No. 23-51

IN THE

Supreme Court of the United States

NEAL BISSONNETTE, ET AL.,
Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENTS

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RULE 29.6 STATEMENT

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

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INTRODUCTION

The Federal Arbitration Act ("FAA") requires courts to enforce arbitration agreements, except those in 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, 2. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court afforded § 1's residual clause (the "any other class of workers" phrase) "a narrow construction" and held that it "exempts from the FAA only contracts of employment of transportation workers." *Id.* at 118-19. "Congress," the Court recognized, "excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes" or undercut federal laws protecting those workers. *Id.* at 121. It included the residual clause to allow for similar regulation of other, nascent transportation industries. *Id.*

Transportation industry workers have long received special legislative treatment due to their importance to commerce and national security. Indeed, one of Congress's first acts was to regulate seamen, *see* First Cong., sess. 1, ch. 29, § 6 (1790), and that legislation was quickly followed by numerous other statutes directly regulating seamen's private employment contracts and working conditions. As the rail industry's importance increased, Congress began regulating the employment contracts and working conditions of railroad employees, too. In World War I, the shipping and rail industries were so critical to the United States that Congress authorized the temporary nationalization of the railroads and requisitioning of merchant ships, shortly thereafter

developing a merchant marine capable of serving as a naval auxiliary in war and national emergencies. And by 1925, "Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers," and "the passage of a … comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Circuit City*, 532 U.S. at 121 (citing Shipping Commissioners Act of 1872, 17 Stat. 262; Railway Labor Act of 1926, 44 Stat. 577). Thus, at the time of the FAA's passage, Congress was focused on regulating the maritime shipping and rail industries (and their employees) to ensure that the channels of national and international commerce remained stable and open.

Respondents Flowers Foods, Inc., Lepage Bakeries Park St., LLC, and C.K. Sales Co., LLC (collectively, "Flowers") are not in the transportation industry. Flowers does not sell transportation services of any kind. Flowers manufactures and markets baked goods. Petitioners are the owners of independent franchise businesses that purchased the exclusive rights to market, sell, and distribute Flowers' products within defined geographic territories. Petitioners' franchise businesses can be bought and sold and operated by others. And their Distributor Agreements unambiguously require them to arbitrate any disputes with Flowers, including employment-related disputes. They claim, however, that they are exempted transportation workers under FAA § 1. The Second Circuit saw through that ruse, holding § 1 inapplicable because Petitioners do not work in the transportation industry. Pet.App.38a-52a.

The Second Circuit's simple rule is the correct one. It follows from § 1's text, which must be "read to give effect to the terms 'seamen' and 'railroad employees.'" *Circuit City*, 532 U.S. at 115. Because § 1 uses those terms to refer to classes of workers in transportation industries, so too must the residual clause. That interpretation is consistent with § 1's context and purpose—to exempt the transportation industry workers who were so indispensable to national commerce and national security that their private employment contracts warranted special protections. It also makes good practical sense, because the rule ensures that § 1's carveout stays "narrow," *id.*, and is generally confined to workers who have recourse to some federally protected alternative dispute resolution mechanism.

Petitioners' contrary rule—whereby the § 1 exemption covers *any worker* who happens to be involved with transporting goods or people in commerce—lacks any sound basis in text, history, purpose, precedent, or policy. It misreads § 1's key terms—"engaged in foreign or interstate commerce," "seamen," and "railroad employees"—and results in a residual clause that is so broad it makes the prior enumeration meaningless. It would leave countless workers without *any* federal arbitration remedy. Petitioners' rule also ignores § 1's history and purpose, stretching the exemption far beyond the federal regulatory framework it was designed to accommodate. It misconstrues *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), which spoke only to whether a particular class of workers *within the transportation industry* was covered by § 1. And it

upends all sorts of arbitration agreements on which businesses and their workers rely.

As the Second Circuit recognized, § 1 was meant to provide a "narrow" exemption for transportation industry workers who play a "necessary role in the free flow of goods," *Circuit City*, 532 U.S. at 121, not an obstacle to arbitration for workers in almost every business nationwide. Accordingly, this Court should affirm.

STATEMENT OF THE CASE

A. Legal Background

1. Congress has long regulated the employment contracts of seamen and railroad employees due to their importance to commerce and national security.

Seamen. Seamen's employment contracts have been federally regulated since the First Congress, which gave workers engaged in seafaring trade the right to demand one-third of their earned wages at ports where cargo was discharged, "unless the contrary be expressly stipulated in the[ir] contract," and a right to their remaining wages "as soon as the voyage [was] ended." First Cong., sess. 1, ch. 29, § 6 (1790). It also required written contracts between seamen and the vessel's "master or commander" for voyages to non-U.S. ports or "from a port in one state to a port in any other than an adjoining state." *Id.* § 1.

Congress subsequently passed The Shipping Commissioners Act of 1872, ch. 322, § 35, 17 Stat. 269. That Act added penalties for delayed wage payments and established a dispute resolution process whereby "a master, consignee, agent or owner, and any of his crew" could submit "any question whatsoever"—including those involving "wages" or "discharge"—to a

"shipping commissioner." *Id.* §§ 25-26; *see infra* 23-25 (explaining the dispute resolution provision's scope). The Act also aimed to disrupt practices amounting to involuntary servitude by requiring seamen to sign written employment contracts for certain long voyages in front of a U.S. Shipping Commissioner. Shipping Commissioners Act § 13; *see Young v. Am. S.S. Co.*, 105 U.S. 41, 44 (1881). It then effectively prohibited seamen from breaching those contracts, making desertion, absence without leave, or insubordination punishable by imprisonment. Shipping Commissioners Act § 51. In *Robertson v. Baldwin*, 165 U.S. 275 (1897), this Court upheld those provisions against a Thirteenth Amendment challenge, citing the importance of seamen to interstate and foreign commerce and the extensive historical regulation of seamen's employment. *Id.* at 281-87.

Half a century later, Congress enacted The Seaman's Act of 1915, ch. 153, 38 Stat. 1164, which eliminated the penalty of imprisonment for desertion and abandonment and prohibited advancing "any seaman wages" to another person. Seaman's Act §§ 4, 7, 9, 11, 12. It also gave seamen the right to demand one-half of their earned wages at ports of discharge *regardless* of their employment contracts' terms. *Id.* § 4; *see Strathearn S.S. Co. v. Dillon*, 252 U.S. 348, 354 (1920) (upholding that provision).

The outbreak of World War I placed the Nation's maritime shipping industry in a new light, demonstrating its critical importance to national security. During the war, President Wilson "instructed the Navy to protect American merchantmen transiting war zones," and the U.S.

Shipping Board requisitioned merchant vessels for the war effort. James W. Harlow, *Soldiers at Sea: The Legal and Policy Implications of Using Military Security Teams to Combat Piracy*, 21 S. CAL. INTERDISC. L.J. 561, 591 (2012); *see also The Western Maid*, 257 U.S. 419, 431-32 (1922) (discussing the government's use of merchant vessels). After the war, Congress enacted the Merchant Marine Act of 1920 (also known as the Jones Act) to create tort remedies for seamen and develop the merchant marine as a naval auxiliary during war or national emergencies. Pub. L. No. 66-261, 41 Stat. 988.

Railroad Employees. Once the Nation came to depend on rail transportation, Congress began regulating railroad employees, too. *See* Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1538 (1990) (discussing "a larger history in which railroads were seen as a special case, justifying federal regulation"). In 1887, Congress established the Interstate Commerce Commission—the Nation's first independent regulatory authority—to comprehensively regulate the railroads. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379. By 1915, "American railroads carried over a million passengers and more than two million tons of freight" per year using "65,000 locomotives, 55,000 passenger cars, and 2.25 million freight cars, while employing 1,800,000 workers." Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 275 (2003).

But "[w]orking conditions on the railroads were onerous," *id.* at 260, and railroad employees engaged in strikes that "frequently paralyzed whole lines and

entire sections of the country," Stone, 42 STAN. L. REV. at 1538. In March 1916, with the U.S.'s entry into World War I looming, railroad employees threatened a nationwide strike unless they were given an eight-hour workday without a reduction in pay. *See Wilson v. New*, 243 U.S. 332, 340 (1917). In response, Congress enacted the Adamson Act, ch. 436, 39 Stat. 721 (1916), which established a wage floor for railroad employees and guaranteed them an eight-hour workday, *see Wilson*, 243 U.S. at 340 (upholding the Act against challenge that Congress lacked authority over private employment contracts).

Once the United States entered the war, President Wilson temporarily nationalized the Nation's railroad system. *See* United States Presidential Proclamation 1419 (Dec. 26, 1917). Congress later re-privatized the railroads through the Transportation Act of 1920, Pub. L. No. 66-152 § 200, 41 Stat. 456, which established the U.S. Railroad Labor Board "to avoid interruptions to commerce by negotiating" railroad employees' grievances. Dempsey, 30 TRANSP. L.J. at 273.

