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 THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

State Cases

Federal Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

INTEREST OF *AMICUS CURIAE*

Amicus curiae California Employment Law Council ("CELC") files this brief in support of respondents Flowers Foods, Inc., *et al.*[1] CELC is a voluntary, non-profit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 80 private-sector employers in the State of California who collectively employ well in excess of a half-million Californians. CELC has participated as *amicus* in many of California's leading employment cases,[2] and several in this Court.[3]

Many members of *amicus* have arbitration agreements with some or all of their employees, and therefore have a significant stake in the outcome of this case. *Amicus*' experience with and expertise in the practical aspects of employment matters allow it

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* declares that no party or any counsel in the pending appeal either authored this brief in whole or in part, or made a monetary contribution to fund the preparation or submission of the accompanying brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the accompanying brief other than *amicus* and its members.

[2] *See, e.g.*, *Donahue v. AMN Servs., LLC*, 11 Cal. 5th 58 (2021); *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021); *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038 (2020); *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018); *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542 (2018).

[3] *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).

to assist this Court in evaluating the issues in this case.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Federal Arbitration Act covers the route salespersons at issue in this case. The FAA's exclusion of transportation-workers in its Section 1 does not apply.

The rule of construction adopted by the court of appeals is correct, for the reasons stated in the brief of respondent; Flowers is not a transportation company. Importantly, the court of appeal's analysis satisfies the two principles this Court has identified in construing the FAA: (i) that the Section 1 exclusion be construed narrowly, and (ii) that Congress in the FAA intended to move the parties to an arbitrable dispute out of court and into arbitration quickly, normally without threshold proceedings or discovery.

Alternatively, however, if this Court for some reason were inclined to disagree with the court of appeal's analysis, the judgment should be affirmed on other grounds. Numerous lower courts have considered cases similar to this one, in which products are shipped *inter*state, and only later delivered *intra*state. Where, as here, the products (whatever may be their point of origin) come to rest in a warehouse or distribution center, and only later are delivered intrastate, the intrastate delivery is not covered by Section 1's exclusion. Although the court of appeals did not rely on this method of analysis, the alternative ground for affirmance suggested here is properly before this Court.

ARGUMENT

Amicus CELC endorses the court of appeals' holding and reasoning, as briefly stated in Section I below. If, however, this Court for some reason were to disagree, the judgment should be affirmed on the alternative, and narrower, grounds shown in Section II, grounds that are properly before this Court.

I. Amicus CELC Endorses The Court Of Appeals' Holding And Reasoning

Amicus CELC supports, but will not here repeat or belabor, the arguments presented by respondent Flowers, *et al.*[4] *Amicus* simply underscores that the court of appeals' decision here gives effect to two core principles of this Court's FAA cases.

First, this Court repeatedly has emphasized that the FAA requires expeditious decision-making, not time-consuming detours into threshold issues that delay the adjudication of disputes on their merits. As Justice Ginsburg explained for the Court in *Preston v. Ferrer*, 552 U.S. 346 (2008), the FAA cannot abide "long delayed [threshold proceedings], in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Id.* at 357 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)); *accord Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (O'Connor, J., concurring) (avoiding a construction of the FAA that would "foster

[4] For simplicity, this brief refers to respondents collectively as "Flowers," and to petitioners Neal Bissonnette and Taylor Wojnarowsky collectively as "Bissonnette."

prearbitration litigation that would frustrate the very purpose of the statute"). As this Court explained in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the transportation-worker exclusion in the FAA's Section 1 should not be construed in a way that "'breed[s] litigation from a statute that seeks to avoid it'"; that would "undermine[e] the FAA's proarbitration purposes." *Id.* at 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

The reasoning of the Second Circuit in this case was sound on many levels, as respondent Flowers demonstrated in its brief. The Second Circuit's rule also is easily administrable, and therefore most faithful to the obligation to avoid any FAA rule that "would . . . hinder speedy resolution of the controversy" on its merits. *Preston*, 552 U.S. at 358. Petitioner Bissonnette himself concedes in his brief that "It makes no sense to graft onto the FAA—a statute designed to promote efficient dispute resolution—a requirement that in many cases will be difficult . . . to apply." Br. for Petitioner at 16. The Second Circuit's test, however, is a model of simplicity.

