL.

Petitioners,

v.

ANGELO BROCK

Respondent.

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

BRIEF OF DRI CENTER FOR LAW AND PUBLIC POLICY AND ATLANTIC LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* [1]

The DRI Center for Law and Public Policy is the advocacy voice and research center for DRI–The Association of Lawyers Defending Business. On behalf of more than 16,000 attorneys who represent businesses in civil litigation, DRI's mission includes enhancing the skills, effectiveness, and professionalism of civil litigation defense lawyers; promoting appreciation for the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as *amicus curiae* in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system. *See* dri.org.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel other than the *amici curiae* and their counsel made a monetary contribution intended to fund preparation or submission of this brief.

* * *

Amici are directly interested in the question presented: When does interstate commerce end for purposes of the limited exemption to the broad rule of arbitrability set forth in the Federal Arbitration Act (FAA)? *See* 9 U.S.C. § 1 (exemption), § 2 (mandatory arbitration rule). They filed at the certiorari stage in this case and at the merits stage in *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024).

Consistent with congressional intent, *amici* long have advocated for the primacy of the FAA and enforcement of contractual arbitration provisions. The Court's resolution of the question presented will affect the enforceability of arbitration agreements across a wide range of industries that rely on local delivery and distribution networks. *Amici* agree with Petitioners. The judgment should be reversed.

SUMMARY OF ARGUMENT

This Court in *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. at 255, held that § 1 does not require a worker's employer to operate in the transportation industry—the focus is on "what [workers] do, not for whom they do it." But the Court expressly reserved what it means to be "engaged in" interstate commerce. *Id. at* 252 n.2 ("The Second Circuit did not address whether Bissonnette and Wojnarowski qualify as transportation workers based on the work that they perform, or whether they are 'engaged in . . . interstate commerce' even though they do not drive across state lines. We do not decide those issues.") That is the question this case presents.

This Court's precedents under analogous statutes establish a functional test for determining when goods

remain "in" interstate commerce: is there "practical continuity of movement" beginning out-of-state, through any local waypoint, to the last destination? *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943). Applied here to § 1, the inquiry has two components. First, *Saxon* and *Bissonnette* require that the class of worker be engaged in transportation (not sales, merchandising, or other work that merely uses a vehicle). 596 U.S. at 455-58; 601 U.S. at 255. Second, *Walling* requires that such transportation be part of an interstate journey that has not concluded—that there is "practical continuity of movement" from the origin to the final destination. 317 U.S. at 568.

The Tenth Circuit adopted a "final leg of a continuous interstate journey" test—a formulation consistent with *Walling*'s functional approach. But the court of appeals then treated business control as a proxy for movement continuity. It emphasized that Petitioner Flowers retains a security interest in routes, controls pricing and promotions, dictates accounts receivable, and could step in to run the route. Pet. App. 23a-26a. From these facts, the court inferred "continuity." In so doing, the Tenth Circuit conflated two separate inquiries: *ongoing business relationship control* with *physical movement of goods*.

The court's factors go to the former issue—how suppliers structure distribution relationships (whether through distributor agreements, licensing arrangements, or other contractual mechanisms)—not to the latter question of whether goods in transit experience, in a practical sense, ongoing and continuous movement. *Walling*'s "practical continuity" test asks if and how goods keep flowing to their final destination. Facts showing business

control over pricing, sales, and customer accounts do not prove whether the goods are moving or at rest.

Southwest Airlines Co. v. Saxon, 596 U.S. 450, 458 (2022), confirms this distinction. The question is whether workers have "a direct and 'necessary role in the free flow of goods' across borders." 596 U.S. at 458 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001)). The airport cargo ramp workers in *Saxon* loaded and unloaded baggage from interstate airplanes, essential to border-crossing movement.