2. The Federal Arbitration Act was adopted in 1925, against this historical and regulatory backdrop. Through the FAA, Congress recognized arbitration's many benefits. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (arbitration offers "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"). The Act's purpose was 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).

FAA § 2, the Act's primary substantive provision, provides that "any ... contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in [the Act]." The phrase "involving commerce" "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). As a result, the FAA covers "a wide range of written arbitration agreements," including agreements to arbitrate employment disputes. *See Circuit City*, 532 U.S. at 111-19.

FAA § 1 establishes a limited exception to § 2's otherwise broad scope for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In contrast to § 2, the Court has afforded § 1 "a narrow construction." *Circuit City*, 532 U.S. at 118. It has recognized that § 1 "does not apply" to arbitration agreements unless they are contained in "a contract of employment." *Gilmer*, 500 U.S. at 25 n.2; *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (clarifying that "contracts of employment" include those of independent contractors). And it has held that § 1's residual clause extends only to "transportation workers." *Circuit City*, 532 U.S. at 119.

B. Factual Background

1. Flowers is a baked goods company that "produce[s] breads (including Wonder Bread), as well

as buns, rolls, and snack cakes in 47 bakeries" nationwide. Pet.App.41a. Flowers divides its market into geographic territories and sells exclusive sales and distribution rights within them to independent franchise companies called "Independent Distributors." *See* JA2 ¶¶ 2-3. Independent Distributors purchase products from Flowers and then resell those products to their customers at a higher price. *See* Pet.App.41a-42a; *see also* JA17 ¶ 4.1.

The Independent Distributor's profit or loss is the difference between the products' purchase price and sale price, minus business expenses. *See* Pet.App.42a. Independent Distributors can increase their profits by selling more products in their territories, lowering expenses, or buying additional territories, among other things. Independent Distributors can incur losses when marketing efforts fail, accounts shrink or shut down, or expenses rise. Independent Distributors are free to sell their territories in whole or in part and retain their increased value (or bear any loss). *See* JA3 ¶ 8.

2. Petitioners are the owners of two "independent businesses"—Bissonnette Inc. and Blue Star Distributors Inc.—that purchased the rights to market, sell, and distribute Flowers products in territories entirely within Connecticut. *See* JA32 ¶ 16.1, 47, 52, 115, 120. Flowers does not control "the specific details or manners and means of [their] business[es]." *Id.* at 15 ¶ 2.6, 18 ¶ 5.1. Moreover, Petitioners are not required to perform services personally and may "engage such persons as [they] deem[] appropriate" to perform all or some of their work. *Id.* at 33 ¶ 16.2.

Petitioners' Distributor Agreements incorporate Arbitration Agreements, *id.* at 37 ¶ 18.3 (Distributor Agreement), 64-71 (Arbitration Agreement), which provide that "any claim, dispute, and/or controversy except as specifically excluded herein ... shall be submitted to and determined exclusively by binding arbitration." *Id.* at 64. The covered claims include "any ... claims premised upon [an Independent Distributor's] alleged status as anything other than an independent contractor." *Id.* at 67. Petitioners signed the Arbitration Agreement on behalf of their companies and also signed a separate Personal Guaranty confirming that they were personally "subject to the Arbitration Agreement." *Id.* at 53-54.

C. Procedural Background

1. Petitioners filed a putative class action lawsuit in federal district court alleging that they should have been classified as Flowers' employees under Connecticut wage-and-hour laws and the FLSA. *See* Pet.App.100a. Flowers moved to dismiss or, in the alternative, to compel arbitration under both the FAA and Connecticut law. *Id.* at 105a, 108a. Petitioners opposed, claiming they were "transportation workers" under FAA § 1. *Id.* at 105a.

The District Court granted Flowers' motion to compel. Petitioners, the court reasoned, "are more akin to sales workers or managers who are generally responsible for all aspects of a bakery products distribution business than they are to traditional transportation workers like a long-haul trucker, railroad worker, or seamen." *Id.* at 114a (internal quotation marks omitted). The District Court concluded that § 1 does not apply on that basis and did

not resolve Flowers' alternative argument that Petitioners do not work "in the transportation industry." *Id.* at 110a n.8.

2. The Second Circuit affirmed on the alternative "transportation industry" ground. Pet.App.3a. Starting with § 1's text, the court recognized that the "two examples that the FAA gives" of "'seamen' and 'railroad employees' ... are telling because they locate the 'transportation worker' in the context of a *transportation industry*." *Id.* at 8a. It then analyzed other cases holding that "the FAA exclusion is limited to workers involved in the transportation industry." *Id.* at 9a-10a (citing, *e.g.*, *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005)). Endorsing those courts' reasoning, the court held that § 1 does not apply because Flowers and its Independent Distributors traffic "in breads, buns, rolls, and snack cakes[,] not transportation services." *Id.* at 11a. It "affirm[ed] without rejecting or adopting the district court's analysis, which," it said, "may very well be a way to decide closer cases." *Id.* at 3a.

The late Judge Pooler dissented. In her view, § 1 applied because Petitioners transport goods that have traveled from out of state as part of a "chain of interstate transportation." *Id.* at 28a.

3. Just one month after the panel issued its opinion, this Court held in *Saxon* that a baggage handler for Southwest Airlines qualified as a "transportation worker" under FAA § 1. *See* 596 U.S. 450. The Second Circuit panel issued a superseding opinion explaining that because the worker in *Saxon* was indisputably in a transportation industry, *Saxon* did not alter its analysis. Pet.App.40a-41a, 48a.

The Second Circuit then denied Petitioners' en banc petition. *Id.* at 78a. Concurring in the denial, Judge Jacobs emphasized that "*every appellate opinion* that grants exemption to a transportation worker under Section 1 of the FAA decides or presumes the prior question of whether that person works in a transportation industry." *Id.* at 85a & n.2 (emphasis added). Three judges dissented from denial, *id.* at 79a-84a, and Judge Pooler filed her own statement reiterating the arguments she had raised in her dissent. *Id.* at 90a.

SUMMARY OF ARGUMENT

In *Circuit City*, this Court supplied the rules for interpreting the § 1 exemption. The exemption (i) must be given "a narrow construction" (ii) that "give[s] effect to the terms 'seamen' and 'railroad employees,'" and (iii) applies the *ejusdem generis* principle so that the residual clause is "controlled and defined" by those two categories of workers. *Circuit City*, 532 U.S. at 115, 118. Those interpretive rules compel the conclusion that § 1's residual clause applies only to classes of workers in the transportation industry—*i.e.*, workers engaged by companies that sell transportation services.

I. Section 1's text compels this conclusion.

A. The *ejusdem generis* principle limits § 1's residual clause to classes of workers who share the characteristics of "seamen" and "railroad employees." Both terms identify workers by the transportation industry in which they are engaged. "[S]eamen" refers to certain "workers engaged in the maritime shipping industry," *Saxon*, 596 U.S. at 460, and "railroad employees" refers to workers engaged in the rail

transportation industry. This is apparent from the face of § 1 and follows from those terms' contemporaneous meaning and the extensive statutory background against which Congress was legislating.

B. That reading of "seamen" and "railroad employees" is also consistent with § 1's history and purpose. By 1925, Congress was directly regulating the working conditions and private employment contracts of workers in the seafaring trade and the rail transportation industries because history had proved those industries' and their workers' importance to the national economy and security. Congress had also developed federal alternative dispute resolution processes for those workers to prevent labor disruptions. By exempting those workers from the FAA, Congress preserved their alternative dispute resolution processes and industry-specific statutory protections.

C. Because "seamen" and "railroad employees" are transportation industry workers, the residual clause's "other class of workers" must share that commonality. Only that reading is faithful to the *ejusdem generis* principle and gives meaning to Congress's enumeration of "seamen" and "railroad employees." And it yields a sensible rule that affords § 1 an appropriately narrow scope.

II. Petitioners' reading of § 1 hits none of those marks.

A. Petitioners' textual analysis is flawed at every turn. Their reading of "engaged in commerce" is flatly inconsistent with *Circuit City* and relies primarily on old Dormant Commerce Clause cases that are both

irrelevant to § 1's meaning and no longer good law. It also renders the enumerated categories of workers effectively meaningless.

In addition, Petitioners' reading of "seamen" as practically anyone who works on any boat ignores statutory context, as well as § 1's history and purpose, and relies on inapposite authorities. Petitioners all but acknowledge that "railroad employees" work for rail transportation companies. In all events, Petitioners' textual arguments, at most, suggest that there may be differences in maritime and rail transportation that arise from differences in those modes of transportation. But any such differences do not alter the fact that "seamen" and "railroad employees" refer only to classes of workers within their respective transportation industries.

B. Petitioners also misread *Saxon*. That case involved an airline employee who indisputably worked in the transportation industry and held only that working in a transportation industry is not *sufficient* for § 1. The *Saxon* Court recognized that "seamen" refers to workers in "the maritime shipping industry." 596 U.S. at 460. And its analysis is consistent with the proposition that engagement in the transportation industry is *necessary* for § 1.