If Congress wishes to create a more-convoluted test for FAA coverage, it of course can amend the statute to provide for that, as it did recently in the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, Pub. L. 117-90, 136 Stat. 28 (March 3, 2022), codified at 9 U.S.C. § 401 *et seq.* (carving out of the FAA "a case" that "relates to" a sexual-assault or sexual-harassment dispute, without defining the scope of the exclusion). Absent such further express congressional action, this Court

should endorse the Second Circuit's reasoned and readily administrable approach to determining at the threshold whether a claimant is covered by the FAA or not.

This Court's second core principle of FAA construction is that the transportation-worker exclusion to FAA coverage in 9 U.S.C. Section 1 should be narrowly construed. *Circuit City*, 532 U.S. at 118 (the FAA's context and purpose compel "a narrow construction"). The Second Circuit's test flows logically from the FAA's text, but if there were any doubt about the matter, the narrow-construction principle fully supports it. By contrast, as shown below, petitioner Bissonnette advances a sweeping theory, focused (as shown below) not on the *worker* but the *goods*, gutting the applicability of the FAA to anyone who in any way helps move any item that has ever crossed state lines. Bissonnette's theory cannot be reconciled with the "narrow construction" that this Court has held required.

The Second Circuit's analysis is faithful to this Court's rules of FAA construction, and its holding and reasoning should be affirmed.

II. Alternatively, This Court Should Affirm The Judgment On Narrower Grounds

Petitioner Bissonnette's brief espouses a far-reaching—and, as shown below, impossibly broad—rule. According to him, "anyone engaged in transporting interstate goods" is excluded from FAA coverage. Brief for Petitioner at 21; *accord id.* at 38 (anyone who "transport[s] interstate cargo"). Section A below exposes, with real-world examples, the overbreadth of the rule that Bissonnette proposes.

Section B then sets forth an alternative ground for affirming the court of appeals, if for some reason this Court were to decline to endorse the rule of law that the court of appeals relied upon.

A. Congress Could Not Possibly Have Intended The Transportation Exclusion To Cover Everyone Who In Any Way Moves Any Goods.

Consider the following real-world examples of work.

1. In the modern world, almost every item moves in interstate commerce at some point.

Almost every good or service implicates interstate activity in some way; "Today almost every object we buy has some component that comes from out-of-state." *In re Grice*, 974 F.3d 950, 958 (9th Cir. 2020). For example, in *Allied-Bruce*, 513 U.S. at 281, this Court found a nexus to interstate commerce in termite-eradication services in one single-family home in Alabama, reasoning that the multistate nature of the termite-eradication company and the use of termite-treating and house-repairing material that came from outside of Alabama were sufficient to determine that the transaction "involved interstate commerce," Economic activity rarely is cloistered within state lines.

2. Real-world examples illustrate as impossibly overbroad the rule petitioner Bissonnette proposes.

Consider two part-time jobs that one of the undersigned counsel held as a teenager: newspaper delivery worker and furniture deliverer. Under petitioner's proposed rule, he was a transportation-worker excluded from FAA coverage. Congress could not have so intended.

First, as a paperboy for the Palo Alto (Calif.) Times, undersigned counsel received at his home 60 newspapers to deliver to residents on his route. The newsprint came from trees grown in Washington, transported to a mill in Oregon, and turned into newsprint at a factory in Idaho. The newsprint then was delivered in rolls to the newspaper's print shop. There, the presses applied printer's ink, made in South Carolina, to create the words on the page. Undersigned counsel put the newspapers in a large canvas bag draped over his shoulders, and set off on his route on a bicycle, covering a total of two miles each day. He delivered each paper in the manner the subscriber designated, for some throwing it on the driveway, for others riding up the driveway to throw or place the paper on the subscriber's front doormat. In all cases the newspapers—the cumulative product of all sorts of goods shipped interstate—found their way to subscribers living in Palo Alto.

Later, undersigned counsel worked part-time as a handyman and delivery worker for a furniture store in the same town. Some duties had him sweeping floors and cleaning the storeroom. There, the store accumulated inventory from manufacturers in North

Carolina and other states. After tidying up the storeroom, he would move furniture items from the store into the store's station wagon (this was well before the days of SUVs) and drove them around town in personal deliveries to the customers who had ordered them from the storeroom.

