

No. 23-51

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IN THE  
**Supreme Court of the United States**

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NEAL BISSONNETTE, et al.,

*Petitioners,*

v.

LEPAGE BAKERIES PARK ST., LLC, et al.,

*Respondents.*

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

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**BRIEF FOR *AMICUS CURIAE*  
INDEPENDENT BAKERS ASSOCIATION  
IN SUPPORT OF RESPONDENTS**

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## **STATEMENT OF INTEREST**<sup>1</sup>

The Independent Bakers Association (“IBA”) is a national trade association of more than 200 family-owned bakeries and related companies and trade groups in the baking industry. The association was founded in 1968 to protect the interests of independent manufacturers of baked goods.

Manufacturers of baked goods, including IBA members, often contract with independent wholesale distributors who purchase the manufacturers’ products and sell them to retailers for a profit. The distributor agreements that govern these relationships often include arbitration provisions that allow the parties to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation.

IBA and its members therefore have a significant interest in the proper interpretation of the Federal Arbitration Act (“FAA”). IBA respectfully submits this brief to offer its unique perspective into the business models, practices, and agreements that are typical in the baking industry.

## **SUMMARY OF ARGUMENT**

Petitioners attempt to shoehorn themselves into the FAA’s transportation-worker exception by claiming that they are “commercial truck drivers” who “sell their driving services to a manufacturer” of baked goods. Pet. Br. 37; *see id.* at 1, 2, 8, 10, 12, 14,

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the brief’s preparation or submission.

16, 37, 38 (“commercial truck drivers”). The record and established practices in the baking industry refute this characterization of petitioners’ roles.

Petitioners are wholesalers, not truck drivers. They own businesses that purchase baked goods from a manufacturer (Flowers Foods, or “Flowers”) and sell those goods to retailers, who in turn resell them to consumers. As middlemen in the supply chain, petitioners’ businesses earn profits based on the difference between the prices at which they buy products from Flowers and the prices at which they resell them to retailers, less their business expenses. Owners of wholesale distributorships, like petitioners, therefore aim to maximize sales and control expenses—and they risk losing money if sales slump or expenses rise. While delivering products may be part of what wholesale distributors do, they are ultimately in the business of selling goods to retailers, not selling transportation services to manufacturers.

Baked-goods distributors also differ from truck drivers because of the significant in-store work they perform. Many distributor contracts, including petitioners’, provide (for example) that the distributor should remove stale products from shelves, rotate products, and solicit retailers within their sales territories. Distributors must also exercise sound business judgment in ordering products, investing in equipment, and expanding their businesses, all at their own expense. These activities are not the work of a commercial truck driver.

In fact, the distributor agreements between petitioners’ businesses and Flowers do not require that petitioners drive a truck at all or personally engage in the physical distribution of their products. The agreements are business-to-business agreements,

which are typical in the industry, and they leave the owner of the distributorship business free to select which employees will perform which functions. Some owners of distributorships adopt a hands-off approach to their companies, while others—apparently including petitioners—are more involved in day-to-day operations. To the extent petitioners spend most of their time engaged in the physical distribution of their products, though, that is not true of all owners of wholesale distributorships.

These factual realities make clear not only that petitioners are not transportation workers, but also that their distributor agreements are not “contracts of employment.” 9 U.S.C. § 1. These business-to-business agreements provide for the *sale of goods*, both to distributors and by distributors. They are not contracts for the performance of personal services or individual work by the business owner.

Of course, most of this analysis is unnecessary if this Court affirms the Second Circuit, as it should. Petitioners do not dispute that they do not work in the transportation industry. The analysis becomes relevant only if the Court accepts petitioners’ position that individuals can fall within the FAA’s transportation-worker exception even if they do not work in the transportation industry—a position this Court should not adopt. Petitioners’ position would invite mini-trials on threshold, fact-intensive questions regarding the details of individual distributors’ day-to-day activities and their relationships with product manufacturers—defeating the purpose of arbitration. If the Court disagrees with the Second Circuit’s analysis, the Court should hew closely to the question presented and allow the lower courts to consider other reasons why petitioners—and



other wholesale distributors—may yet fall within the scope of the FAA.

