No. 23-___

IN THE

Supreme Court of the United States

C.K. SALES CO., LLC, ET AL.,

Petitioners,

v.

MARGARITO V. CANALES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") does not "apply to contracts of employment of seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has afforded § 1 a "narrow construction" and held that its residual clause ("any other class of workers") applies only to "contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–19 (2001). This Court has further clarified that "transportation workers" include only those classes of workers who "play a direct and 'necessary role in the free flow of goods' across borders." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (quoting *Circuit City*, 532 U.S. at 121).

The question presented is whether § 1 applies to a class of workers who do not work in the transportation industry, but instead market, sell, and distribute baked goods within defined intrastate territories.

PARTIES TO THE PROCEEDING

Petitioners C.K. Sales Co., LLC; Lepage Bakeries Park St., LLC; and Flowers Foods, Inc. (collectively, "Flowers") were Defendants in the District Court and Appellants in the Court of Appeals.

Respondents Margarito V. Canales and Benjamin J. Bardzik were Plaintiffs in the District Court and Appellees in the Court of Appeals.

RULE 29.6 DISCLOSURE

Petitioner C.K. Sales Co., LLC is a wholly owned subsidiary of Petitioner Lepage Bakeries Park St., LLC, which is itself a wholly owned subsidiary of Petitioner Flowers Foods, Inc. Petitioner Flowers Foods, Inc. is a publicly held corporation whose shares are traded on the New York Stock Exchange.

RELATED PROCEEDINGS

- *Canales et al v. CK Sales Company, LLC et al*, No. 1:21-cv-40065, U.S. District Court for the District of Massachusetts. Order denying motion to compel arbitration entered March 30, 2022.
- *Canales v. CK Sales Co.*, No. 22-1268, U.S. Court of Appeals for the First Circuit. Judgment affirming district court order entered May 5, 2023. Order denying Appellants' petition for panel rehearing entered June 2, 2023.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

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PETITION FOR A WRIT OF CERTIORARI

This Court granted certiorari in *Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (cert. granted Sep. 29, 2023), to decide whether § 1 of the FAA—which exempts "contracts of employment of transportation workers," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001)—applies to workers who are not "employed by a company in the transportation industry," *Bissonnette* Pet. i. The Court did so to resolve a split that was most clearly reflected in a pair of cases—one from the Second Circuit, and one from the First—involving "the same [category of] workers" and overlapping defendants. *See id.* at 2, 15–16. This is that First Circuit case. It presents the same question at issue in *Bissonnette* on substantively identical facts.

In *Bissonnette*, the Second Circuit held—in a case involving claims by owners of Flowers Independent Distributors against Flowers Foods, Inc. and its subsidiaries—that § 1 applies only to workers in the transportation industry. *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655, 657 (2d Cir. 2022). On that basis, the Second Circuit held that the *Bissonnette* plaintiffs were required to arbitrate their claims. *See id.* at 663. In this case, the First Circuit held—in a case involving claims by owners of a Flowers Independent Distributor against Flowers Foods, Inc. and its subsidiaries—that the § 1 exemption applies to Respondents even though "the business for which they do their work is not in the transportation industry." Pet.App.12a. In so doing, the First Circuit relied on its prior ruling in *Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228 (1st Cir. 2023), which expressly rejected *Bissonnette*'s

transportation industry holding. *Id.* at 234–35. And after rejecting Flowers' other arguments in favor of arbitration, the First Circuit held that Respondents cannot be compelled to arbitrate their claims. Pet.App.17a.

Petitioners therefore respectfully request that the Court hold this petition pending resolution of *Bissonnette*, and then grant, vacate, and remand for reconsideration consistent with the Court's decision in *Bissonnette*.

OPINION BELOW

The decision of the U.S. Court of Appeals for the First Circuit (Pet.App.1a–17a) is reported at 67 F.4th 38.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 2023. The Court of Appeals denied Petitioners' petition for panel rehearing on June 2, 2023. On July 27, 2023, Justice Jackson granted an extension of time to file this petition up to and including October 30, 2023. No. 23A92 (U.S.). Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Federal Arbitration Act states:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty

> jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but 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.

STATEMENT OF THE CASE

A. Legal Background

Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Consistent with that purpose, the FAA's text sets forth a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Act's primary substantive provision, § 2, states that arbitration agreements "in any . . . contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. This Court has held that the phrase "involving commerce" in that provision "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

Section 1 of the Act limits the scope of § 2. It provides, in relevant part, 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." In contrast to § 2, the Court has afforded § 1 "a narrow construction." *Circuit City*, 532 U.S. at 118.