These days, of course, many people read their newspapers online, and order furniture directly from manufacturers. So let us consider a more-modern example, one that became ubiquitous during the COVID pandemic: food-delivery workers. They take items such as pizzas (made using Wisconsin cheese, flour ground in Kansas, and onions grown in California) and hamburgers (made with Nebraska beef, tomatoes from Florida, and lettuce grown in Arizona), drive them short distances to customers' homes, and deliver and receive payment for meals.

Petitioner Bissonnette's theory is that all of these are transportation workers, because they were "engaged in transporting interstate goods." Brief for Petitioner at 21. But did Congress see such workers as "transportation" employees exempt from the FAA? Surely not. As the court of appeals held, such workers are not in the transportation *industry* at all; they are (respectively) in the newspaper business, the furniture business, and the restaurant business. But even if this Court were to disagree with the court of appeals' method of analysis, the same result follows for other reasons. The following section explains why.

B. The Court Of Appeals' Judgment Equally Can Be Affirmed Under A Different Theory: The *Inter*state Shipment Of Goods Ends When The Goods Come To Rest, And Only Later Reach Their Final Destination In A New And Different *Intra*state Delivery.

The lower-court cases are impossible to reconcile, but the better-reasoned cases point the way to an alternative theory that produces the same result as that reached by the Second Circuit. Subsection 1 below sets forth that theory; subsection 2 explains why the alternative theory is properly before this Court.

1. The FAA covers petitioner Bissonnette because he made wholly local deliveries within the State of Connecticut; the products he delivered (regardless of where they came from originally) had "come to rest" in a Connecticut warehouse.

a. The facts are undisputed.

Respondent Flowers' brief sets forth the undisputed facts (pp. 7-8), and petitioner Bissonnette does not dispute them in his own brief (p. 9). Respondents manufacture Wonder Bread and other packaged baked goods and ship them across state lines to regional warehouses, including the one in Connecticut at issue here. When the products come to rest in the regional warehouse, they are not earmarked or assigned for delivery to any specific

retailer, let alone a consumer. These interstate shipments are not at issue in this lawsuit.

Instead, the lawsuit focuses on what happens next: Petitioner Bissonnette, who runs a separately incorporated business, picks up, sells and delivers products to retailers such as Walmart, Target, and Safeway, entirely within Connecticut. The intrastate deliveries are functionally identical to those posited above: what the newspaper deliverer does on his or her bike, the furniture deliverer does in the station wagon, and the food-delivery workers do on their motorcycles. In each case, they take products that (wherever the products may have originated) are by then at rest, and deliver them—wholly intrastate—to local customers or consumers.

b. Such drivers do not become FAA-exempt by delivering, intrastate, goods that have come to rest in that state.

For example, Judge Barrett wrote for a unanimous Seventh Circuit panel rejecting a claim in such circumstances in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020). The plaintiffs were food-delivery drivers. Plaintiffs contended that they were exempt from the FAA because they carried goods that traced their origins to some other state; "A package of potato chips, for instance, may travel across several states before landing in a meal prepared by a local restaurant and delivered by a Grubhub driver; likewise, a piece of dessert chocolate may have traveled all the way from Switzerland." *Id.* at 802. Plaintiffs contended that the FAA's transportation-worker exclusion "is not so much

about what the worker does as about where the goods have been." *Id.*

But the district court granted summary judgment for Grubhub, and the Seventh Circuit affirmed. "[P]laintiffs' interpretation [of the FAA] would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport . . . . [T]he plaintiffs had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong. They did not even try [to] do that, so . . . the plaintiffs' contracts with Grubhub do not fall within" the FAA's transportation exemption." *Id.* at 802-03.