This Court in *Bissonnette* addressed concerns that the § 1 exemption might sweep too broadly, explaining that *Saxon's* requirements would "undermine . . . any attempt to give the provision a sweeping, open-ended construction." 601 U.S. at 256. *Walling's* "practical continuity of movement" test provides the limiting principle that the *Saxon* Court anticipated.

The decision below upends the structure of the FAA. Affirmance would sweep into § 1 local delivery workers across sectors—drivers who never cross state lines, negotiate sales, and operate wholly within a single metropolitan area—so long as the goods once crossed a state border and their employer manages them. This threshold inquiry is a fact-intensive merits preview at odds with the speed and predictability of the FAA. This Court should reverse.

ARGUMENT

I. The Tenth Circuit invoked the correct test but applied the wrong factors

1. Congress established the governing architecture of the FAA: § 2 broadly covers contracts "involving commerce"; § 1 narrowly exempts workers "engaged in" interstate commerce. *Circuit City Stores, Inc. v.*

Adams, 532 U.S. 105, 115-18 (2001). Congress used its broadest commerce language ("involving commerce") in § 2 to define the FAA's reach but used "engaged in commerce"—the narrower formulation—to make a small carve-out in § 1. *Id. at* 118.

That disparity is not by happenstance.

For nearly a century, this Court has distinguished goods still "in" interstate commerce from goods that have "come to a permanent rest" within a State. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935) (holding poultry shipped interstate had left commerce upon arrival at New York slaughterhouses because chickens had "come to a permanent rest within the State" and were "held solely for local disposition and use"); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568-71 (1943) (distinguishing goods with "practical continuity of movement" from goods "acquired and held by a local merchant for local disposition"). The decision below erases that crucial distinction and risks classifying the most local of employers as interstate carriers.

The Tenth Circuit adopted a "final leg of a continuous interstate journey" test—asking whether local delivery constitutes the concluding segment of a single interstate movement or a "separate local transaction." Pet. App. 19a, 27a. Although that standard is consistent with this Court's precedents, the Tenth Circuit used the wrong factors to gauge the *continuity* of ongoing interstate commerce.

In *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943), the Court, to decide the "engaged in interstate commerce" issue, asked whether there is "practical continuity of movement" from out-of-state

origin through intermediate handling to the ultimate destination. Similarly, in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022), the Court inquired whether workers play "a direct and 'necessary role in the free flow of goods' across borders." 596 U.S. at 458 (quoting *Circuit City,* 532 U.S. at 121). A "final leg of a continuous journey" should use both formulations.

But the Tenth Circuit treated distributor-agreement control mechanisms—security interests, pricing authority, operational oversight—as a proxy for continuity of movement (i.e., the type of retained contractual controls over pricing, promotions, and customer relationships that a franchisor, distributor, or exclusive supplier might exercise over a downstream business). It so concluded despite Flowers, in the Distribution Agreement (§ 16.1), disclaiming control over "the specific details or manner and means" of Brock's business. *See* J.A. 30.

To establish "continuity," the court noted that Flowers retains a security interest in the route; controls pricing and promotions; dictates accounts receivable; treats chain retailers as its own customers; and could step in to run the route. Pet. App. 23a-26a. From these facts, the court concluded that store delivery "forms the last leg of an interstate route" and is not a separate local retail business. Pet. App. 27a.

This analysis erroneously conflates two concepts: (1) whether an upstream supplier, distributor, licensor, franchisor, or other analogous party maintains control over another business's local operations, and (2) whether goods are still flowing toward their destination in a continuous movement. *See* Pet. App. 22a–28a (22a—inferring continuity from Flowers's "significant degree of control over Brock's

operations"; 24a—"… [the] terms of the Distributor Agreement evince Flowers's continuing control over the distribution route"; 28a—"Flowers retains significant control over Brock, Inc., such that we view Flowers's true customers as the various retail stores and Brock as Flowers's last-mile delivery driver.")