## ARGUMENT

### I. Petitioners Are Wholesale Distributors, Not Commercial Truck Drivers.

Wholesale distributors play a critical role in the supply chain for baked goods, which typically includes three key participants: (1) manufacturers who make the products, (2) wholesalers who buy the products from manufacturers and sell them to retailers, and (3) retailers who sell the products to consumers. Flowers and other major manufacturers of baked goods rely on this business model, selling their products to wholesale distributors that, in turn, help bring those baked goods to market by reselling them to retailers for a profit.

Although they declare themselves “commercial truck drivers,” Pet. Br. 1, 2, 8, 10, 12, 14, 16, 37, 38, petitioners in fact operate at the second stage of the supply chain—they are the principals of franchise businesses that purchase baked goods from Flowers and resell them to retailers for a profit. Like other wholesale distributors of baked goods, petitioners differ from commercial truck drivers in at least four ways. *First*, they take title to the baked goods they purchase, and earn money by reselling those goods to retailers, not by selling transportation services to manufacturers or others. *Second*, wholesale distributors spend much of their time engaged in activities, including in-store sales and marketing and off-premises business management, that go far beyond driving a sales vehicle. *Third*, distributors rely on profit-oriented business judgment to run their businesses, which includes deciding how best to invest

their businesses' resources. *Fourth*, distributors typically enter into business-to-business agreements with manufacturers that do not require the distributor's principal or any particular individual to perform transportation or delivery services (or any other services)—the business owners retain full discretion to decide how to structure their businesses and need not drive trucks. For all of these reasons, petitioners belong to a “class of workers” properly described as wholesale distributors of baked goods, not commercial truck drivers. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022).

**A. Distributors Earn Money By Selling Baked Goods To Retailers.**

Petitioners, like other baked-goods distributors, are engaged in the sale of goods as wholesalers, not in the provision of transportation services to manufacturers or other third parties. Their business model involves buying products from manufacturers such as Flowers, taking title to the products, and then reselling them to retailers at a higher price. *See, e.g.*, JA 13–14 (§§ 2.1–2.3), 17–18 (§§ 4.1–5.1); *see also* JA 12–13 (“the parties desire” to authorize petitioners “to sell certain defined products within a territory or territories and otherwise operate the distributorship business hereunder”).<sup>2</sup>

Manufacturers of baked goods typically grant wholesale distributors the rights to sell and distribute their products within a specified territory and to use

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<sup>2</sup> Citations to the Distributor Agreements at issue are to the agreement with Bissonnette Inc. *See* JA 10. The same provisions are included in the Distributor Agreement with Blue Star Distributors Inc. *See* JA 76.

the manufacturer's trademarks and other proprietary materials in marketing the products. *See* JA 14 (§ 2.4), 17 (§ 3.2), 38 (§ 19.1). To further the parties' mutual interest in maximizing sales of the products, the manufacturer ordinarily makes available point-of-sale advertising materials, assists in facilitating promotions with retailers, and advertises the products in national or local media. *See* JA 28 (§§ 13.1–.2).

Wholesale distributors are not necessarily limited to selling products from a single manufacturer. Their agreements with manufacturers often permit them to increase their sales by distributing products purchased from other manufacturers, typically with a requirement that the products not compete with each other. *See, e.g., Urena v. Earthgrains Distrib., LLC*, 2017 WL 4786106, at \*6 (C.D. Cal. July 19, 2017) (Earthgrains distributor also engaged in distributing cookies manufactured by another company). Here, for example, petitioners' distribution agreements permit them to sell other products that do not compete with those of Flowers. JA 17–18 (§ 5.1).