Rittman v. Amazon.com, Inc., 971 F.3d 904 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021), ruled for the plaintiffs on the FAA transportation-worker issue, but the Ninth Circuit's opinion drew a careful distinction between the facts of that case and those at issue here. Consumers bought items from Amazon, which were shipped interstate and then handed off immediately to local delivery drivers to complete the consumer's purchase. Importantly, the ultimate customer's identity was known at all times in the delivery process, and indeed from the moment the purchase was made on Amazon's website; Amazon simply transferred, for its own organizational convenience, responsibility to effectuate the final leg of the delivery. The critical fact was that the deliveries, "although intrastate, were essentially the last phase of a *continuous journey* of the interstate commerce," the final destination of which was known at the outset. *Id.* at 911 (emphasis added; citation and internal quotation marks omitted). Continuity of

delivery was the touchstone. ". . . Amazon packages do not 'come to rest[]' at Amazon warehouses, and thus the interstate transactions do not conclude at those warehouses. The packages are not held at warehouses for later sales to local retailers; they are simply part of a process by which a delivery provider transfers the packages to a different vehicle for the last mile of the packages' interstate journeys." *Id.* at 916.

The court's focus on the continuity of the delivery derived from cases under other statutes. For example, the court noted, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), held that the Fair Labor Standards Act did not apply to poultry workers who worked intrastate, even though the poultry came from out of state. As *Rittman* emphasized, "[the] poultry shipped from out of state 'came to rest' when [it] reached slaughterhouses"; "'The interstate transactions in relation to that poultry' ended at the slaughterhouse," and "the flow in interstate commerce had ceased." *Id.* at 916 (citations to *Schechter* omitted). *See also United States v. Yellow Cab*, 332 U.S. 218, 233 (1947) ("when local taxicabs merely convey . . . train passengers between their homes and the railroad station, . . . that service is not an integral part of interstate transportation," even though the train trip itself was interstate; passengers had other local-transportation options available to arrive at the station or leave the station after exiting the train).[5]

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[5] *Yellow Cab* was later overruled on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

Rittman also relied on a tax case, *People of State of New York ex rel. Pennsylvania Railroad Co. v. Knight*, 192 U.S. 21 (1904), in which this Court held that intrastate cab service was a local service subject to local taxation, even though the cabs carried passengers who had taken an interstate railroad trip. The transition from the railroad to the cab, in a trip paid separately, broke the chain of interstate travel. *Id*. at 28. In *Rittman*, similarly, the Ninth Circuit saw the question of continuity of interstate shipment as the touchstone. 971 F.3d at 915-16.[6]

A prior Ninth Circuit case drew a similar distinction. *Watkins v. Ameripride Services*, 375 F.3d 821 (9th Cir. 2004), was a wage-hour case. The case turned on whether plaintiff, a route salesperson carrying goods such as uniforms for delivery, was exempt from state wage-hour law. If plaintiff "was engaged in transporting property in interstate commerce" within the meaning of federal transportation regulations, then plaintiff was exempt from the state law. *Id*. at 825. Plaintiff's duties required him to pick up the uniforms from a company warehouse and deliver them to local customers. There was no dispute that the uniforms were shipped from out of state. The question, however, was whether the storage of the uniforms in the warehouse

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[6] The Ninth Circuit majority purported to disclaim reliance on a "com[ing] to rest" doctrine, 971 F.3d at 916 n.5, but dissenting Judge Bress correctly pointed out that the majority had relied on exactly that, *id*. at 921, 936. Judge Bress would have held that, regardless of the continuity of the delivery chain, the local drivers were not covered by the FAA's transportation-worker exemption because they themselves did not cross state lines with the goods. *Id*. at 922-28.

for a time broke the chain of interstate commerce for the local delivery. The court articulated a rule similar to that later applied in *Rittman* under the FAA: "[If] a [customer] places orders with an out-of-state vendor for delivery to specified intrastate customers, a temporary holding of the goods within an intrastate warehouse for processing does not alter the interstate character of the transportation chain culminating in delivery to the customer." *Id.* at 826. If, on the other hand, the customer's orders are filled from the warehouse with goods reaching the warehouse without designation for future delivery to a specific customer, then "the transportation chain culminating in delivery to the customer is considered intrastate in nature." *Id.*[7]

A Fifth Circuit case, *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022), was factually similar to *Watkins*, involving the delivery of work uniforms and other products to local customers from a Houston warehouse. Plaintiff contended that he was a transportation-worker exempt from the FAA, even though his deliveries were entirely intrastate and local, because the uniforms and other products he delivered had crossed state lines before reaching the warehouse. The Fifth Circuit held that the FAA's transportation-worker exclusion did not apply. The exclusion only applies to workers who "'play a direct and "necessary role in the free flow of goods" across borders.'" *Id.* at 433 (quoting *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 451 (2022), and *Circuit City*, 532 U.S. at 121). The Fifth Circuit held that the local

[7] After articulating the test, the court of appeals remanded the case to the district court to apply that test.

delivery drivers lacked such a direct and necessary interstate role. "Once the goods arrived at the Houston warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce." *Id*. at 433.