But a foreign state business can exercise pervasive control over local operations in another state *without* those operations still being part of an ongoing and continuous interstate journey. The Tenth Circuit's approach thus expands § 1's narrow exemption to swallow § 2's broad rule of mandatory nationwide arbitration. If any retained contractual control suffices to extend the § 1 exemption, then virtually all franchise, distribution, and exclusive supplier-type relationships across industries are non-arbitrable. That is not what Congress intended the FAA to mean.

2. This Court's precedents make clear that the "engaged in commerce" inquiry is *functional*: what is happening with the goods? In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), poultry shipped from other states left interstate commerce upon arrival at New York slaughterhouses. The chickens had "come to a permanent rest within the State," were "held solely for local disposition and use," and were "not destined for transportation to other States." *Id. at* 543. After interstate travel was over, what followed were local transactions: "the flow in interstate commerce had ceased." *Id.*

Walling addressed a different situation: A wholesaler received goods ordered from out-of-state manufacturers for specific customers. 317 U.S. at 568. In that circumstance, the warehouse was "a convenient intermediate step in the process of getting

them to their final destinations." *Id. at* 568. "The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate." *Id. at* 569. Whether goods have already been sold to a specific customer is one factor used to decide whether "placing goods in a warehouse" marks the end of interstate transit. *Id.*

But pre-commitment alone is not dispositive. The inquiry is "practical," focusing on the real-world circumstances of what happens to the goods in shipment—not on any single factor. *Id. at* 569-70. And *Walling* marked limits. Not every good that crosses state lines remains in interstate commerce locally. Evidence that goods were shipped "anticipat[ing] [the] needs of specific customers, rather than on prior orders or contracts," does not show a single stream of transit; the record must contain "that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition." *Id.*

Walling thus did two things at once. It held that a warehouse pause does not "necessarily terminate" interstate commerce. *Id. at* 568. But it also held that such a pause does not necessarily continue it. The inquiry is practical and fact-based. It turns on what happens to the goods at the warehouse, not on formal labels or the existence of corporate control.

The presence of a predetermined destination is one consideration—but it is neither necessary nor sufficient standing alone. Pre-commitment matters because it tends to indicate that the warehouse is a throughput point rather than a depot. But goods that are pre-allocated can still lose their interstate

character if they are warehoused for extended periods, commingled with local inventory, or subjected to fresh commercial decisions such as inspection, reallocation, or sale rejection. The inquiry remains holistic.

3. In *Circuit City*, 532 U.S. 105 (2001), the Court confirmed that the § 1 exemption applies only to transportation workers. Applying *ejusdem generis*, the Court reasoned that "any other class of workers" must be read considering the two listed groups: seamen and railroad employees. *Id. at* 114-15. The Court observed that Congress uses "engaged in commerce" in statutory language narrowly and specifically, doing so to reach those workers directly in, or very closely tied to, the channels of interstate commerce. *Id.* On the other hand, when Congress needs to exercise its maximum commerce power, it uses broader formulations and phrasing such as "affecting" and "involving" commerce. *Id. at* 115-16.

Saxon took the next step. The Court held that airplane cargo ramp agents are included in § 1's exemption because they have a direct and necessary role in the free flow of goods across borders. 596 U.S. at 458. Such workers are "actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* The question is whether a given "class of workers" is part of that journey. *Id. at* 455.

Most recently, in *Bissonnette*, 601 U.S. at 246, the Court held that § 1 does not limit the exemption to workers employed in the transportation industry. The focus remains on "what [workers] do, not . . . for whom they do it." *Id. at* 255. *Bissonnette*, however, did not decide what it means to be "engaged in" interstate commerce in close-call, borderline cases—

such as last-mile drivers who work exclusively on local delivery routes serving their own State. The Court expressly reserved that question. *Id. at* 252 n.2.