C. Finally, Petitioners' rule undermines the FAA by exempting workers who—like restaurant delivery drivers and grocery store stock clerks—have nothing to do with § 1's purpose. Virtually all manufactured and retailed products move in interstate commerce at some point, and countless manufacturers have workers who transport their goods, or load or unload them. Sweeping those workers into § 1, as Petitioners suggest, would convert § 1 into a broad exemption

that includes many workers with no federally protected right to alternative dispute resolution. It would deprive those workers of the "efficient dispute resolution" mechanism that Petitioners' concede the FAA "is designed to promote." Pet. Br. 33, 37. And as this case demonstrates, it will force courts to answer more fact-intensive questions regarding § 1's applicability to specific classes of workers.

ARGUMENT

I. SECTION 1'S RESIDUAL CLAUSE EXEMPTS CLASSES OF WORKERS IN THE TRANSPORTATION INDUSTRY.

A. "Seamen" and "Railroad Employees" Refer to Classes of Workers in the Transportation Industry.

1. As with any question of statutory interpretation, the analysis "begins with the text." *Ross v. Blake*, 578 U.S. 632, 638 (2016). Section 1 provides that:

> [N]othing 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. By its terms, the provision exempts from the FAA's scope two specific categories of workers ("seamen" and "railroad employees"), as well as a residual category ("any other class of workers")—all of whom must be "engaged in foreign or interstate commerce."

This Court set out the interpretive framework for § 1 in *Circuit City*, holding that § 1 must "be afforded a narrow construction" and "read to give effect to the terms 'seamen' and 'railroad employees.'" *Circuit City*,

532 U.S. at 115, 118. The residual clause is "controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 115; *see also Saxon*, 596 U.S. at 458 (same). Accordingly, "[t]he wording of § 1 calls for the application of the maxim of *ejusdem generis*," *Circuit City*, 532 U.S. at 114, the rule that "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 224 (2008) (the general term must "share the common attribute of the listed items").

The commonality between "seamen" and "railroad employees" is that both refer to classes of workers in industries that sell transportation services: "maritime shipping," *Saxon*, 596 U.S. at 460, and rail transportation.

2. Seamen. In *Saxon*, this Court recognized that, in 1925, "seamen" commonly meant "those 'whose occupation [was] to assist in the management of ships at sea; a mariner; a sailor; ... any person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.'" *Id.* The use of seamen in § 1, however, does not sweep so broadly as to cover everyone on any boat. Instead, it refers only to "a subset of workers engaged in the maritime shipping industry." *Id.*

This more cabined interpretation of "seamen" mirrors how Congress used the term elsewhere when the FAA was enacted. Other federal statutes used "seamen" to refer to workers on vessels in the

maritime shipping industry and distinguished "seamen" from other workers within admiralty jurisdiction, such as fishermen or whalers. *See supra* 4-6; *infra* 23-25; *see, e.g.*, The Seamen's Act of 1915, 38 Stat. 1164 (regulating the work of "seamen" aboard certain "merchant vessels," not "fishing or whaling vessels, or yachts"); First Congress Act of 1790, ch. 29, 1 Stat. 131, 131 ("An Act for the government and regulation of Seamen *in the merchants service*" (emphasis added)); Henry W. Farnam, *The Seaman's Act of 1915*, 6 AM. LABOR LEGISLATION REV. 41, 43, 45 (Mar. 1916) (First Congress's act applied to "seamen in the merchant service"); The Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262 (defining the Act as pertaining to "Seamen engaged in Merchant Ships belonging to the United States").

"Seamen," in other words, were workers on "a ship that is engaged in a carrying trade in connection with trade and commerce." *In re Jupp*, 274 F. 494, 495 (W.D. Wash. 1921). And when Congress intended to go beyond this narrower understanding of "seamen," it said so. *See, e.g.*, Seamen's Act of 1915, 38 Stat. 1164, 1169 § 12 (amending one provision of the Shipping Commissioner's Act of 1872 to clarify that "[t]his section shall apply to fishermen employed on fishing vessels as well as to seamen").

This reading of "seamen" comports with the other language in § 1. Scalia & Garner, READING LAW at 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."). In particular, this reading follows from the phrase "engaged in foreign or

interstate commerce," which describes not only the residual clause's "other class of workers" but also "seamen" (and "railroad employees"). *See Saxon*, 596 U.S. at 459 ("The use of 'other' in the catchall provision indicates that Congress considered the preceding items to be 'matters in foreign [or interstate] commerce.'"). That phrase makes clear that, for § 1 purposes, "seamen" includes only those who are "engaged in the flow of interstate [or foreign] commerce" by sea. *Circuit City,* 532 U.S. at 117 (defining "engaged in commerce").

Section 1's reference to "contracts of employment" confirms that usage of "seamen," because at the time of the FAA's passage, the seamen with federally regulated contracts of employment were traveling in vessels engaged in foreign or coast-to-coast trade. *See, e.g.*, 46 U.S.C. § 564 (1925) (so limiting the written shipping articles requirement); Act of Feb. 18, 1895, ch. 97, 28 Stat. 667, 667 (requiring "an agreement ... with each seaman" only for certain trade voyages). And by the time of the FAA's passage, Congress extensively regulated the employment contracts of seamen in the maritime shipping industry. *See supra* 4-6.

Thus, "seamen," as used in § 1, does not encompass everyone who works on *any* boat engaged in commerce. It refers, as this Court has already recognized, to transportation workers in the "maritime shipping industry." *Saxon*, 596 U.S. at 460.

3. Railroad Employees. Petitioners acknowledge that "dictionaries from 1925 have no entry for 'railroad employees.'" Pet. Br. 29. But the phrase's plain meaning is inescapable. A "railroad" referred then, as it does now, to "a runway or track formed of

rails" that make a "permanent way for wagons." "Railroad," WEBSTER'S NEW INTERNATIONAL DICTIONARY (1922); *see also* "Railroad," MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/railroad (accessed Dec. 8, 2023) (similar, minus the "wagons"). And an "employee" is "[o]ne employed by another." "Employee," WEBSTER'S NEW INTERNATIONAL DICTIONARY (1922); *see also New Prime*, 139 S. Ct. at 543 (clarifying that "railroad employee" might include "anyone engaged in the customary work directly contributory to the operation of the railroads" (internal quotation marks omitted)). The term "railroad employees" thus encompasses those who work for the railroads—the companies that sell rail transportation services.

As with "seamen," that reading of "railroad employees" reflects the limiting phrase "engaged in foreign or interstate commerce." *See supra* 17-18. It also mirrors Congress's regulation of railroad employees' contracts of employment at the time. The Adamson Act, ch. 436, 39 Stat. 721 (1916), for example, applied only to workers for railroad companies. *See Wilson*, 243 U.S. at 340. In addition, by 1925, Congress was contemplating the Railway Labor Act of 1926, a "comprehensive statute providing for the mediation and arbitration of railroad labor disputes," which applied only to workers in the rail transportation industry. *Circuit City*, 532 U.S. at 121 (citing Railway Labor Act of 1926, 44 Stat. 577). The Railway Labor Act of 1936 was similarly limited to transportation industry workers. *Id.* (citing 49 Stat. 1189, 45 U.S.C. §§ 181-188).

Thus, by using the term "railroad employee," Congress referred to classes of workers in the rail transportation industry.

B. Historical and Statutory Context Shows That Congress Intended to Preserve Regulatory Regimes Governing Transportation Industries.

"Histor[y] and purpose"—two vital "tools of divining meaning," *Abramski v. United States*, 573 U.S. 169, 179 (2014)—confirm that § 1's focus is the transportation industry. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7, (2011) (looking to "purpose and context"). Congress enacted the FAA in the midst of a transportation revolution and significant regulation of the maritime shipping and rail transportation industries, as well as their workers' employment conditions.

1. Congress has long sought to maintain stability in the maritime shipping industry by regulating seamen's employment contracts. *See supra* 4-6. As this Court has explained, "[f]rom the earliest historical period the contract of the sailor has been treated as an exceptional one" because "the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained,—as Molloy forcibly expresses it, 'to rot in her neglected brine.'" *Robertson*, 165 U.S. at 282-83. Seamen's employment contracts were thus "subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water." *Patterson v. Eudora*,

190 U.S. 169, 176 (1903); *see also supra* 4-6 (detailing historical regulation).

For example, with the Shipping Commissioners Act of 1872, Congress established a penalty for delayed wage payment to seamen. *See* 17 Stat. at 262, 264-67, §§ 12-24. The Seamen's Act of 1915 added new wage regulations and harsher penalties for violations. *See* ch. 153, 38 Stat. 1164. Importantly, those acts applied only to workers in the maritime shipping industry—that is, workers on vessels selling maritime transportation services—not to anyone working on any boat. *See supra* 4-6; *infra* 23-25.