Bean v. ES Partners, Inc., 533 F. Supp. 3d 1226 (S.D. Fla. 2021), applied the same distinction. Plaintiff was hired as a route driver to deliver medications and medical devices to the defendant's Florida customers. His work was intrastate. The company sought to compel arbitration of his FLSA claim. Plaintiff resisted, claiming that he was a transportation-worker exempt from FAA coverage. The court rejected that contention and compelled arbitration. "While it's true that, colloquially speaking, [plaintiff] may be a 'transportation-worker,' he's not necessarily one who's 'engaged in' interstate commerce," as the FAA exemption requires. *Id*. at 1232 (emphasis deleted). The medications and medical supplies at issue came to Florida from other states. Once they got to Florida, however, they "'c[a]me to rest' at warehouses, third-party merchants, or pharmacies," and plaintiff failed to dispute that plaintiff's employer "gets involved only when customers want those goods delivered locally from those 'at rest' locations." *Id*. at 1236. Citing many of the cases discussed above, the court therefore compelled arbitration, because the warehousing of the goods—which were not earmarked for any particular Florida customer—broke the chain of interstate shipment for purposes of the FAA's transportation-worker exclusion.

Fraga v. Premium Retail Sales, 61 F.4th 228 (1st Cir. 2023), distinguished between, on the one hand, interstate shipments earmarked at the outset for a particular recipient, and those that make interstate journeys without such earmarking. At issue was the delivery of so-called Point-of-Purchase marketing materials, which were sent interstate to merchandisers, such as the plaintiff in the case, who then delivered them to customers intrastate. The intrastate last leg was part and parcel of the interstate shipment, the court held—and so the FAA's Section 1 exclusion applied—because "the POP materials began their interstate journeys intended for specific retail stores as part of [defendant's] contractual obligations to deliver materials to those retailers." *Id*. at 241. A different rule would apply, the court explained, if an "out-of-state delivery that end[ed] in the [defendant's] general inventory, followed by an in-state trip" only after a specific recipient had been identified and the materials earmarked for that recipient. *Id*.

Fraga relied on the First Circuit's earlier decision in *Immediato v. Postmates, Inc.*, 54 F.4th 67 (1st Cir. 2022), a case involving food-delivery drivers. *Immediato* compelled arbitration of their claims, applying the key distinction between (on the one hand) a continuous interstate shipment, and (on the other) an interstate shipment that came to rest and only later is further delivered intrastate. The FAA's Section 1 exemption does not encompass the local deliveries, "even if those goods previously have been shipped interstate." *Id.* at 76. *Immediato* relied on this Court's decision in *United States v. American Building Maintenance Industries*, 422 U.S. 271

(1975), which had held that the Clayton Act, 9 U.S.C. § 12 *et seq*., did not apply to purchases of cleaning supplies from a local distributor. The cleaning supplies had been shipped interstate previously, but the "flow of commerce had ceased" with the delivery to the distributor. *Id*. at 285. Applying that rule, *Immediato* held that "it is nose-on-the-face plain that the interstate movement [of meal components] terminated when the goods arrived at local restaurants and grocery stores." *Id*. at 78.

Numerous other cases have similarly held that last-mile food-delivery workers are not covered by the FAA's transportation exclusion. *See, e.g*., *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1153 (N.D. Cal. 2015) (prepared meals from restaurants are not "indisputably part of the 'stream of commerce,'" regardless of where the meals' ingredients came from); *Lee v. Postmates, Inc*., No. 18-cv-03421-JCS, 2018 WL 6605659, at *7 (N.D. Cal. Dec. 17, 2018) (the FAA's transportation-worker exclusion did not cover those making local deliveries from merchants).