That is the question presented. *Walling*'s "practical continuity of movement" test provides an answer because it focuses on physical and functional aspects surrounding the movement of tangible things, not legal fictions about business relationships. The legal standard asks whether the goods are going to a fixed destination known at the time of foreign shipment, and whether superseding local circumstances (cessation of transit movement, repackaging and redirecting, commingling with general stock in trade, and local business decisions) stop the chain of connection. *See Walling*, 317 U.S. at 570 ("'commerce among the States is not a technical legal conception, but a practical one, *drawn from the course of business*'") (quoting *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)) (emphasis added).

The Tenth Circuit never asked whether the bread was continuing in the same physical movement, or if it was acted upon by an external force putting the flow of interstate transit to rest. It asked only whether Flowers maintained business control over the distribution relationship. But control over merchandising, pricing, and accounts, while relevant to the totality of the circumstances, does not answer the question of what happens locally: are the goods still on the way, even slowly, to a set destination in the original interstate stream of transportation and commerce? Or do they sit idle in a warehouse, get commingled with equivalent intrastate commodities, or expire (go stale) on an ultimate road to nowhere?

Consider a limiting example. A national appliance manufacturer grants exclusive sales territories to independent dealers. The manufacturer sets prices, controls marketing, approves customer accounts, and holds a security interest in local inventory. If a delivery truck brings washers and dryers from a regional hub to the dealer's local warehouse, and the dealer then negotiates sales to end customers, no one would say those final deliveries are "in interstate commerce" simply because the manufacturer retains control. Business relationship continuity is not physical movement continuity. Even if appliances were pre-ordered by specific customers, a court would still need to examine whether the goods were held, sorted, fixed up, or subjected to new and discretionary business decisions locally, etc. The totality of circumstances, not any one factor, governs.

Brock operates under a Distribution Agreement that expressly disclaims control "as to the specific details or manner and means of [his] business." J.A. 30. Unlike a traditional franchisee, Brock faces no mandatory operating hours, no corporate training requirements, no facility standards, and no performance benchmarks. If factors short of actual franchise-level control suffice to establish "continuity," the test has no meaningful limiting principle. If Brock is exempt here on this record, any business that coordinates local distribution with a national brand—from beverage distributors to pharmaceutical representatives—would qualify.

Saxon confirms the distinction. The Court asked whether ramp loaders play "a direct and 'necessary role in the free flow of goods' across borders." 596 U.S. at 458 (quoting *Circuit City,* 532 U.S. at 121). Cargo

loaders' work contributed to border-crossing movement—the goods were moving toward a crossing.

That is not true in this case. Here, the bread never crosses another state line and Respondent's work is necessary to local distribution in Colorado. Interstate commerce is over before he begins; what's left is local sales, not the free flow of goods across borders. *See Saxon*, 596 U.S. at 458; *Circuit City,* 532 U.S. at 121.

Under the Tenth Circuit's reasoning, interstate transit *never ends* so long as an upstream national brand has downstream controls. This has no stopping point: pharmacies, groceries, restaurants, hardware co-ops, car dealerships, office suppliers, and beverage distributors among others all become candidates for the § 1 exemption. The Tenth Circuit's framework, if accepted, would extend the exemption to any worker whose employer maintains control over a multi-state supply chain. That is a test without a meaningful limiting principle—not because the court of appeals failed to articulate one, but because it chose the wrong factors. Vertical control among affiliated companies is ubiquitous; fungible goods being in a constant state of movement is not. Because the control test is unmoored from real-world functionality, it does not properly cabin § 1's exemption as Congress intended.

II. Applying *Walling's* "practical continuity of movement" test: Stale bread returned to the warehouse is not in interstate transit

Walling teaches that a warehouse pause does not "necessarily terminate" interstate commerce. 317 U.S. at 569. But neither does it necessarily continue commerce. The *Walling* test is functional: whether there is "practical continuity of movement" from out-

of-state origin through intermediate handling to the ultimate destination. *Id. at* 568. That practical inquiry looks at what happens to the goods in real world transit—not to formal categories or corporate control structures. To be in interstate commerce, goods must be "different from goods acquired and held by a local merchant for local disposition." *Id. at* 570.