Wholesale distributors of baked goods are *not* paid for providing transportation services to manufacturers or others. In fact, they are not paid by manufacturers at all. Rather, distributors make income from the *profits* they generate as wholesalers, *i.e.*, the difference between the prices at which they buy products from manufacturers and the prices at which they sell products to retailers, less the operating expenses of their businesses. JA 3–4, 17 (§ 4.1); Pet. App. 42a; *see Franze v. Bimbo Foods Bakeries Distrib., LLC*, 2019 WL 2866168, at \*2 (S.D.N.Y. July 2, 2019), *aff'd*, 826 F. App'x 74 (2d Cir. 2020). Distributors seek to profit from their sales, but—like any other sales-oriented business—they

may and sometimes do sustain losses as a result of their business decisions and market conditions (e.g., by ordering more product than they are able to sell to their retail customers). *See Carpenter v. Pepperidge Farm, Inc.*, 2023 WL 4552291, at \*5 (E.D. Pa. July 14, 2023), *appeal pending*, No. 23-2372 (3d Cir.).

Ultimately, petitioners and other wholesale distributors of baked goods are in the business of *selling products to retailers*. *See Carpenter*, 2023 WL 4552291, at \*8 (citing distributor for Pepperidge Farm products). Their earnings come from maximizing sales, controlling expenses, and managing business enterprises in which they make significant investments. *See Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74, 77–78 (2d Cir. 2020); *Franze*, 2019 WL 2866168, at \*4, \*9 (discussing wholesale distributors' strategies to maximize sales and profits and the management skills that are critical to their businesses). While those wholesale distributors who personally participate in the physical distribution of products to retailers may spend varying parts of their days operating sales vehicles, they do not sell transportation services and are not “commercial truck drivers.”<sup>3</sup>

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<sup>3</sup> The North American Industry Classification System—which is used by federal agencies to classify businesses and analyze data related to the U.S. economy—identifies Wholesale Trade as one sector of the economy (Sector 42) that includes businesses “engaged in wholesaling merchandise, generally without transformation, and rendering services incidental to the sale of merchandise.” OMB, *North American Industry Classification System* 307 (2022), [https://www.census.gov/naics/reference\\_files\\_tools/2022\\_NAICS\\_Manual.pdf](https://www.census.gov/naics/reference_files_tools/2022_NAICS_Manual.pdf). Distributors of bakery products are included in a subpart of that sector (#424490 – Other Grocery and Related Products Merchant Wholesalers).

**B. Distributors Engage In Sales  
And Marketing Work Inside  
Retailers' Stores.**

The activities of baked-goods distributors go far beyond driving trucks. Like other wholesalers, distributors of baked goods engage in sales and marketing work—much of which may take place inside the retailer's store.

One of a distributor's most important contractual obligations to a manufacturer is its agreement to use best efforts to develop its sales territory and maximize sales. Here, for example, petitioners' companies agreed to use "commercially reasonable best efforts to develop and maximize the sale of Products to [retailers] within the Territory and service the Territory in accordance with Good Industry Practice." JA 17–18 (§ 5.1).

The definition of "Good Industry Practice" reflects generally accepted standards of the baking industry and provides key information about the sales and marketing activities in which wholesale distributors are regularly engaged. It includes: (i) "maintaining an adequate and fresh supply" of the products being sold, (ii) "actively soliciting all [retailers] in the Territory not being serviced," (iii) "properly rotating all" products, (iv) "promptly removing all stale" products, (v) "maintaining proper service and delivery to all [retailers] in the Territory requesting service in accordance with [the retailers'] requirements," (vi) "maintaining all equipment in a sanitary condition and in good safe working order," and

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*Id.* at 330–31. By contrast, truck transportation workers are in a different sector (Sector 48). *See id.* at 371, 378 (describing Transportation sector and Truck Transportation subsector).