Despite Congress's efforts, strikes impacted the maritime shipping industry in the years leading up to the FAA. In 1919, for instance, a strike of 60,000 longshoremen in New York idled 150,000 workers across the maritime shipping industry and effectively stopped shipping for nearly a month. *See* Calvin Winslow, LONGSHOREMEN'S STRIKES, 1900–1920, THE ENCYCLOPEDIA OF STRIKES IN AMERICAN HISTORY 553 (2015). In 1921, non-unionized seamen went on a strike that "completely paralyz[ed] the Atlantic Coast." Benjamin W. Labaree *et al.*, AMERICA AND THE SEA: A MARITIME HISTORY 543-44 (1998). Further underscoring the importance of the maritime shipping industry to Congress, during World War I, the Government had to requisition merchant ships to support the war effort. *See The Western Maid*, 257 U.S. at 431-32. Shortly after the War, Congress acted to develop and maintain the merchant marine to be "sufficient to … serve as a naval or military auxiliary in time of war or national emergency." Pub. L. No. 66-261, 41 Stat. 988, 988.

2. Congress similarly regulated railroad employees' working conditions and employment contracts to maintain stability in the railroad industry. *See supra* 6-7. In the late 1800s and early 1900s, the railroad industry was marked by strikes that seriously threatened the national economy. The Great Railroad Strike of 1877, for instance, has been called "[t]he most extensive" strike "which ever took place in this, or indeed in any other country." Philip S. Foner, THE GREAT LABOR UPRISING OF 1877 at 33 (1977) (internal quotation marks omitted). It caused the prices of meat, grain, milk, and coal to spike and forced businesses to "clos[e] down for lack of coal and raw materials." *See* Gerald G. Eggert, *Gunfire and Brickbats: The Great Railway Strikes of 1877*, American History Illustrated 41 (1981). The Southwest Strikes of 1886 similarly caused businesses in impacted towns to idle for weeks. *See* Theresa A. Case, *The Great Southwest Railroad Strike and Free Labor*, College Station: Texas A&M University Press, 2010, available at https://encyclopediaofarkansas.net/entries/great-southwestern-strike-4911/. And the Pullman Strike of 1894 halted railway traffic from the Mississippi valley to the Pacific, threatening many industries that depended on rail transportation services. *See* A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Pol. Econ. 540, 541, 554 (1901) (explaining that in Chicago, "[s]upplies were so far cut off that the city was for days threatened with famine").

When threatened with another strike on the eve of the Nation's entry into World War I, Congress passed the Adamson Act of 1916. *See supra* 6-7. The next year, President Wilson nationalized the railroad

industry, which was eventually returned to private control in 1920. *See supra* 7.

3. Thus, when the FAA was enacted, Congress was extensively regulating the private employment contracts of seamen and railroad employees to provide stability to two transportation industries that were critical to commerce and national security. For the same reason, Congress created special federal alternative dispute resolution processes for those two classes of transportation industry workers.

As to seamen, in 1872, Congress created a federal dispute resolution process for "merchant seamen and merchant ships" in interstate and foreign commerce. *See* Shipping Commissioners Act of 1872, 17 Stat. at 267, §§ 4, 25; Act of June 9, 1874, ch. 260, 18 Stat. 64, 64-65; Act of Feb. 18, 1895, ch. 97, 28 Stat. 667, 667.

This mediation process did not, as Petitioners and their Amici suggest, *see* Pet. Br. 26; Constitutional Accountability Ctr. Br. 14-15, 18-23, extend to anyone on any boat engaged in commerce. *See, e.g.*, 46 U.S.C. § 544 (1925) (excluding vessels in coastwise trade). Indeed, the 1872 Act was entitled, "An Act to Authorize the Appointment of Shipping Commissioners by the Several Circuit Courts of the United States, to Superintend the Shipping and Discharge of Seamen *Engaged in Merchant Ships* Belonging to the United States, and for the Further Protection of Seamen," Shipping Commissioners Act of 1872, 38 Stat. at 263, § 4 (emphasis added), and it applied only to seamen working on vessels in the shipping trade—not navy ships, pirate ships, fishing boats, or whalers. *See* 46 U.S.C. § 544 (1925) (expressly excluding those, like whalers and fishermen, who "by custom or agreement [are] entitled

to participate in the profits or result of a cruise, or voyage"); *id.* at § 601 (expressly extending the wage attachment provision to "fishermen employed on fishing vessels *as well as* to seamen" (emphasis added)); Act of June 9, 1874, ch. 260, 18 Stat. at 64-65 (clarifying that the Act does not cover short trading voyages or fishermen); *The Cornelia M. Kingsland*, 25 F. 856, 858-61 (S.D.N.Y. 1885) (Shipping Commissioners Act "is not applicable to the fishermen who engage upon a lay [*i.e.*, a profit sharing agreement]," but instead clearly applies to those in the "merchant service"); *Burdett v. Williams*, 27 F. 113, 117-18 (D. Conn. 1886) (holding that "whaling voyage[s]" are not covered by the Shipping Commissioners Act).

The Act was "designed for the protection of seamen in the merchant service" because, "[a]s a class," they "had previously been the subject of constant imposition and deception." *Young*, 105 U.S. at 43-44; *see also United States v. Smith*, 95 U.S. 536, 536 (1877) ("Shipping commissioners are vested with certain powers and are charged with the performance of certain duties in engaging seamen for the *merchant service*." (emphasis added)); *Harper v. U.S. Seafoods LP*, 278 F.3d 971, 978 (9th Cir. 2002) ("In 1872, Congress created shipping commissioners with responsibility for looking after merchant seamen"); Benjamin Harris Brewster, *Shipping Commissioners*, 18 Op. Att'y Gen. 54, 55 (1884) (observing that the original 1872 Act applied to "all vessels, whether engaged in the foreign or coasting *trade*" (emphasis added)). The shipping commissioner's enumerated duties thus ended with a catchall provision clearly limiting the commissioner's jurisdiction: "To perform

such *other duties relating to merchant seamen or merchant ships* as may be required by law." 46 U.S.C. § 545 (1925) (emphasis added); *see United States v. The Grace Lothrop*, 95 U.S. 527, 530-31 (1877) (recognizing same); George Cyrus Thorpe, FEDERAL DEPARTMENTAL ORGANIZATION AND PRACTICE, Ch. 43, § 2 at 452 (1925) (observing that Shipping Commissioners "supervise the making and fulfillment of contracts between seamen and masters or owners of merchant ships"). The mediation process thus applied only to workers on a vessel engaged in the maritime shipping trade. *See The Western Maid*, 257 U.S. at 431-32 (distinguishing between ships in the carrying trade and those in public service); *In re Jupp*, 274 F. at 495 (observing that merchant ships are "engaged in a carrying trade in connection with trade and commerce").

The definition of "seaman" in 46 U.S.C. § 713 (1925) does nothing to alter that fact. *Contra* Constitutional Accountability Ctr. Br. 14-15, 20. In *Warner v. Goltra*, 293 U.S. 155, 161 (1934), this Court held that § 713 was merely intended to distinguish "seamen" from "masters," because seamen were viewed as "a ward of admiralty" while the master could "drive a bargain for himself" and then "stand upon his rights." *Id.* at 162. The definition means at most that masters are not "seamen" for purposes of the mediation process, but the process still extends only to workers in the maritime shipping industry.

As to railroad employees, "[t]he first national law aiming at amicable adjustment of labor disputes was enacted in 1888." Joshua Bernhardt, THE RAILROAD LABOR BOARD: ITS HISTORY, ACTIVITIES, AND ORGANIZATION 1 (1923). After many iterations of a

voluntary dispute resolution process for railroads and their employees, *id.* at 7-22, Congress created a "quasi-judicial" grievance process in 1920, *see id.* at 48-49; *see also* Transportation Act of 1920, §§ 300-316, 41 Stat. 456, 469-74. And a year after the FAA's enactment, Congress created a more comprehensive federal mediation scheme. *See* Railway Labor Act of 1926, 44 Stat. 577; 46 U.S.C. § 651 (repealed).

Those processes were limited to workers in the rail transportation industry—to railroad companies selling transportation services to the public. *See* 41 Stat. at 469-70 (§§ 302-04) (applying 1920 Act to railroads "subject to the Interstate Commerce Act," 41 Stat. at 469 (§ 300(1))—*i.e.*, to the railroad transportation industry); Interstate Commerce Act of 1887, 24 Stat. 379, 379 (stating that "this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water" in interstate commerce); Constitutional Accountability Ctr. Br. 21 n.3 (conceding that "Congress expressly limited the scope of [the Transportation Act of 1920] to companies in a particular industry"); Ch. 347, § 1, 44 Stat. 577, 577 (limiting Railway Labor Act of 1926 to "any carrier by railroad, subject to the Interstate Commerce Act").[1]

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[1] Other predecessor dispute resolution statutes for railroads and their employees were similarly limited to railroad companies. *See, e.g.*, Erdman Act of 1898, ch. 370, 30 Stat. 424, 424 (stating "Act shall apply to any common carrier or carriers and their officers, agents, and employees except masters of vessels and seamen ... engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water" in interstate commerce).

