No. 22A984

In the Supreme Court of the United States

NEAL BISSONNETTE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND TYLER WOJNAROWSKI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Applicants,

v.

LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, AND FLOWERS FOODS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNOPPOSED APPLICATION FOR A FURTHER EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JENNIFER D. BENNETT
Counsel of Record
GUPTA WESSLER PLLC
100 Pine Street
Suite 1250
San Francisco, 94111
(415) 573-0336
jennifer@guptawessler.com

Counsel for Applicants

June 1, 2023

TO: The Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Second Circuit

Applicants respectfully seek a further 30-day extension of time within which to file a petition for a writ of certiorari to review the Second Circuit's judgment in this case, to and including July 17, 2023. Absent an extension, the deadline for filing the petition will be June 15, 2023. This application is being filed on June 1, 2023—more than 10 days before the petition is due. *See* S. Ct. R. 13.5. Respondents' counsel has confirmed that they do not oppose the extension.

In support of this request, the applicants state as follows:

1. The Second Circuit initially issued its opinion on May 5, 2022. App. 1a. It issued an amended opinion on September 26, 2022. App. 49a. And it denied rehearing en banc on February 15, 2023. App. 99a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case involves a recurring question that, despite this Court's recent intervention, continues to split the circuits: Which workers are exempt from the Federal Arbitration Act? That statute exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This exemption, this Court has explained, applies to the employment contracts of "transportation workers." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

3. In this case, the plaintiffs are commercial truck drivers, a class of workers that virtually everyone agrees are transportation workers "engaged in foreign or interstate commerce." App. 31a, 80a–81a, 117–18a. Nevertheless, a panel majority of the Second Circuit held that they are not exempt from the Federal Arbitration Act solely because they

don't work for a trucking company. App. 15a–16a. Instead, they are employed by a bakery conglomerate—the manufacturer of Wonder Bread—which distributes its goods across the country by hiring its own truck drivers, rather than hiring a trucking company to do so. *See* App. 5a, 44a.[1] To be exempt from the Federal Arbitration Act, the panel majority held, a worker must not only be a member of a class of workers engaged in commerce like seamen and railroad employees, but the worker must be a member of a "transportation industry." App. 15a–16a. Because this requirement appears nowhere in the statute, the panel itself had to define it. And the panel decided that "an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement." *Id.* The truck driver plaintiffs in this case, the panel held, do not satisfy this definition solely because they are employed directly by a bakery conglomerate, rather than a trucking company. App. 16a.

4. Judge Pooler dissented. The dissent emphasized that the "one area of clear common ground among federal courts addressing the transportation worker exemption is that truck drivers qualify." App. 31a. "The majority's contrary conclusion—that because the plaintiffs are truckers for a bakery company, they are in the bakery industry and therefore not transportation workers," the dissent explained, "is textually and precedentially baseless." App. 32a. Quoting a prior Seventh Circuit decision, the dissent concluded that "'a trucker is a transportation worker regardless of whether he transports

[1] For purposes of this application, we state the facts as the panel majority understood them.

his employer's goods or the goods of a third party.'" *Id.* (quoting *Int'l Bhd. of Teamsters Loc. 6 Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012)).

5. Shortly after the court issued this decision, this Court decided *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022). *Saxon* explicitly rejected the contention that whether a worker is exempt from the Federal Arbitration Act depends on the industry in which they work. What matters, the Court held, is "the actual work" the worker performs, not what their employer "does generally." *Id.* at 1788.

6. Based on *Saxon*, the plaintiff truck drivers petitioned for rehearing or rehearing en banc. The court granted panel rehearing, but the panel majority adhered to its original decision despite *Saxon*. App. 64a–66a. Judge Pooler again dissented, pointing out that now the panel majority's decision was not only unmoored from the text of the Federal Arbitration Act and in conflict with the other circuits, but also in conflict with this Court's precedent. App. 81a–82a. And, the dissent explained, this Court's decision in *Saxon* makes good sense: It would make no sense to hold that the Federal Arbitration Act exempts the driver of an eighteen-wheeler, hauling goods to WalMart stores across the country if the driver works for a trucking company hired by WalMart, but that the statute does not exempt that same driver if WalMart has decided to hire its truck drivers directly. *See* App. 90a. Either way, the truck driver is a transportation worker engaged in commerce.