(vii) “operating the distributorship business hereunder in compliance with all applicable federal, state and local laws, rules and regulations.” JA 14–15 (§ 2.6). Distributors also seek to identify and engage new customers and develop relationships with key contacts at retail stores. JA 3 (§ 8); Pet. App. 42a, 102a; *see also Franze*, 2019 WL 2866168, at \*4 (noting independent operator’s direct dealings and relationships with store owners and store employees). The successful distributor spends time building relationships with store personnel and increases sales through communications regarding promotions and displays. JA 3 (§ 8); *Carpenter*, 2023 WL 4552291, at \*5; *Franze*, 2019 WL 2866168, at \*4.

A wholesale distributor’s in-store activities typically include product merchandising, *i.e.*, arranging the display of products on shelves, endcaps, and promotional displays in ways that appeal to consumers and stimulate sales. *See Carpenter*, 2023 WL 4552291, at \*5. A distributor may follow “planograms” developed by retailers (*i.e.*, schematics showing how products should be located and displayed on shelves), or it may decide to depart from them based on the distributor’s own sales experience and knowledge of the market and consumer preferences. *Id.* at \*6 (noting that distributors deviated from planograms based on consumer preferences for particular Pepperidge Farms products).

Therefore, if the owner of a distributorship chooses to personally engage in product distribution, *see infra*, Part I.D, a significant portion of his or her day will likely be spent in retailers’ stores interacting with store personnel, promoting products to retailers, requesting authorizations for displays and shelf

space, merchandising the products on the shelves, building seasonal or other promotional displays, and completing the sales. These in-store, off-the-truck activities are important and time consuming, require business judgment and skill—and have nothing to do with operating a motor vehicle. As the Second Circuit has observed, a successful wholesale distribution business requires more than the ability to drive a truck. *See Franze*, 826 F. App'x at 78. Wholesale distributors achieve success based “on their ability to increase sales, build customer relationships, effectively identify the popularity of different products, hire and train employees, and manage profits and losses.” *Id.*

**C. Distributors Rely On Business Judgment To Order Products, Manage Costs, And Consider Expansion.**

The owner of a distributorship business must develop and oversee the execution of business strategies to maximize sales and control expenses. These strategies include decisions regarding product ordering, hiring new workers, investing in equipment, and territory expansion. This is a significant part of the “work” in which a wholesale distributor is engaged, and it does not involve driving a truck.

Distributorship principals, either alone or with assistance from managers or operators they have retained, make product-ordering decisions to ensure that their retail customers have sufficient quantities of fresh products. *See Carpenter*, 2023 WL 4552291, at \*10. These decisions are based on knowledge of consumer preferences and involve the exercise of

judgment and sales strategy. *Id.*<sup>4</sup> A strategy of aggressive product ordering has the upside of potentially increased sales and profits but entails risk and the potential for loss if the wholesale distributor orders too much product which then goes stale. *Id.* at \*5.

Distributorship principals must also manage costs, such as by making decisions about how many employees to hire and which equipment to invest in. Additional employees may enable the business to leverage its sales and expand its reach, but will also increase expenses. And when deciding which equipment the business should invest in, the business owner must account for the needs, assets, sales, and growth trajectory of the business.

The business owner must also decide whether and how to expand the business. A distributorship business may begin with a single territory that the business owner will operate personally or retain someone else to handle. But as business within the territory grows or other territories and investment capital become available, the owner may decide to expand within the territory by hiring additional personnel or enter into new territories. *See, e.g., Carpenter*, 2023 WL 4552291, at \*2 (describing distributors' decisions to expand and restructure their businesses); *Urena*, 2017 WL 4786106, at \*2 (describing distributors' acquisition of additional sales areas and hiring workers to service them).

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<sup>4</sup> Good product-ordering decisions are critical to maximizing sales and controlling expenses. Preparing an order takes time. Distributors must choose from multiple product varieties and packaging options offered by the manufacturer and decide which kinds of products to order and the quantities of each.



These kinds of entrepreneurial decisions involve investments and risks that owners undertake with the goal—but not the guarantee—of increasing profits. If, for instance, the owner decides to expand the distributorship business, financial investments will be needed for additional sales vehicles and inventory. The business owner must likewise invest time and money in selecting and managing personnel to assist in the operation of the additional sales locations.