As this history reflects, Congress enacted § 1 having "in mind" "the two groups of transportation workers" whose employment contracts were already federally regulated and "as to which special arbitration legislation already existed[,] and [it] rounded out the [exemption] by excluding all other similar classes of workers." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Loc. 437*, 207 F.2d 450, 452-53 (3d Cir. 1953) (en banc). By excluding those workers, Congress preserved the statutory protections and "statutory dispute resolution schemes" that it had tailored to the unique needs of workers in the maritime shipping and rail transportation industries. *See Circuit City*, 532 U.S. at 121. And it left space for Congress to design similar statutory schemes to govern new and emerging transportation industries. *See id.* As it happened, Congress extended the alternative dispute resolution process to air carriers within a decade of the FAA. *See* Railway Labor Act of 1936, 49 Stat. 1189.

4. While "quite sparse," *Circuit City*, 532 U.S. at 119-20, the legislative history of § 1 also suggests that the exemption was meant to safeguard existing statutory frameworks governing maritime shipping and rail industry workers.

Senator Thomas Sterling introduced the precursor to the Federal Arbitration Act in 1922. As originally proposed, the bill lacked the § 1 exemption and included a now-absent reference to "seamen's wages" and interstate commerce in the definition of "maritime transactions." *See* Imre Szalai, AN ANNOTATED LEGISLATIVE RECORD FOR THE FEDERAL ARBITRATION ACT 56 (2020) (reprinting S. 4214, 67th Cong, 4th Sess. (1922)). The addition of the exemption

and the removal of "seamen's wages" and "interstate" from the definition of "maritime transactions" appear to have been motived by concerns from Andrew Furuseth, the head of the Seamen's Union who spearheaded the Seamen's Act. *See id.* at 55. The hearing testimony also references a letter from prominent South Dakota lawyer C.O. Bailey, who represented several large railroad companies. *Id.* at 55 & n.47. While Bailey's letter appears lost to history, correspondence describing it suggests that Bailey was concerned about the bill interfering with "contracts with railroad employees and with sailors on vessels engaged in foreign or coastwise commerce." Letter from Sen. Sterling to Charles L. Bernheimer, Jan. 26, 1923, CU Chamber Archives, Box 114, Folder 19; *see also* Szalai, Ann. History at 55 n.47 (describing correspondence regarding the Bailey letter). Responding to those concerns, then-Secretary of Commerce Herbert Hoover suggested what is now the § 1 exemption. Szalai, Ann. History at 57. The exemption preserved the federal statutory framework governing seamen and railroad employees and quelled the opposition.

C. The Residual Clause Is Limited to Classes of Workers in the Transportation Industry.

1. In light of the meaning of "seamen" and "railroad employees" and § 1's history, the residual clause encompasses only workers who, like seamen and railroad employees, work in the transportation industry—*i.e.*, work for businesses that sell transportation services, indeed transportation services that are critical to the Nation's economy and security. This is "seamen's" and "railroad employees'"

common thread. Under the maxim *ejusdem generis*, this point of commonality also defines and limits the accompanying residual clause. *Circuit City*, 532 U.S. at 114; *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 23 (1st Cir. 2020) ("Plainly," where "seamen" and "railroad employees" are "defined by the nature of the business for which they work," "the activities of a company [must be] relevant in determining the applicability of the FAA exemption to other classes of workers.").

This interpretation comports with a critical aspect of *ejusdem generis*—to "giv[e] the enumeration the effect of limiting the general phrase (while still not giving the general phrase a meaning that it will not bear)." Scalia & Garner, READING LAW at 200. Why did Congress enumerate seamen and railroad workers? The answer: In 1925, Congress was directly regulating the seamen's and railroad employees' employment contracts and had already enacted federal alternative dispute resolution processes to mediate their employment disputes. Congress was preserving regulatory regimes that applied to workers in those two transportation industries. And it included the residual clause to preserve its ability to enact similar regulatory regimes for developing transportation industries.

This Court employed precisely this reasoning in *Circuit City*. It read "the residual clause … to give effect to the terms 'seamen' and 'railroad employees.'" 532 U.S. at 115. And it looked to the exemption's history and purpose to conclude that the residual clause is limited to "transportation workers." *Id.*

Of course, not *all* workers in the transportation industry fall within the exemption's scope. *See*

Pet.App.48a-49a. Because "[i]n 1925, seamen did not include *all* those employed by companies engaged in maritime shipping," § 1 is not an industrywide exemption. *Saxon*, 596 U.S. at 460-61 (emphasis added). But participation in the transportation industry is a threshold, *necessary* condition for falling within the exemption's scope.

2. The transportation industry requirement also makes sense. It matches the "narrow" exemption to the problem it was designed to solve: avoiding interference with existing or anticipated regulatory frameworks governing the Nation's critical transportation industries. *See supra* Part I.B. In addition, the requirement furthers the FAA's overarching purpose. By exempting only workers in transportation industries, § 1 ensures that most excluded workers will have recourse to other federal alternative dispute resolution mechanisms or federal statutory protections. And in cases where workers do not "play a direct and 'necessary role in the free flow of goods' across borders," *Saxon*, 596 U.S. at 458, it leaves the FAA's broader purpose intact. That is a good thing, because arbitration has many benefits, as this Court has repeatedly recognized. *See Stolt-Nielsen*, 559 U.S. at 685 ("lower costs, greater efficiency and speed"); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (same); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

Because "seamen" and "railroad employees" are "defined by the nature of the business for which they work," most courts acknowledge that "the activities of a company are relevant in determining the

applicability of the FAA exemption to other classes of workers." *Waithaka*, 966 F.3d at 23; *see also, e.g.*, *In re Grice*, 974 F.3d 950, 956 (9th Cir. 2020) (noting that "[t]he nature of the business for which a class of workers perform[ed] their activities" is a "critical factor"). The Second Circuit's straightforward approach means that most businesses need not concern themselves with the intricacies of § 1, ensuring that the benefits of speedy and efficient dispute resolution are not lost to thorny threshold questions. Unless they sell transportation services, businesses and their workers can enter arbitration agreements knowing they are enforceable under the FAA.

* * *

Petitioners' own Question Presented concedes that they are not engaged in a transportation industry. Pet. Br. i. That is for good reason. As the Second Circuit recognized, both Flowers and Petitioners "peg[their] charges" to the goods they sell rather than "to the movement of [those] goods." Pet.App.48a. Their "commerce is in breads, buns, rolls, and snack cakes—not transportation services." Pet.App.49a; *see also* JA14 ¶ 2.6 (Distributor Agreement referencing "the baking industry"). And while a strike among Flowers' Independent Distributors would certainly upset Flowers and those who buy its products, it would not disrupt the national economy or threaten national security as disruption of the maritime shipping or railroad transportation industries would. *See supra* 21-22. Because Petitioners work outside the transportation industry, their arbitration agreements are enforceable under the FAA.

II. PETITIONERS' CONTRARY ARGUMENTS ARE MERITLESS.

Petitioners do not attempt to ascribe a purpose to the § 1 exemption or discuss its historical context. Instead, Petitioners advocate an expansive reading of § 1 that "would defeat Congress' intent," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012)—excluding from the FAA all sorts of workers who have *not* been regulated like seamen and railroad employees, who are *not* central to commerce or national security, and who would *lack* a federal alternative dispute resolution remedy if exempted from the FAA. This result, without more, demonstrates that Petitioners' interpretation of the residual clause cannot be correct. *See id.* (holding that *ejusdem generis* cannot defeat Congress's purpose). But more, Petitioners make a hash of the statutory text, randomly plucking the terms "commerce," "seamen," and "railroad" from materials that have nothing in common with the FAA. They also advance a misreading of *Saxon* and concoct an entirely unworkable, veritably unlimited rule.

A. Petitioners' Interpretation of § 1 Cannot Be Squared with the Exemption's Text.

1. Petitioners begin their textual argument discussing the phrase "engaged in commerce," *see* Pet. Br. 5 n.1, 16-21, claiming that "*anyone* engaged in foreign or interstate transportation was 'engaged in commerce'" and thus that any "class of workers engaged in interstate transportation" qualifies for the exemption. *Id.* at 16-17 (emphasis added). That argument goes too far.

Off the bat, Petitioners' interpretation directly conflicts with this Court's decisions in *Circuit City* and *Saxon*. In *Circuit City*, the Court held that § 1's "engaged in interstate or foreign commerce" language did *not* signal a "congressional intent to regulate to the outer limits of [Congress's] authority under the Commerce Clause" but was "understood to have a more limited reach." 532 U.S. at 115-16. And in *Saxon*, the Court stressed that "seamen" and "railroad employees," read together with "engaged in foreign or interstate commerce," limits § 1's scope to only those transportation workers who "play a direct and 'necessary role in the free flow of goods' across borders." 596 U.S. at 458. The Court has thus repeatedly rejected Petitioners' argument that "*anyone*" engaged in foreign or interstate transportation is covered by § 1. *See id.* at 460-61.