The touchstone of all these cases is the question of continuity: whether goods come to rest following their interstate journey. If they do, the interstate-transportation chain is broken, and the later intrastate delivery is a new trip not covered by the FAA Section 1's exclusion. This Court should apply that rule here.

c. Other cases should be overruled.

It certainly is true that some other cases have strayed from the coming-to-rest principle. Those cases should be disapproved. In one, a Ninth Circuit panel even failed to pay heed to that court's own prior

teaching. In *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023), *petition for cert. filed* (No. 23-427) Oct. 23, 2023, plaintiffs were local delivery drivers. Domino's buys pizza ingredients from out-of-state suppliers. The ingredients then are delivered to Domino's Southern California Supply Chain Center without earmarking them for later delivery to any particular Domino's franchisee. At the supply center, employees "reapportion, weigh, and package the relevant ingredients for delivery to local franchisees." *Id.* at 1136. When a franchisee later placed orders for particular pizza ingredients, Domino's filled the order from inventory in the warehouse, and one of the local drivers—the plaintiffs in the case—delivered the ingredients. The court found that the local drivers "are engaged in interstate commerce" for purposes of the FAA's transportation exclusion, even though "Domino's franchisees do not order the goods until after they arrive at the warehouse." *Id.* at 1138. *Carmona Mendoza* cannot be reconciled with the cases cited in the preceding section, even the Ninth Circuit's own prior decision in *Rittman*.

The First Circuit in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021), like *Rittman*, considered claims by Amazon's delivery drivers. The First Circuit found them exempt from FAA coverage based on the Section 1 transportation-worker exclusion. The workers were "'engaged in . . . interstate commerce[]' regardless of whether the workers themselves physically cross[ed] state lines," because the drivers worked "within the flow of interstate commerce." *Id.* at 13, 26 (citation omitted). Perhaps the result in *Waithaka* can be

reconciled with that in *Rittman*, because in each case the ultimate customer was known during the goods' interstate shipment, and indeed from the time the customer placed her Amazon order. But *Waithaka* failed to mention, let alone rely on, that important fact. The court simply recited that the drivers worked "within the flow of interstate commerce," *id*. at 13, 19, 23, 24, 26, without analyzing whether their work was actually within, or instead outside of, the interstate travel.[8]

Cases like these fail to evaluate and/or give significance to the break in an interstate shipment when goods come to rest. Such cases should be disapproved.

2. The alternative ground for affirmance is properly before this Court.

It is true, of course, that the court of appeals did not address the alternative ground for the decision suggested here, and the petition for *certiorari* did not place the alternative ground at issue by name. But when resolution of a question of law is a "predicate to an intelligent resolution" of the question on which the Court granted certiorari, the question of law is "fairly comprised in" the question expressly raised by the certiorari petition. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *accord Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978) (a question not explicitly mentioned but "essential to analysis of the [decision below]," are "fairly comprised by the question

[8] The First Circuit later repaired the damage somewhat in its later decision in *Immediato*, which read *Waithaka* to apply only to local deliveries that are part and parcel of "the larger interstate movement of those goods." *Immediato*, 54 F.4th at 75.

presented" in the petition). That particularly is true where the opposing party is "not . . . adversely affected" by addressing the other issue, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371-72 n.4 (1967), *overruled on other grounds by Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and where the alternative grounds are presented to defend, rather than attack, a judgment, *see Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Those principles govern here. *Amicus* contends that petitioner Bissonnette is not "engaged in foreign or interstate commerce" under the FAA, 9 U.S.C. § 1, because his deliveries are wholly intrastate. If this Court accepts that threshold proposition, then the Court need not even reach the question of whether it matters that respondent Flowers is not a transportation company. Addressing now the alternative ground for affirmance works no prejudice on petitioner Bissonnette, because the facts are undisputed (as shown above), and resolving the alternative ground now would obviate possibly protracted proceedings on remand.

This Court therefore can and should consider the alternative ground for affirmance that *amicus* CELC proffers.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be affirmed, either based on the court of appeals' reasoning or alternatively under the theory presented in Section II of this brief.

Respectfully submitted.

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