All of these decisions are integral to the operation of a wholesale-distributorship business and have a direct impact on the business's income. The resulting profits or losses are based on the principals' business judgment and management skills, not on collecting money for hauling goods in a truck.

**D. The Owner Of A Distributorship  
Need Not Drive A Truck At All.**

Agreements between manufacturers and wholesale distributors typically do not specify which of the distributor's personnel will perform which roles. Although it is possible for a distributor to be an individual or sole proprietor (and thus a direct party to the distributor agreement), more often than not, these wholesalers are corporations or limited liability companies.<sup>5</sup> Here, for example, Flowers contracted

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<sup>5</sup> Distribution agreements may or may not require the wholesaler to incorporate or form an LLC. See *Franze*, 2019 WL 2866168, at \*1 (independent operator elected not to form legal entity); *Carpenter*, 2023 WL 4552291, at \*2 (distributor for Pepperidge Farm products chose to operate multiple distributorships as sole proprietorships but to form an LLC for one). Where agreements do impose this requirement, it is a legitimate means of organizing operations and managing risks for *both* parties and is not (as petitioners suggest) a “shell” game. Pet. Br. 9.

with Bissonnette Inc. and Blue Star Distributors Inc., which are Connecticut corporations owned and managed by petitioners. It is these entities that are “Distributors” under the agreements, not the individual owners who merely guarantee performance of the obligations. JA 12, 15–16 (§ 2.10), 53 (Ex. F). These business-to-business relationships between manufacturers and wholesalers are the norm in the baking industry.

Under these arrangements, the individual owners of a wholesale-distribution company are *not* personally required to engage in the physical distribution of the products—or, for that matter, to perform any particular services at all. How distributorships are managed and operated is up to their owners. The principals of some wholesale distributors are “absentee” owners who are removed from day-to-day operations and may “hir[e] others to run their businesses entirely.” *Franze*, 826 F. App’x at 76–77, 79 (describing business activities); *Carpenter*, 2023 WL 4552291, at \*6. Others may “[o]verse[e]” their companies without personally engaging in the physical distribution of products to retailers. *Urena*, 2017 WL 4786106, at \*6. And still others may spend some of their time driving sales vehicles, as petitioners say they do. Pet. Br. 9.

Distributors are thus free to determine which individuals within their respective companies will be assigned to handle various tasks. *See Franze*, 826 F. App’x at 77; *Carpenter*, 2023 WL 4552291, at \*1, \*6; *Urena*, 2017 WL 4786106, at \*2. Petitioners’ own agreements exemplify this practice: The “Non-Personal Service” provisions make clear that the agreements do “not require” that any obligations “be conducted personally, or by any specific individual in

DISTRIBUTOR’s organization.” JA 33 (§ 16.2). If the principal of a wholesale distributorship chooses to operate a sales vehicle personally, the principal is free to do so, though driving from one store to another is likely to be less time-consuming—and certainly less significant—than the principal’s other business and in-store activities. *See supra*, Part I.B.

\* \* \*

In short, distributors of baked goods are fundamentally wholesalers, not commercial truck drivers. Baked-goods distributors’ sales-oriented business model, in-store work, business judgment and investment decisions, and business-to-business agreements with manufacturers demonstrate that the “work” these distributors are “engaged” to do is focused on selling the baked goods that they have purchased—which distinguishes them from truck drivers. *Saxon*, 596 U.S. at 456. Simply put, a wholesale distributor cannot make a living without buying and selling products; a transportation worker can and does.

## **II. Distributor Agreements Are Not “Contracts Of Employment.”**

In addition to showing that the owners of wholesale distributorships are not “transportation workers,” the analysis above confirms that business-to-business distributor agreements fall within the scope of the FAA for a different reason—they are not “contracts of employment” within the meaning of 9 U.S.C. § 1.