This Court has interpreted § 1 in three key opinions. First, in *Circuit City*, this Court rejected an interpretation of § 1 that would extend its "residual clause" to *all* "contracts of employment." 532 U.S. at 109. The residual clause, *Circuit City* explained, "should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 114–15. Consistent with those principles, the Court held that § 1 "exempts from the FAA *only* contracts of employment of *transportation workers*." *Id.* at 119 (emphases added). Then, in *New Prime Inc. v. Oliveira*, the Court clarified that the phrase "contracts of employment" includes not only "contracts that reflect an employer-employee relationship," but also "contracts that require an independent contractor to perform work." 139 S. Ct. 532, 539 (2019). Most recently, in *Southwest Airlines Co. v. Saxon*, this Court held that § 1 applies to classes of workers who "load and unload cargo on and off planes traveling in interstate commerce." 596 U.S. 450, 457 (2022). In reaching that conclusion, *Saxon* rejected the argument that every worker in the transportation industry necessarily qualifies as a "transportation worker" for purposes of the residual clause. *See id.* at 456. Instead, it held that § 1 applies only to classes of

workers that "actually engage[] in interstate commerce in their day-to-day work." *Id.*

Consistent with those precedents, courts across the country have consistently applied § 1 only when four circumstances are present. *First*, as a threshold matter, the arbitration provision in question must appear in a "contract of employment"—*i.e.*, in an agreement by workers "to perform work." *New Prime*, 139 S. Ct. at 539; *see Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 596 (4th Cir. 2023). *Second*, the party seeking to avoid its agreement to arbitrate must work "within the transportation industry." *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289–90 (11th Cir. 2005); *see Bissonnette*, 49 F.4th at 657. *Third*, that party must belong to a "class of workers" that frequently performs work "intimately involved with the commerce (*e.g.* transportation) of . . . cargo." *Saxon*, 596 U.S. at 456–59; *see also Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801–02 (7th Cir. 2020) (Barrett, J.). *Fourth*, the transportation in which the class of workers is engaged must be "foreign or interstate"—*i.e.*, the class of workers must "play 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) (emphasis added).

B. Factual Background

1. "Flowers Foods is the parent holding company of numerous operating subsidiaries which produce fresh breads, buns, rolls, and snack cakes." CA1 App. 17 ¶ 2.[1] Through those operating subsidiaries, Flowers

[1] Citations to "CA1 App" are to the appendix Petitioners filed in the First Circuit.

divides the market for its products into geographic territories, and sells exclusive sales and distribution rights for each territory to independent franchisees it calls "Independent Distributors." *See id.* at 7 ¶¶ 15, 19; *id.* at 34. Independent Distributors, in turn, market, sell, and distribute Flowers products to retail stores, convenience stores, and restaurants within their respective territories. *See id.* at 34–35 ¶¶ 2.1, 2.4.

Independent Distributors purchase products from a Flowers subsidiary at one price and then resell those products to their customers at a higher price. *See id.* at 21 ¶ 12. Each Independent Distributor's profits or losses thus consist of the difference between the products' purchase price and their sale price, minus the Independent Distributor's business expenses. Independent Distributors can increase their profits by marketing and selling more products in their existing territories, keeping expenses in check, buying additional territories, or selling some or all of their existing ones. On the flipside, Independent Distributors can incur losses when they fail to provide good service, when accounts shrink or shut down, or when they fail to properly manage their business expenses. In the meantime, Independent Distributors can also work to increase the value of their territories, which they may then "s[e]l[l] or transfer[] in whole or in part." *Id.* at 45 ¶ 15.1.

2. Respondents are the owners of T&B Dough Boys, a Massachusetts corporation that serves as an Independent Distributor for Flowers subsidiary C.K. Sales. *Id.* at 18 ¶ 4; *id.* at 26 ¶ 18. Margarito Canales—a former grocery store employee with "experience in retail, management, and in sales," *id.*

at 121—owns 51% of T&B; Benjamin Bardzik—who "had the connections to get . . . decent and affordable trucks" for T&B, *id.* at 122—owns the other 49%. *Id.* at 26 ¶ 18. In 2018, T&B entered into Distributor Agreements with C.K. Sales for three territories. *Id.* at 34; *id.* at 18–19 ¶ 5. All three of those territories fall entirely within the Commonwealth of Massachusetts. *Id.* at 18–19 ¶ 5, 21 ¶ 11.