The key question is: are goods genuinely progressing toward their intended destination within the interstate commercial stream, or have they become stationary and practically disconnected from their original cross-border transportation trajectory?

A predetermined destination when shipped from out of state is not dispositive of whether goods (and workers dealing with them) remain in interstate commerce through the last mile of delivery. In cases like *Walling*, where specific goods were earmarked for particular customers before leaving the out-of-state shipper, the warehouse was only a waystation: The interstate journey continued uninterrupted to the customer. The continuity inquiry is practical and fact-intensive: It asks whether the goods are still moving toward a pre-known destination or whether they have stopped, been redirected, and become subject to new commercial decisions before final delivery, in other words, "goods acquired and held by a local merchant for local disposition." *Walling,* 317 U.S. at 570.

A. The *Walling-Schechter* distinction

Two foundational cases define the poles. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court held that poultry shipped from other states had left interstate commerce upon arrival at slaughterhouses in New York. The chickens had

"come to a permanent rest within the State," were "held solely for local disposition and use," and were "not destined for transportation to other States." *Id. at* 543. The interstate journey was complete; what followed were "local transactions" in which "the flow in interstate commerce had ceased." *Id. at* 543.

In *Walling*, 317 U.S. at 564, the Court held that when the wholesaler received goods ordered from out-of-state manufacturers "*for specific customers,*" the goods retained their interstate nature despite a temporary warehouse pause. *Id. at* 567-68. The warehouse was a temporary pause in a pre-planned delivery—the goods were already committed to identified recipients before they ever left the manufacturer. *Id. at* 568-69. "No ritual of placing goods in a warehouse" can defeat federal regulation where the warehouse is merely "a convenient intermediate step in the process of getting the goods to their final destinations." *Id. at* 568.

But as for goods ordered generally "in anticipation of needs of specific customers, rather than on prior orders or contracts," the evidence was that "[a]pparently many of these orders are treated as deliveries from stock in trade." *Id. at* 566. *Walling* remanded for determination of whether stock-in-trade goods retained their interstate character, concluding that no such "course of business is revealed by this record," *Id. at* 570, but acknowledging that a given set of facts "might" be sufficient "to establish that practical continuity" for out-of-state, warehoused goods to nonetheless still be in interstate transit.

The Court's opinion in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) interpreting "engaged in commerce" in § 2(a) of the Robinson-Patman Act, 15

U.S.C. § 13(a), and §§ 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14 and 18, illustrates the same principle: it distinguishes between goods that once moved interstate and goods that are still "in" commerce. *Gulf Oil* held that because the interstate movement ended before the relevant activity, a company's purchases of asphalt that had traveled interstate did not make the company "engaged in commerce." *Id. at* 199-200.

Several common indicators from these cases distinguish continuity from interruption:

Indicators of continuing interstate journey: (1) goods pre-committed to specific recipients before shipment; (2) the warehouse serves as mere throughput—a pause in a planned delivery; (3) no reallocation decision occurs at the warehouse; (4) the same transaction runs from origin to final recipient.

Indicators that interstate journey has ended: (1) goods arrive as general inventory, not pre-committed to specific customers; (2) storage involves receiving, inventorying, and holding (often overnight); (3) allocation to routes or customers happens *after* arrival; (4) what follows intrastate is a new transaction: a local sale with offer and acceptance.

B. Unsold, stale bread that is returned to Flowers is not continuously moving in interstate transit—the warehouse is the interstate journey's end, not a waypoint

Walling's "practical continuity" test for deciding whether a worker is "engaged in" interstate commerce turns on what happens to goods at the warehouse—not on corporate control or contractual relationships.