Distribution agreements such as those involved in this case are contracts between manufacturers and wholesale-distributorship businesses. The business

enterprise that is engaged in marketing and selling a manufacturer's products may be a corporation, LLC, or sole proprietorship, but regardless, the wholesale distributorship is a business.

Business-to-business distributor agreements are not "contracts of employment" because they do not promise work and compensation to an individual. See *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 596 (4th Cir. 2023); *R & C Oilfield Servs., LLC v. Am. Wind Transp. Grp., LLC*, 447 F. Supp. 3d 339, 347 (W.D. Pa. 2020); *Tillman Transp., LLC v. MI Bus. Inc.*, 2023 WL 4875872, at \*4 (E.D. Mich. July 31, 2023); *D.V.C. Trucking, Inc. v. RMX Glob. Logistics*, 2005 WL 2044848, at \*3 (D. Colo. Aug. 24, 2005). As one court put it, "businesses do not sign employment contracts with one another." *Shazor Logistics, LLC v. Amazon.com, LLC*, 628 F. Supp. 3d 708, 712 (E.D. Mich. 2022).

Instead, a product distribution agreement is a "contract for the sale of goods." *Heiman v. Bimbo Foods Bakeries Distrib. Co.*, 902 F.3d 715, 719 (7th Cir. 2018); see *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 775 P.2d 233, 236 (N.M. 1989); see also *Eureka Water Co. v. Nestle Waters N. Am., Inc.*, 690 F.3d 1139, 1148 (10th Cir. 2012) (explaining that "a distribution contract is a commitment by a manufacturer to sell products to a distributor with the expectation that the distributor will resell them to others"). Though wholesale-distribution agreements often involve services, the predominant nature and purpose of these agreements is a transaction in goods, and cases "overwhelming[ly]" apply the Uniform Commercial Code ("UCC") to these agreements rather than the common law applicable to services agreements. *Pepsi-*

*Cola Bottling Co. of Pittsburg v. PepsiCo, Inc.*, 431 F.3d 1241, 1255 n.7 (10th Cir. 2005); *see also Paulson, Inc. v. Bromar, Inc.*, 775 F. Supp. 1329, 1333 (D. Haw. 1991).<sup>6</sup> A distributor’s service obligations exist to increase demand for the sale of goods to retailers, and those service responsibilities are “meaningless” without the distributor’s purchases from the manufacturer or sales to the retailer. *WICO Corp. v. Willis Indus.*, 567 F. Supp. 352, 355 (N.D. Ill. 1983); *Heiman*, 902 F.3d at 719.

All of this confirms that a distributor agreement is not a “contract of employment,” providing an additional basis for concluding that the FAA governs petitioners’ agreements here—and further differentiating petitioners from commercial truck drivers.

### **III. The Decision Below Correctly Obviates The Need For A Fact-Intensive Analysis By Providing A Clear, Workable Rule.**

Although the preceding analysis establishes that petitioners are not “truck drivers” or transportation workers, that analysis is unnecessary if the Court agrees with the Second Circuit that the FAA’s transportation-worker exemption applies only to workers in the transportation industry who satisfy the requirements of *Saxon* and other precedents. Petitioners do not dispute the Second Circuit’s holding that they are not part of the transportation industry.

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<sup>6</sup> Similarly, precedents near in time to the passage of the FAA applied the UCC’s predecessor, the Uniform Sales Act, to transactions between manufacturers and distributors. *See Tidewater Oil Co. v. Spoerer*, 125 A. 601, 601–02 (Md. 1924); *E.E. Huber & Co. v. Lalley Light Corp.*, 218 N.W. 793, 793–95 (Mich. 1928).

Pet. App. 49a. Nor could they—it is clear from the distributor agreements in the record and the work in which the petitioners are actually engaged that petitioners are in the business of selling baked goods, not transportation services, and thus are not part of the transportation industry. *Id.* The Second Circuit’s “straightforward” approach will be sufficient to resolve many cases without the need for further analysis. *Id.* at 51a.