7. The plaintiffs petitioned for rehearing en banc from the amended opinion, which the Second Circuit denied. Several judges dissented from the denial, explaining that although rehearing en banc in the Second Circuit is "quite rare," this case presented the "exceptional circumstances" in which it should have been granted. App. 101a. That's

because, the dissenters explained, *Saxon* "expressly rejects the notion embedded in our circuit precedent that the industry in which an employer operates, rather than the work that the employee does, determines whether the employee belongs to a 'class of workers engaged in foreign or interstate commerce.'" App. 103a. The panel majority's amended opinion, the dissent concluded, "do[es] the opposite of what *Saxon*'s reasoning and holding require." App. 104a.

8. The decision below created a circuit split the day it was decided. *See* App. 81a, 91a–93a, 117a–118a (collecting cases with which the decision conflicts); *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021), *aff'd*, 142 S. Ct. 1783 (2022) ("[A] transportation worker need not work for a transportation company."). And the First Circuit has already explicitly rejected it. *See Fraga v. Premium Retail Servs., Inc.*, 61 F.4th 228, 234 (1st Cir. 2023) ("Premium urges us to follow the *Bissonnette* majority. For four reasons, we decline to do so."); *Canales v. CK Sales Co., LLC*, 67 F.4th 38, 40 (1st Cir. 2023) (holding that the exact same workers at issue here—truck drivers for bakery conglomerate Flower Foods—are exempt from the Federal Arbitration Act). This case thus presents a square circuit split, as well as a recognized conflict between the decision below and this Court's precedent, over a frequently recurring and important question: Does the Federal Arbitration Act exempt all transportation workers or solely those workers whose employers are transportation companies?

9. The applicants respectfully request a further 30-day extension of time to file a petition for a writ of certiorari seeking review of the Second Circuit's ruling and submit that there is good cause for granting the request. Counsel of record, Jennifer Bennett, did

not previously participate in this litigation and therefore requires additional time to prepare the petition. In addition, Applicants' counsel and her colleagues are also heavily engaged with other appellate matters, including appellate briefs due in the Fifth Circuit (*Ethridge v. Samsung*, No. 23-40094, *Zaragosa v. Union Pacific Railroad Co.*, No. 23-50194), the Sixth Circuit (*Parker v. Battle Creek Pizza*, No. 22-2119), the Seventh Circuit (*Taylor v. The Salvation Army*, No. 23-1218), the Ninth Circuit (*Donahue v. Union Pacific Railroad Co.*, No. 22-16847, *Anderson v. Intel*, No. 22-16268), the Eleventh Circuit (*Steines v. Westgate*, No. 22-14211), the New Mexico Supreme Court (*Sanchez v. United Debt Co.*, No. S-1-SC-39563), the Nevada Supreme Court (*Eskew v. Sierra Health*, No. 85369), the California Supreme Court (*Ochoa v. Ford*, No. S279969), the California Court of Appeal (*Liapes v. Facebook*, No. A164880), and the Washington Court of Appeals (*Long v.* Monsanto, No. 838954). Extending the deadline to file the petition in this case to July 17, 2023 will allow applicants' counsel to carefully research and prepare the petition in this case.

10. Respondents' counsel does not oppose this request.

CONCLUSION

For the foregoing reasons, the applicants respectfully request that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including July 17, 2023.

Dated: June 1, 2023

Respectfully Submitted,

/s/ Jennifer D. Bennett
JENNIFER D. BENNETT
Counsel of Record
GUPTA WESSLER PLLC
100 Pine Street
Suite 1250
San Francisco, 94111
(415) 573-0336
jennifer@guptawessler.com

Counsel for Applicants