In this case, the baked goods arrive at Flowers's Colorado warehouse as general inventory—not pre-

committed to any retailer. The bread is *unloaded* from the interstate truck and then received and inventoried. It is then in a fixed position, stored overnight. The next morning it is *re-sorted* by route, an allocation decision that is made locally, after arrival. Finally, the bread is *re-loaded* onto a different, local delivery truck. When placed in transit in another State, the bread is not pre-sold to anyone.

The record shows interruption—not continuity:

Fact	Citation	Significance
"Suggested orders for each customer"	Pet. App. 25a	Orders locally predicted, not pre-committed. System suggests allocations; actual sales are on delivery.
"Commercially reasonable best efforts to develop and maximize the sale"	Pet. App. 6a, 24a	Sale incomplete when warehoused; otherwise, no "best efforts" clause needed.
Stale product returns	Pet. App. 6a, 23a, 24a	Flowers "repurchase[s] a certain percentage of Brock's stale products."

Fact	Citation	Significance
"Actively soliciting" unserved stores	Pet. App. 6a	Business model involves Brock finding new customers, not fulfilling existing orders. Local work.
"Accumulation of sales histories" / "individual customer sales profiles"	Pet. App. 25a	Inventory prediction tools, not order fulfillment tracking, showing no pre-shipment destination.

Here, there is no practical continuity: Goods are unloaded, redirected by an allocation decision, and sent on an entirely new journey (local sales) that was not planned before they arrived. Bread that may return unsold cannot simultaneously be in continuous transit to a pre-identified destination. The contingency proves the absence of pre-commitment. This is not the continuation of an existing shipment. It is a series of new sale transactions in which retailers can accept, reject, or modify orders and return goods—not practically continuous movement.

Flowers's Denver warehouse is not a mere "convenient intermediate step in the process of getting [bread shipments] to their final destinations." Walling, 317 U.S. at 568. It is the end of the line.

C. Federal regulations separate local delivery drivers from long-haul truckers

Federal transportation regulations distinguish between interstate long-haul truckers and local delivery drivers. This regulatory framework recognizes that two separate categories of workers perform distinct functions and job duties at work, which goes to *Saxon*'s requirement that the worker, in his or her job duties, have "a direct and 'necessary role in the free flow of goods' across borders." 596 U.S. at 458 (quoting *Circuit City,* 532 U.S. at 121).

The Federal Motor Carrier Safety Administration (FMCSA) maintains a specific exemption for "short-haul" drivers who operate within a 150 air-mile radius of their work-reporting location, return to that location daily, and do not exceed a 14-hour workday. 49 C.F.R. § 395.1(e). Short-haul truck drivers are exempt from electronic logging device requirements and the 30-minute rest-break mandate.

Federal regulations create a bright-line distinction based on vehicle weight. Drivers of vehicles with a gross vehicle weight rating of 26,001 pounds or more must obtain a Commercial Driver's License. 49 C.F.R. § 383.91. Drivers of smaller vehicles, including most bread delivery trucks, do not require a CDL. This categorically distinguishes operating a large tractor-trailer across state lines from driving a local delivery van; functionally, they are entirely different jobs.

Just ten years after Congress enacted the FAA, it passed the Motor Carrier Act of 1935, using the *same phrase*: "engaged in interstate . . . commerce." Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543. The FMCSA has interpreted this language to require

actual engagement in interstate commerce. 49 C.F.R. § 390.3T; FMCSA, Regulatory Guidance for 49 C.F.R. § 390.3T, Question 24 (requiring a showing that "the driver or motor carrier has actually operated in interstate commerce"). [2] The trucking industry and the federal government recognize that local delivery drivers are doing different work than long-haul interstate truckers, the same distinction urged here.

D. Historical context: Express company workers are an illustrative analogue

Historical context illuminates how Congress and this Court understood local delivery work in the era when the FAA was enacted. Local delivery workers existed in 1925—they were called "express company" workers. Their history provides an illustrative analogue to the question presented.