Petitioners' supposedly supporting cases (Pet. Br. 18-19) are inapposite. Almost all concern whether *States* could regulate conduct "directly connected with foreign or interstate commerce" under the Dormant Commerce Clause. *See Caldwell v. North Carolina*, 187 U.S. 622, 624-26 (1903) (whether state tax was an impermissible tax on interstate commerce); *Crenshaw v. Arkansas*, 227 U.S. 389, 395-97 (1913) (whether state licensing requirement improperly "imposes a direct burden" or "affect[s] interstate commerce"); *Kansas City v. Seaman*, 160 P. 1139, 1141 (Kan. 1916) (laundry service between Missouri and Kansas was interstate commerce that city could not tax).[2] And

[2] Petitioners' reliance on *United States v. Simpson* and *Wilson v. United States* is similarly misplaced as those cases show only that Congress can regulate interstate transportation. (continued)

they embrace a view of the Commerce Clause that this Court has already held is broader than § 1. *See Circuit City*, 532 U.S. at 115-16. Moreover, that line of Dormant Commerce Clause cases has been "expressly disavowed" by this Court as reflecting an overly broad view of the Commerce Clause in general—one that does not, and cannot, fit *Circuit City*'s more limited construction. *See United States v. IBM Corp.*, 517 U.S. 843, 851 (1996) (discussing how Court has "expressly disavowed" this line of cases).

Petitioners' attempts (Pet. Br. 19-21) to cast this Court's occasional, isolated uses of the phrase "engaged in commerce" as precedent on which Congress relied are equally unpersuasive. In each cited case, the Court was *not* interpreting the phrase "engaged in commerce," let alone § 1. The Court was merely using "engaged in commerce"—typically only once, if at all—as an incident of speech.[3] That is not

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Simpson, 252 U.S. 465, 466 (1920); *Wilson*, 232 U.S. 563, 567 (1914).

[3] *See Ayer & Lord Tie Co. v. Kentucky*, 202 U.S. 409, 411, 423 (1906) (applying common law "home rule" and using the phrase incidentally); *The Abby Dodge v. United States*, 223 U.S. 166, 172-73, 176-77 (1912) (holding that Congress could regulate in foreign waters, and using the phrase "engaged in foreign commerce" only once as incidental speech); *Kirmeyer v. Kansas*, 236 U.S. 568, 572-73 (1915) (applying now-rejected Dormant Commerce Clause analysis in connection with liquor and using the term "engaged in commerce" only once and incidentally); *Rearick v. Pennsylvania*, 203 U.S. 507, 511 (1906) (same but considering transport of brooms across state lines); *Wagner v. City of Covington*, 251 U.S. 95, 103 (1919) (same but considering transport of drinks); *Rossi v. Pennsylvania*, 238 U.S. 62, 65-66 (1915) (same but for a merchant who transported liquor interstate, never uses the phrase "engaged in commerce").

"relevant judicial precedent" (Pet. Br. 21) at all, much less the kind of "settled," "consisten[t]," precedential consensus against which Congress can be understood to act. *Cf. Edelman v. Lynchburg Coll.*, 535 U.S. 106, 116-17 (2002).

Finally, Petitioners' "engaged in commerce" analysis cannot control the meaning of the residual clause or else the terms "seamen" and "railroad employees" would do no real textual work. By giving the residual clause "its broadest application"—anyone involved in the interstate transportation of goods—Petitioners effectively render "the prior enumeration[s] superfluous." Scalia & Garner, READING LAW at 199-200. That runs afoul of the *ejusdem generis* canon, *see id.*, the canon against superfluity, and *Circuit City*'s instruction that the residual clause should "*give effect* to the terms 'seamen' and 'railroad employees.'" 532 U.S. at 115 (emphasis added). If Congress had really meant to exclude "all workers involved in interstate transportation," it would have said that. Why specifically enumerate "seamen" and "railroad employees" unless it was focused on a more meaningful commonality? *See id.*

2. Petitioners' arguments about the term "seamen" suffer from similar defects. Petitioners cite dictionaries, newspaper articles, organized labor concepts, and cases and statutes using the term "seamen" in wildly varying contexts to claim that "everyone who worked aboard a boat—regardless of who they worked for—was a seaman." Pet. Br. 22. This approach ignores the context in which that word appears, § 1's history and purpose, the statutory frameworks against which Congress was legislating,

and *Saxon*—all of which demonstrate that "seamen" carries a narrower meaning. *See supra* Part I.

Petitioners' argument that "seamen" can have a broad meaning proves only the unremarkable proposition that the term has different meanings in different contexts. *See, e.g.*, *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259-60 (1922) (reading "seaman" broadly in light of remedial purpose of "unseaworthy" doctrine); *McCullough v. Jannson*, 292 F. 377, 378 (9th Cir. 1923) (applying the term broadly to satisfy the Jones Act's remedial purpose); *Tucker v. Alexandroff*, 183 U.S. 424, 445 (1902) (interpreting the merchant seaman concept broadly in light of treaty obligations regarding deserting naval officers of foreign ships). Where a word "takes on different meanings depending on context," courts must look "to the statute and the surrounding scheme … to determine the meaning Congress intended." *Dubin v. United States*, 599 U.S. 110, 118 (2023). Petitioners make no attempt to do so here.

The Marine Hospital Service Act, for example (Pet. Br. 27), expressly defined "seaman" broadly, and it did so *only* for "legislation relating to the marine hospital service" in view of its statutory purpose: generating revenue to establish marine hospitals. Act of Mar. 3, 1875, ch. 156, §§ 2, 3, 6, 18 Stat. 485, 485. Similarly, the Jones Act (Pet. Br. 27) has long been "liberally construed" to attain its "remedial" end for tort liability. *See The Arizona v. Anelich*, 298 U.S. 110, 123 (1936). Even there, however, "[t]he inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991). And it is neither

surprising nor illuminating that labor organizers defined the seamen's union broadly to recruit more members and increase their bargaining power. *See* Pet. Br. 28. As explained above, the relevant statutory framework against which § 1 was enacted used "seamen" to refer to workers in the maritime shipping industry. *See supra* 4-6, 16-18, 23-25.

Petitioners also wrongly describe the shipping industry. Pet. Br. 23-24. Vessel ownership does not, without more, determine whether the vessel is selling maritime transportation services. For example, Petitioners cite Benjamin W. Labaree *et al.*, AMERICA AND THE SEA: A MARITIME HISTORY (1998), for the proposition that Ford Motor used its own ships to transport its autos. But the author notes that Ford Motor was "carrying automobiles *and general cargo* between the U.S., Cuba and South America." *Id.* at 527 (emphasis added). In other words, Ford appears to have been using space on its ships for itself *and* selling space to others—a partial charter. Partial charters were not unusual then and are not unusual now, *see, e.g.*, *Luckenbach v. W.J. McCahan Sugar Ref. Co.*, 248 U.S. 139, 150 (1918); *Grand Famous Shipping Ltd. v. China Navigation Co.*, 45 F.4th 799, 802 (5th Cir. 2022), and they entail the sale of maritime transportation services regardless of who owns the boat.

Petitioners' lumber schooner example also illustrates the point. In the nineteenth and early twentieth centuries, shipping associations created by lumbermen invested together in lumber schooners—which were ships designed to haul lumber, like an "ore ship" is designed to haul iron ore. *See* Paul S. Taylor, THE SAILORS' UNION OF THE PACIFIC 163 (1923). But

those schooners engaged in coastwise trade as merchant vessels, providing a transportation service to those willing to pay the freight. *See, e.g.*, *Leonard v. William G Barker Co.*, 214 F. 325, 326 (D. Mass. 1914); Labaree, AMERICA AND THE SEA at 367 (discussing how the lumber schooners were active all along the East Coast).

Several of Petitioners' other examples likewise appear to refer to vessels that were actually selling or chartering transportation services; still others are ambiguous on that score or concern vessels outside the maritime shipping industry, such as those that were used as an incidental part of a different business.[4] And Petitioners' fishing authorities are simply off-point;[5] as explained above, fishermen, whalers, and yachtsmen have long been distinguished from "seamen" in the maritime shipping industry. *See supra* 16-18, 23-25.

3. Petitioners' attempt (Pet. Br. 29-32) to broaden the term "railroad employees" is similarly misplaced. When the FAA was enacted, "[a] 'railroad company,' in

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[4] *See, e.g.*, *Ayer*, 202 U.S. at 410-11 (indicating that the tie company had a separate shipping charter for boats and engaged in coastwise trade); *Ellis v. United States*, 206 U.S. 246, 257-60 (1907) (Eastern Dredging Company was selling its services to a public works project of the United States); *W. Kentucky Coal Co. v. Parker's Adm'r*, 17 S.W.2d 753, 753 (Ky. 1929) (providing no information other than towboat's ownership); *Bos. Marine Ins. Co. v. Metro. Redwood Lumber Co.*, 197 F. 703, 707 (9th Cir. 1912) (same).