In June 2019, T&B expanded by purchasing a fourth Massachusetts territory from C.K. Sales. *Id.* at 19 ¶ 7. The new territory included "a well-known vacation spot" and "an affluent area" that was "a hot-bed for organic products." *Id.* at 123. In connection with their purchase, Respondents submitted a business plan, which discussed their intention to increase sales of Flowers products within the new territory by adding accounts and selling additional brands of Flowers products. *See id.* at 19–20 ¶ 8; *id.* at 90–91. The plan also specified that a full-time T&B employee would work in the new territory five days a week, while Respondents themselves planned to merchandise and interface with large customers on Wednesdays and Sundays. *See id.* at 90.

In October 2020, Respondents arranged for C.K. Sales to buy back their fourth territory in order to facilitate T&B's purchase of a different territory (the "fifth territory"). *Id.* at 20 ¶ 9. Once again, T&B signed a Distributor Agreement with C.K. Sales in connection with the purchase. *Id.* at 94. And once again, Respondents submitted a business plan, which heavily emphasized the role of the full-time employee T&B had hired. *Id.* at 20 ¶ 9; *id.* at 121–27. Substituting the fifth territory for the fourth, the plan explained, would increase T&B's profit margin

because the fifth territory (unlike the fourth one) "would be in a contiguous territory with the [first] three." *Id.* at 123. Respondents attested that owning contiguous territories would allow T&B to operate more efficiently, and that the value of their investment would increase because contiguous territories would "mak[e] a potential sale to a [new] prospective owner more attractive." *Id*

3. The relationship between C.K. Sales and T&B is spelled out in substantively identical Distributor Agreements that Respondents signed on T&B's behalf in connection with the purchases of their territories. Those Distributor Agreements make clear that T&B is "an independent business" and that Flowers does not control "the specific details or manner and means of [each Independent Distributor's] business." *Id.* at 46–47 ¶ 16.1. For example, the Agreements provide that T&B is "responsible for obtaining [its] own delivery vehicle(s) and purchasing adequate insurance thereon[.]" *Id.* at 41–42 ¶ 9.1. It can make and use its own "advertising materials." *Id.* at 44 ¶ 13.1. It may use Flowers "trade names and trademarks" as it sees fit "in connection with [the] advertising, promoting, marketing, sale, and distribution of [Flowers] Products in the Territory." *Id.* at 50 ¶ 19.1. It can decide whether to dispose of "[s]tale" products, sell them for non-human consumption, donate them to charity, or sell them back to Flowers. *Id.* at 43–44 ¶¶ 12.1–12.3. And it can operate outside businesses and sell noncompetitive products. *See id.* at 37–38 ¶ 5.1.

Notably, the Agreements "do[] not require that [T&B's] obligations [t]hereunder be conducted personally by [an] Owner." *Id.* at 47 ¶ 16.2. Instead,

T&B was "free to engage such persons as [it] deems appropriate." *Id.*

The Distributor Agreements also contain a "Mandatory and Binding Arbitration" provision that incorporates, as Exhibit K, a separate Arbitration Agreement. *See id.* at 49–50 ¶ 18.3 (Distributor Agreement provision); *id.* at 58 (Arbitration Agreement). The Arbitration Agreement provides that "any claim, dispute, and/or controversy except as specifically excluded herein . . . shall be submitted to and determined exclusively by binding arbitration." *Id.* The covered claims specifically include "any . . . claims premised upon [an Independent Distributor's] alleged status as anything other than an independent contractor, tort claims . . . and claims for alleged unpaid compensation, civil penalties, or statutory penalties under either federal or state law." *Id.* at 59.

The Arbitration Agreement states that it "shall be governed by the FAA and Massachusetts law to the extent Massachusetts law is not inconsistent with the FAA." *Id.* at 60. It also includes a severability clause, which provides that, "[i]f any provision of . . . this Arbitration Agreement [is] determined to be unlawful, invalid, or unenforceable, such provisions shall be enforced to the greatest extent permissible under the law, or, if necessary, severed, and all remaining terms and provisions shall continue in full force and effect." *Id.* at 59.