So-called express companies (such as Adams Express, Wells Fargo Express, American Express) emerged in the 1830s to help Americans ship and receive small packages. They were the FedEx and UPS of their era. Their business model is centered on local delivery: picking up goods from railroad depots and delivering them to homes and businesses. "Express service typically involved the last leg of delivery of goods earlier moved by railway, done by express companies acting in concert with steamships, railroads, and stage lines to deliver goods." Bert Benedict, *The Express Companies of the United States: A Study of a Public Utility* 3 (1919). These workers performed tasks similar to what bakery distributors

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[2] *See* https://www.fmcsa.dot.gov/regulations/49-cfr-ss-3903t-general-applicability-question-24 (https://perma.cc/955N-N46P).

do today: picking up goods that had arrived by interstate carrier and delivering them locally.

Express companies were not obscure. At the time of the Hepburn Act of 1906, express freight charges represented approximately 75% of all transportation fees charged in the United States. *See* Arthur S. Field, *The Rates and Practices of Express Companies*, 3 Am. Econ. Rev. 314, 325 (1913). The Hepburn Act brought express companies under the same federal regulatory regime as railroads. Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584, 584-85 (1906). Congress thus knew about these companies and their workers.

In *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), this Court held that express companies and railroads are both common carriers, but they are distinct *kinds* of carriers. *Id. at* 187 ("the businesses of the companies concerned were quite as distinct"). A Wells Fargo messenger injured on a train could not sue under the Employers' Liability Act because he was not a "railroad employee"—he was an employee of a different kind of carrier: an express company. This distinction mattered because the express companies, while common carriers, did not themselves directly operate the primary interstate transportation modes—ships and railroads—like seamen and railroad employees did. Express companies were not *doing* interstate transportation when they picked up goods at the depot, *after* the interstate journey ended.

The canon of *ejusdem generis* instructs that "any other class of workers" should be read as similar to the specifically enumerated categories. *Circuit City*, 532 U.S. at 115. What do seamen and railroad employees have in common that might distinguish them from express company workers? They worked for carriers

that *operated* the primary interstate modes themselves. Express companies, by contrast, provided local distribution services using the interstate infrastructure others had built. This distinction maps onto the question here: Bakery distributors do not operate the trucks that bring bread across state lines; they distribute it locally after it arrives.

Amici do not suggest this historical context provides a definitive answer—the FAA's drafters did not leave a clear record of their intent regarding express company workers. But the history is illustrative. Congress knew about local delivery workers but did not mention them by name in § 1. Taken together, the § 1 residual clause's reference to workers "engaged in" interstate commerce most naturally reaches only those workers who, like seamen and railroad employees, were employed by carriers and whose job on a day-to-day basis was to personally operate the primary interstate modes.

III. Federal occupational classifications treat "Truck Drivers" as separate classes of workers from "Driver/Sales Workers"

1. *Saxon* and *Bissonnette* direct courts to examine what the worker does. A class is exempt under § 1 if its members have "a direct and 'necessary role in the free flow of goods' across borders." *Saxon*, 596 U.S. at 458 (quoting *Circuit City,* 532 U.S. at 121).

That inquiry asks, is transportation itself the *work*? Or is it merely *how* the worker gets to work?

A long-haul trucker's job is transportation. His compensation correlates with miles driven and tonnage hauled. The economic value he creates is the movement—getting goods from Point A to Point B.

A driver/sales worker, by contrast, earns the merchant's margin: the difference between wholesale and retail price. His profit depends not on distance, but on sales volume. He is a merchant on wheels—a peddler with a route, not a transport carrier for hire.