[5] *See, e.g.*, *The S.L. Goodal*, 6 F. 539, 542 (D. Conn. 1881); Bureau of Fisheries, REPORT OF THE COMMISSIONER OF FISHERIES FOR THE FISCAL YEAR 1906 & SPECIAL PAPERS, THE FISHERIES IN ALASKA 14-15.

ordinary usage, [was] a company which is principally engaged in operating a railroad." *Sisk v. White Oak Lumber Co.*, 14 F.2d 552, 553 (W.D. Va. 1926). "[L]umber companies, mining companies, and quarry companies, which operate[d] railroads as incidental to their chief business, [were] not referred to as railroad companies." *Id.*; *see also E&W Lumber Co. v. Rayley*, 157 F. 532, 535 (9th Cir. 1907) (holding that a corporation operating a private rail system in support of its logging business was not a railroad company for purposes of a common law doctrine addressing negligence claims against railroads).[6]

The vast majority of federal statutes governing railroads, including the railroad-related alternative dispute resolution schemes, applied only to railroads that sold transportation services. *See, e.g.*, Adamson Act of 1916, Pub. L. No. 64-252, 39 Stat. 721, 721 (extending protections to "employees who are now or may hereafter be employed by any common carrier by railroad"); *see also* The Hours Services Act of 1907 Pub. L. No. 59-274, 34 Stat. 1415, 1415-16 (similar); *see generally supra* 25-27. Indeed, Petitioners effectively admit in a footnote that the relevant federal statutes governing railroad workers "applied only to public

[6] *See also, e.g.*, *J. Ray Arnold Lumber Co. v. Carter*, 108 So. 815, 819 (Fla. 1926) (holding that lumber company operating an ordinary log road or tram road does not constitute a "railroad company"); *Railey v. Garbutt*, 37 S.E. 360, 360 (Ga. 1900) (presumption of negligence that applied to "railroad companies" did not apply to defendant sawmill corporation operating a private, dedicated rail); *McKivergan v. Alexander & Edgar Lumber Co.*, 102 N.W. 332, 334 (Wis. 1905) (lumber corporation operating private rail was not a "railroad company").

railroads," or, more accurately, to commercial lines. Pet. Br. 30 n.11.

Petitioners' supposedly contrary authority is inapposite. *Parris v. Tennessee Power Co.*, 188 S.W. 1154 (Tenn. 1916), on which Petitioners rely (Pet. Br. 30 n.11), admits that "[a] railroad company *ordinarily* means a commercial line," before adopting a broader definition due to the particular "reasons of the statute" at issue—a Tennessee statute with a broad equitable purpose of ensuring payment for work performed constructing any rail line. *Id.* at 1155 (emphasis added). The vast majority of Petitioners' other cited cases concern the construction of state remedial statutes where the state court purposefully chose a broad interpretation of "railroad" based on the statute's specific purpose.[7] Even then, those courts often acknowledged the distinction between railroad

[7] *See Woodward Iron Co. v. Thompson*, 88 So. 438, 439 (Ala. 1921) (plaintiff seeking to recover "damages for an [employment] injury"); *Homochitto Lumber Co. v. Albritton*, 96 So. 403, 403 (Miss. 1923) (same); *Stewart v. Blackwood Lumber Co.*, 136 S.E. 385, 386 (N.C. 1927) (same); *Morgan v. Grande Ronde Lumber Co.*, 76 Or. 440, 443-44 (1915) (same); *J.J. Newman Lumber Co. v. Irvin*, 79 So. 2, 3 (Miss. 1918) (same). Petitioners also cite a string of cases where courts use the term "railroads" in contexts that shed no light on the definition of "railroad employees." *See* Pet. Br. 30 (citing, *e.g.*, *Aluminum Co. of Am. v. Ramsey*, 222 U.S. 251 (1911) (considering Fourteenth Amendment challenge to state law that distinguished between railroad and other companies); *Tower Lumber Co. v. Brandvold*, 141 F. 919 (8th Cir. 1905) (holding defendant lumber company that owned railroad not liable for employee's injury); *Dayton Coal & Iron Co. v. Dodd*, 188 F. 597, 604, 609 (6th Cir. 1911) (because plaintiff "was being transported by the defendant [on the coal rail] as an incident of his employment [in the coal industry]," there was a master-servant relationship, not carrier-passenger).

companies and companies that happen to operate private railroads in service of their own business. *See, e.g.*, *Schus v. Powers-Simpson Co.*, 89 N.W. 68, 69 (Minn. 1902) (defendant was "*not* organized as a railroad company" and did not sell rail service but was subject to the fellow servant rule (emphasis added)); *Jackson v. Ayden Lumber Co.*, 74 S.E. 350, 351 (N.C. 1912) (considering whether fellow servant rule extends "to employees of a lumber company"). These cases do not inform the § 1 exemption—which, in contrast to those laws' broad remedial purposes, is to be given a "narrow construction," *Circuit City*, 532 U.S. at 115—or undercut the transportation industry commonality between seamen and railroad employees.

4. In all events, to the extent there are differences between how the maritime shipping industry and railroad industry define themselves, those differences would not preclude application of the *ejusdem generis* principle. *See, e.g.*, *Christopher*, 567 U.S. at 163-65 (applying *ejusdem generis* to accommodate the "unique regulatory environment within which pharmaceutical companies must operate"). At most, any such differences are inherent in the modes of transportation themselves—indeed, in the differences between sea and land. For example, since ancient times, seamen have been understood to "owe their allegiance to a vessel and not solely to a land-based employer"; thus, the "nature of the vessel" can bear on whether one is a seaman. *Wilander*, 498 U.S. at 347, 356. Similarly, because seas are open but rails are fixed, concepts like charter vessels for non-standard routes do not map neatly onto the railroads, which operate set routes on fixed lines. These sorts of

tradition-based and mode-based differences in sea and rail transportation do not change the fact that § 1 "seamen" work in the maritime shipping industry and § 1 "railroad employees" work in the rail transportation industry.

In short, the *ejusdem generis* doctrine "does not specify that the court must identify the genus that is at the lowest possible level of generality. The court has broad latitude in determining how much or how little is embraced by the general term." Scalia & Garner, READING LAW at 207. To draw the line, courts should be guided by "the evident purpose of the provision," and the need to avoid a commonality so broad that it renders the more specific terms "pointless." *Id.* at 208-09. Petitioners' reading ignores both of those principles, disregarding § 1's purpose and rendering Congress's enumeration of "seamen" and "railroad employees" meaningless.

B. *Saxon* Does Not Support Petitioners' Reading of § 1.

Unable to support their position with § 1's text, history, or purpose, Petitioners cling to a few lines from *Saxon*. *See* Pet. Br. 33-35. But *Saxon* concerned a worker who was indisputably engaged in a transportation industry. The portion of the opinion Petitioners cite holds only that workers *within the transportation industry* must actually engage in transportation work. And the Court's broader analysis supports the Second Circuit's interpretation of § 1.

1. One need only review *Saxon*'s caption to know that it did not address—much less decide—the question here. The plaintiff's name was Latrice

Saxon. The defendant? Southwest Airlines, a company "in the business of moving people and freight." Pet.App.48a. Southwest Airlines is in the air transportation industry. And it goes without saying that strikes or other disruptions involving airline industry workers would profoundly disrupt the Nation's transportation infrastructure. Indeed, for that reason Congress amended "the Railway Labor Act in 1936 to include air carriers and their employees" in the same dispute resolution scheme that governs railroad companies and their employees. *Circuit City*, 532 U.S. at 121 (citing 49 Stat. 1189, 45 U.S.C. §§ 181-188); *see supra* 26-27.

2. The portions of *Saxon* on which Petitioners rely speak only to the distinct question whether all workers in the air transportation industry fall within § 1. *Saxon*, 596 U.S. at 455-56. "Saxon argue[d] that because air transportation '[a]s an industry' is engaged in interstate commerce, 'airline employees' constitute a 'class of workers' covered by § 1." *Id.* at 455 (quoting Resp. Br. 17). "Southwest, by contrast, maintain[ed] that ... the relevant class ... includes only those airline employees who are actually engaged in interstate commerce in their day-to-day work." *Id.* at 455-56 (quoting Reply Br. 4). The Court "rejected Saxon's industrywide approach" and declined to adopt an industrywide exemption. *Id.* at 456.

Rejecting the argument that *all airline employees* are covered by § 1 says nothing about workers *outside* the air transportation industry. As the Second Circuit recognized, "the distinctions drawn in *Saxon*" simply "do not come into play" where a class of workers is engaged in an entirely different industry. Pet.App.48a. Put differently: *Saxon* held that

working in the transportation industry is not *sufficient* for the § 1 exemption. That holding does not answer the question here: whether working in the transportation industry is *necessary* for § 1. *See Saxon*, 596 U.S. at 458 (recognizing that "transportation workers" "must *at least* play a direct and 'necessary role in the free flow of goods' across borders" (emphasis added)). Indeed, the Court's observation that Saxon's § 1 status was "based on what she does *at Southwest*, not what Southwest does generally" suggests that work in the transportation industry *is* necessary. *Id.* at 456 (emphasis added). Far from making the employer's identity irrelevant by saying that § 1 status turns on "what [Saxon] does," full stop, the Court foregrounds it, presupposing Saxon's work in a transportation industry.