Clear rules are particularly important for cases, like this one, alleging that workers have been misclassified as independent contractors. It has become commonplace in these cases for plaintiffs to argue that they fall within Section 1’s transportation-worker exemption as a means of avoiding arbitration to which they have agreed. *See, e.g., Immediato v. Postmates, Inc.*, 54 F.4th 67 (1st Cir. 2022); *Franze*, 826 F. App’x 74; *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020); *O’Bryant v. Flowers Foods, Inc.*, 629 F. Supp. 3d 377 (D.S.C. 2022); *Osvatics v. Lyft, Inc.*, 535 F. Supp. 3d 1 (D.D.C. 2021); *O’Shea v. Maplebear Inc.*, 508 F. Supp. 3d 279 (N.D. Ill. 2020). Under petitioners’ position, the threshold question whether the plaintiffs are transportation workers would likely involve a fact-intensive mini-trial on matters related to the merits of the plaintiffs’ misclassification claims, *e.g.*, whether the plaintiffs are employed as “drivers” who are paid for the act of transporting the manufacturer’s goods or whether they are business owners engaged in the purchase, distribution, and sale of goods for a profit. In resolving these matters, a court would need to examine multiple issues, such as the details of the plaintiffs’ work, the relationship between the plaintiffs and the company, whether the plaintiffs are

individual workers or business enterprises, how (and for what) the plaintiffs are compensated, and whether the plaintiffs engage employees or contractors.

Only after conducting that analysis would the court determine whether to compel arbitration or decide that the case should proceed to litigation. Regardless of which result the court reaches, the purpose of the parties' agreement to arbitrate will have been frustrated: Adding a fact-intensive threshold determination to a potentially fact-intensive merits analysis is contrary to the strong federal policy favoring arbitration as an efficient means of resolving disputes. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (explaining that the purpose of the FAA is "to facilitate streamlined proceedings"); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasizing that Section 1 should not be interpreted in a manner that introduces complexity and uncertainty and breeds litigation); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (recognizing the intent of the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

The Second Circuit's holding that Section 1's exemption does not cover individuals outside the transportation industry helps alleviate this problem. This bright-line rule will allow courts in many cases to reach an early, efficient determination regarding the applicability of the FAA. Further, it prevents plaintiffs from self-adjudicating their status by declaring themselves transportation workers based on a limited selection of the tasks they perform. Contrary to petitioners' assertions that the "transportation industry" requirement is

“unworkable,” Pet. Br. 35, it will often be easy to conclude that plaintiffs are subject to the FAA. This Court should adopt the Second Circuit’s rule.

If the Court reaches a different conclusion, IBA respectfully requests that the Court hew closely to the question presented, without holding or suggesting that petitioners fall within the transportation-worker exemption—much less suggesting that *all* wholesale distributors in the baking industry fall within it. There are many reasons why petitioners and other distributors of baked goods would not be covered by the transportation-worker exception. For example, the business-to-business agreements at issue here are not contracts of employment. *Supra*, Part II. And it is far from clear that petitioners are engaged in the *interstate* transportation of goods: Like many wholesale distributors, Bissonnette Inc.’s and Blue Star Distributors Inc.’s sales territories are located entirely within a single State. Their product sales and the movement of the products they have purchased occur entirely within that State. Even if the products that they purchase from Flowers *originated* from outside the State, those products have already completed their interstate movement when petitioners take ownership of them. *See* Pet. App. 41a-42a; *Wallace*, 970 F.3d at 802 (“the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders”); *see also United States v. Yellow Cab Co.*, 332 U.S. 218, 233 (1947), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).<sup>7</sup>

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<sup>7</sup> Some wholesale distributors own or lease their own warehouse space, further negating the argument that there is a continuous flow of goods from the manufacturer to the retailer. *See, e.g., Gruma Corp.*, 2003 WL 25907509, at n.2 (NLRB Nov. 21, 2003).



**CONCLUSION**

The Court should affirm the judgment of the Second Circuit.

Respectfully submitted.

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