2. Federal occupational classifications reflect this distinction. The Bureau of Labor Statistics (BLS) classifies "Driver/Sales Workers and Truck Drivers" (SOC 53-3030) into three subcategories. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Standard Occupational Classification (2018).[3]

Two subcategories apply to truck drivers whose job *is* driving: "heavy and tractor-trailer truck drivers" (53-3032) and "light truck drivers" (53-3033). *Id.* The latter category—local delivery drivers—expressly excludes "driver/sales workers" (53-3031) who "drive truck or other vehicle over established routes or within an established territory and sell or deliver goods" and "[m]ay also take orders, collect payment, or stock merchandise at point of delivery." *Id.* The federal government thus treats merchandising, sales, and delivery work requiring incidental local driving as functionally distinct from other transportation work.

3. This functional distinction aligns with *ejusdem generis*. Seamen and railroad employees operated the primary interstate modes—ships and trains that crossed borders. Driver/sales workers do not operate interstate carriers; they distribute goods locally after those goods arrive. The residual clause most naturally reaches workers similar to the enumerated categories, not those performing local merchandising.

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[3] *See* https://www.bls.gov/soc/2018/major_groups.htm#53-0000 (https://perma.cc/LNY7-RTPW).

This Court recognized the distinction nearly a century ago. In *Baltimore & Ohio Southwestern Railroad Co. v. Burtch*, 263 U.S. 540, 544 (1924), the Court held that some work is "so closely related to interstate transportation as to be practically a part of it" while other work is "too remote." Driver/sales workers fall on the "too remote" side of that line—their connection to interstate commerce is the origin of the goods they sell, not the work they perform.

A vehicle does not make a worker a transportation worker. A pharmaceutical sales representative cannot visit doctors without her car. A home health aide cannot reach patients without hers. But no one would call them transportation workers—because the vehicle is not where the economic value is created.

The same principle applies here. The bakery distributor creates value at the point of sale: negotiating orders, stocking shelves, rotating inventory, handling accounts. The truck is *how* he reaches customers, not *what* he does when he arrives.

If the exemption turns on whether an employer retains brand control, or whether goods once crossed state lines, then § 1 ceases to be a narrow carve-out. It becomes a backdoor repeal. Any franchised enterprise with multistate sourcing (from bakeries to pharmacies to electronics) risks being non-arbitrable.

The same functional test that excludes bakery distributors would include a yard driver whose sole job is shuttling loaded trailers directly between an out-of-state railhead and an outbound interstate terminal. That worker *is* engaged in interstate transportation—his work is movement, not sales. The

inquiry is neutral; it separates "engaged in interstate movement" from "performing local distribution."

And under the rule below, any local delivery driver becomes an "interstate transportation worker" simply because the product originated out-of-state and the employer structured distribution contracts with retained oversight. That would exempt grocery distributors, beverage reps, pharmaceutical detailers, and even warehouse pickers—none of whom cross state lines or engage in border-facing transit.

In industries using mixed interstate and intrastate stock—dairy from local creameries alongside national brands, produce from nearby farms beside lettuce trucked from Arizona, craft beer brewed in-state alongside imports, meat from regional ranchers beside beef shipped from Nebraska—the rule below supplies no principled way to distinguish local delivery from interstate transport. Must courts conduct item-by-item analysis of each delivery? Apportion the driver's time? The Tenth Circuit's approach transforms § 1's threshold inquiry into a litigation engine rather than a workable rule. That is the opposite of what Congress intended when it enacted the FAA: to make arbitration a universally applicable, simple, and fast way to resolve—with limited exception—nearly all commercial disputes.

4. Under the Tenth Circuit's rule, any worker touching goods with interstate origins can claim exemption—miring § 1's exemption in a fact- and discovery-intensive threshold inquiry. This Court warned against that result in *Bissonnette*.

Walling provides the limiting principle: the goods must practically be in continuous movement. Here,

the bread was unloaded, stored overnight, re-sorted, and reloaded based on local decisions—with unsold stale loaves potentially returning to the warehouse. That is interruption, not continuation. The final leg of the bread's interstate journey ended at the warehouse *before* Respondent's local work began.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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