3. The *Saxon* Court's remaining analysis reflects the same text- and history-based framework that yields the transportation industry principle. In particular, *Saxon* recognized that the "engaged in commerce" language Congress chose for § 1 has a well-known "narrower" meaning that does not reach "the outer limits of [Congress's] authority under the Commerce Clause." *Id.* at 457-58. It then proceeded to "appl[y] the *ejusdem generis* canon," which "counsel[s] that the phrase '"class of workers engaged in ... commerce"' should be 'controlled and defined by reference' to the specific classes of '"seamen"' and '"railroad employees"' that precede it." *Id.* at 458 (quoting *Circuit City*, 532 U.S. at 115). As explained above, that analytical framework compels the conclusion that workers *not* engaged in the maritime shipping industry or another transportation industry are *not* covered by § 1.

For that reason, it was unsurprising that Saxon's counsel (Petitioners' counsel here) conceded that point during oral argument. In particular, when asked whether her "test [would] apply to any company that engages in the … shipment or transportation of people or goods across state lines," or more specifically to "a company that ships most of its products across state lines to consumers," she answered that people working for such a company "likely … wouldn't be exempt from the statute here." Tr. of Oral Arg. at 56:22-25, 57:12-14, 58:5-6, *Saxon*, 596 U.S. 450 (No. 21-309). As she correctly recognized, "in 1925 ... railroad employees and seamen were really people who worked in industries that shipped goods for the public." *Id.* at 57:23-58:1; *see also id.* at 61:11-21 (suggesting that department store workers who transport goods for their stores "are likely not exempt," and drawing a "distinction … between railroads that shipped things for the public … and say … a coal company's internal railroads").

Petitioners understandably seek to distance themselves from those concessions. *See* Pet. Br. 32-33 n.14. And to be clear, Flowers recognizes that lawyers can take different positions for different clients and that concessions by the plaintiff in *Saxon* do not bind Petitioners here. But those concessions are relevant—regardless of the lawyer who made them—for at least three reasons. First, they highlight the distinction between the industry-based argument the plaintiff pressed in *Saxon* and the argument Flowers advances here. Second, they underscore that, by ruling for the plaintiff in *Saxon*, this Court did not understand itself to be opening the floodgates for § 1 litigation outside the transportation industry. *See* Tr.

of Oral Arg. at 58:7-8, *Saxon*, 596 U.S. 450 (No. 21-309) (making the "transportation industry" point in the process of reassuring the Court that the rule for which she was advocating "really … is still quite a narrow category"). And third, they happen to be correct. *See supra* Part I.

C. Petitioners' Counterintuitive Reading of § 1 Yields an Unworkable Rule That Undermines Rather Than Advances the FAA's Purpose.

1. Beyond its textual shortcomings, Petitioners' suggestion that courts ignore the worker's industry makes no sense as a practical matter. Indeed, the inference that a "transportation worker" must work in a "transportation industry" is so obvious that almost all post-*Circuit City* cases regarding § 1—including both of this Court's subsequent cases—involve transportation industry workers. *See New Prime*, 139 S. Ct. 532 (commercial trucking company); *Saxon*, 596 U.S. 450 (commercial airline).

But a decision adopting Petitioners' rule will open the floodgates. In the modern economy, virtually all products move in interstate commerce at some point. And almost every business must at least occasionally transport people or goods, or load or unload goods, in the sales process. Petitioners' reading of § 1 would fundamentally transform the "narrow" exemption the Court described in *Circuit City*, 532 U.S. at 118, into a gaping hole that could nullify otherwise valid arbitration agreements in all manner of employment contracts nationwide. It would deprive workers who transport goods or people interstate (or even those who load or unload goods before or after an interstate

trip) of the "efficient dispute resolution" mechanism that Petitioners agree the FAA "is designed to promote." Pet. Br. 16, 37. And it would yield a whole new wave of litigation about which classes of non-transportation-industry workers fall under § 1.

The few times courts have considered the applicability of § 1 to workers outside the transportation industry illustrate just how broadly Petitioners' rule would sweep. Consider, for example, a newspaper-company employee who delivers out-of-state papers and related advertisements to local customers. *Reyes v. Hearst Commc'ns, Inc.*, No. 21-cv-3362, 2021 WL 3771782 (N.D. Cal. Aug. 24, 2021). Or a franchisor's employees delivering ingredients to in-state franchisees. *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023). Or even a "pizza delivery person who deliver[s] pizza across a state line to a customer in a neighboring town." *Hill*, 398 F.3d at 1289-90.

If this Court adopts Petitioners' interpretation, cases involving retail sales chains, franchised restaurants, product manufacturers, and delivery drivers are only the beginning. Given *Saxon*'s holding that loading or unloading cargo counts as transportation work, 596 U.S. at 457, cases involving grocery store employees, pet store employees, and any other retail workers who help unload products as they arrive will invariably follow. If the residual clause extends outside the transportation industry (as Petitioners argue) and if cargo unloading qualifies as engagement in interstate commerce (as *Saxon* held), many of those workers will suddenly find themselves categorized as "transportation workers"—and unable to arbitrate under the FAA.

2. To be sure, there may be other reasons why at least some of those workers may fall outside the § 1 exemption. *See* BIO 23-24 (identifying several such reasons in this case). Some, like Petitioners, may not have "contracts of employment." *See, e.g.*, *D.V.C. Trucking Inc. v. RMX Glob. Logistics*, No. 05-cv-705, 2005 WL 2044848, at *2 (D. Colo. Aug. 24, 2005). Others, again like Petitioners, may have job descriptions that are sufficiently heavily weighted to non-transportation tasks, such as sales or marketing, that they are not "engaged in … interstate commerce" for purposes of § 1. *See, e.g.*, *Veliz v. Cintas Corp.*, No. C 03-1180, 2004 WL 2452851, at *7 (N.D. Cal. Apr. 5, 2004), *modified on reconsideration on other grounds*, 2005 WL 1048699 (N.D. Cal. May 4, 2005). And still others, yet again like Petitioners, may have insufficient connections to interstate commerce. *See, e.g.*, *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 916 (N.D. Cal. 2020).

These inquiries, however, are typically far more fact-intensive than the question whether a worker is within the transportation industry at all. *See, e.g.*, *Singh v. Uber Techs., Inc.*, 939 F.3d 210, 226 (3d Cir. 2019) (remanding for discovery on such questions); *Aleksanian v. Uber Techs., Inc.*, No. 22-cv-98, 2023 WL 7537627, at *4 (2d Cir. Nov. 14, 2023) (same, citing *Singh*). This case proves the point. The District Court initially held that Petitioners were outside the scope of § 1 because they "are more akin to sales workers or managers … than they are to traditional transportation workers like a long-haul trucker, railroad worker, or seaman." Pet.App.114a (internal quotation marks omitted). But the Second Circuit opted to affirm "on the *more straightforward ground*

that the [Petitioners] do not work in a transportation industry." Pet.App.51a (emphasis added). In so doing, the court avoided questions regarding the intrastate nature of Petitioners' work. Pet.App.49a n.5 (recognizing that Petitioners "never leave the state of Connecticut" but declining to decide whether "the interstate element of the exclusion" is satisfied). If any connection the products Petitioners carry have to interstate commerce is even arguably enough to satisfy § 1, that, too, will require a fact-intensive inquiry.[8]

The Second Circuit's transportation industry rule was more "straightforward" not because the panel was employing some sort of talismanic "price-structure-and-revenue test" (Pet. Br. 2), but because the nature of a company's business and its sources of revenue are common-sense markers of whether a company is in the transportation industry. To be sure, the Second Circuit acknowledged that its "approach is not a universal solvent," and that there may be hard cases. Pet.App.51a. But it is readily apparent that Independent Distributors for a baked goods company

[8] If this Court rejects the transportation industry rule, it should affirm on any of the alternative grounds raised in Flowers' Brief in Opposition to Certiorari: that Petitioners lack contracts of employment, that their role as franchise businesses owners precludes § 1's application, that they are not engaged in interstate transportation, and that the arbitration agreements are enforceable under state law. *See* BIO 23-24. At the very least, it should hold that engagement in the transportation industry is at least *relevant* to the § 1 analysis, *see, e.g.*, *Singh v. Uber Techs., Inc.*, 67 F.4th 550, 557 (3d Cir. 2023); *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005), and remand for the Second Circuit to apply that standard and address the other outstanding issues.

like Flowers work outside the transportation industry. *Contra* State of Illinois Amicus Br. 4-15 (arguing that the transportation industry inquiry may be complicated in some cases, without acknowledging the greater complexity of other inquiries it will frequently pretermit).

In short, Flowers has no quarrel with Petitioners' statement that "application of the FAA" should not turn on "difficult, fact-intensive threshold questions." Pet. Br. 37. But it is actually Petitioners' unbounded expansion of the FAA's heretofore "narrow" exemption that brings that result about—in this case and generally—by foreclosing the Second Circuit's "more straightforward," statutorily supported path.

CONCLUSION

The decision below should be affirmed.

December 13, 2023

Respectfully submitted,

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