C. Procedural History

1. Respondents filed a complaint in the U.S. District Court for the District of Massachusetts alleging that Flowers had misclassified them as independent contractors in violation of Massachusetts

law. Pet.App.21a–22a. Flowers moved to dismiss or, in the alternative, to compel arbitration of Respondents' claims based on their Arbitration Agreements. *Id.* at 22a.

The District Court denied Flowers' motion, finding that Respondents are "transportation workers within the meaning of § 1 and are exempt from the FAA." *Id.* at 37a. In so doing, the District Court relied heavily on Petitioners' "statements that they spend over fifty hours a week delivering goods," even though "the Distributor Agreements do not require [them] to personally drive trucks or deliver goods[.]" *Id.* at 34a. With respect to the interstate element, the District Court acknowledged that Respondents never asserted that "they ever had to physically cross state lines to carry out their responsibilities." *Id.* at 33a n.3. But Petitioners "represent[ed] that the baked goods crossed state lines before" they reached the warehouse. *Id.* at 33a. And according to the District Court, that was enough. *Id.* at 34a–35a. Finally, the District Court rejected Flowers' argument that § 1 "requires an employer to be a transportation company . . . to apply" as inconsistent with First Circuit authority. *Id.* at 36a.

3. Flowers timely appealed to the First Circuit. While that appeal was pending, the Second Circuit decided *Bissonnette*, holding that if workers "do not work in the transportation industry, they are not excluded from the FAA [under § 1]." 49 F.4th at 662. Shortly thereafter, the First Circuit decided *Fraga*, which expressly rejected *Bissonnette* and held that § 1 can apply to workers outside the transportation industry. 61 F.4th at 235.

On May 5, 2023, the First Circuit issued its decision in this case. Pet.App.1a. It rejected Flowers' argument that § 1 does not apply outside the transportation industry, explaining "[t]his contention does not survive our recent analysis in *Fraga*." *Id.* at 12a. It then proceeded to reject Flowers' remaining arguments. The First Circuit rejected on the merits Flowers' argument that § 1 does not apply because Respondents are business owners with a wide array of responsibilities and need not perform any transportation work personally. *Id.* at 16a. It then refused to consider Flowers' arguments that § 1 does not apply because Respondents work exclusively within the bounds of the Commonwealth and because the Distributor Agreements are business-to-business contracts, not "contracts of employment" under § 1. *Id.* at 9a–12a. In the First Circuit's view, Flowers did not adequately preserve those arguments in the District Court. *See id.*

Petitioners moved for panel rehearing. On June 2, 2023, the First Circuit denied that motion. *Id.* at 18a–20a.

REASONS FOR GRANTING THE PETITION

On September 29, 2023, the Court granted a petition for a writ of certiorari to review the Second Circuit's holding in *Bissonnette* that workers who "do not work in the transportation industry . . . are not excluded from the FAA [under § 1]." 49 F.4th at 662.

This case presents the same question as *Bissonnette*. Unlike the Second Circuit, the First Circuit rejected Flowers' argument that § 1 is limited to classes of workers in the transportation industry. Pet.App.12a–13a. And it did so in reliance on circuit

precedent that expressly rejected *Bissonnette*. Pet.App.12a–13a (repeatedly citing *Fraga*, 61 F.4th at 234–37 ("Premium urges us to follow the Bissonnette majority. . . . [W]e decline to do so.")). This Court granted certiorari in *Bissonnette* to resolve that inter-circuit conflict.

This Court's resolution of the Question Presented in *Bissonnette* will control the resolution of this case. Both cases involve Flowers Independent Distributors with wage-and-hour claims against Flowers Foods, Inc. and its subsidiaries. And the legal issues in the two cases are substantively identical.

As a result, this Court's ruling in *Bissonnette* will almost certainly require granting this petition, vacating the decision below, and remanding for further proceedings in this case. If this Court affirms the Second Circuit's holding in *Bissonnette* that § 1 is limited to the transportation industry, a remand will be required so that this case can proceed to arbitration. And even if this Court adopts some other standard and vacates the Second Circuit's ruling in *Bissonnette* for further proceedings under that standard, a remand for further proceedings will likewise be warranted here.

Because this Court's resolution of *Bissonnette* will affect the proper disposition of this case, this petition should be held for *Bissonnette*. Once this Court decides *Bissonnette*, it should grant this petition, vacate the decision below, and remand for further proceedings.

CONCLUSION

The Court should hold this petition pending its disposition of *Bissonnette*, and then grant, vacate, and remand for reconsideration in light of that decision.

October 30, 2023

Respectfully submitted,

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