No. 24-935

IN THE

Supreme Court of the United States

FLOWERS FOODS, INC., ET AL.,
Petitioners,

v.

ANGELO BROCK,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), and *Bissonnette v. LePage Bakeries Park Street, LLC*, 601 U.S. 246 (2024), this Court answered narrow questions about FAA § 1, expressly reserving decision on the core issue that has been driving litigation and dividing courts: whether local delivery drivers are "engaged in foreign or interstate commerce" under § 1 when the goods they deliver traveled across state lines. *See Saxon*, 596 U.S. at 457 n.2; *Bissonnette*, 601 U.S. at 252 n.2, 256. That question implicates broad swathes of the national economy. And until this Court answers it, the question will spawn drawn-out litigation over what should be a simple, threshold issue.

Respectfully, the time for an answer has come. The last-mile split is deeply entrenched and widely acknowledged. No one (not even Brock) disputes its importance. This case is the ideal vehicle. And the Tenth Circuit's rule has no basis in § 1's text, conflicts with this Court's precedents, and would exclude from the FAA's scope grocery workers who stock shelves. The Court should grant certiorari and solve the § 1 problem for once and for all.

ARGUMENT

I. THE COURTS OF APPEALS ARE DIVIDED.

Flowers' petition detailed a 2-to-3 circuit split about whether workers who neither cross state lines nor directly engage with the channels of interstate transportation are engaged in interstate commerce under FAA § 1 due to the journey of the goods they carry. *See* Pet. 13-19. That division of authority has been acknowledged by at least four different Courts of

Appeals. *See Lopez v. Cintas Corp.*, 47 F.4th 428, 432 (5th Cir. 2022) (acknowledging split among "sister circuits"); *Ortiz v. Randstad Inhouse Servs., LLC*, 95 F.4th 1152, 1161 (9th Cir. 2024) (recognizing that "courts of appeals have reached different conclusions"); Pet.App.13a, 29a (declining to follow the Fifth Circuit); *Bissonnette v. LePage Bakeries Park St., LLC*, 123 F.4th 103, 106 n.1 (2d Cir. 2024) (*Bissonnette II*) (recognizing that circuit courts have reached "opposite conclusion[s]").

1. Brock does not dispute that the Tenth, First, and Ninth Circuits focus on the goods' journey, not the worker's work. *See* Pet. 16-19; BIO 11. If anything, Brock's opposition suggests (wrongly) that this side of the split is even deeper. *See* BIO 11 (citing *Bissonnette II*, 123 F.4th at 106-07, and *Adler v. Gruma Corp.*, 135 F.4th 55, 67-68 (3d Cir. 2025)).[1]

2. The Fifth and Eleventh Circuits apply a different rule. In those jurisdictions, courts focus on the worker's work, not the goods' journey, and require workers to cross state lines or directly engage with the means of interstate transportation to fall within § 1. *See* Pet. 14-16 (discussing *Lopez*, 47 F.4th 428, and *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021)).

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[1] Although it makes no difference, Brock's characterization of the Second and Third Circuits' decisions is incorrect. *Bissonnette II* declined to decide "whether the class of workers that [the] Plaintiffs belong to is engaged in interstate commerce," remanding for "the district court [to] consider" that question in the first instance. 123 F.4th at 106. And in *Adler*, the defendant "d[id] not dispute" the issue. 135 F.4th at 68 (quoting Pet.App.15a).

a. Brock's attempts to distinguish *Lopez* and deny the inter-circuit conflict ignore the Fifth Circuit's actual analysis and holding. For example, citing the *Lopez district court's* analysis and *Lopez's brief*, Brock first contends that *Lopez* and the Tenth, First, and Ninth circuit decisions are reconcilable because Lopez was not actually "a last-mile driver." BIO 12-13. Rather, Lopez performed some sales and customer-service tasks. *Id.*

But the district court's analysis and Lopez's self-serving arguments are not Fifth Circuit law. For that, one must look to the Fifth Circuit's actual decision in *Lopez*. There, the court described itself as "tasked with determining whether" "local delivery drivers [who] take items from a local warehouse to local customers" and "enter the scene after the goods have already been delivered across state lines" are engaged in interstate commerce under § 1. *Lopez*, 47 F.4th at 432. Immediately thereafter, the Fifth Circuit "conclude[d] that local delivery drivers are not so 'engaged' in 'interstate commerce' as § 1 contemplates." *Id.* "Once the goods arrived at the Houston warehouse and were unloaded," the court explained, "anyone interacting with those goods was no longer engaged in interstate commerce." *Id.* at 433.

Those are the exact facts here. Brock interacted with Flowers' goods only after they arrived at a local warehouse and were unloaded. Thus, far from offering "no reason to believe" that the Fifth Circuit would reach the same result here (BIO 13), the Fifth Circuit's analysis in *Lopez affirmatively compels* it. And instead of following Lopez's suggestion that the court avoid a "split with the First and Ninth Circuits" by focusing on Lopez's alternative job duties (*id.*), the

Fifth Circuit expressly acknowledged and entered into the circuit conflict.[2] *See Lopez*, 47 F.4th at 432. Brock cannot avoid this reality by rewriting the Fifth Circuit's opinion using quotes from the district court and a party's brief.

Brock next argues that "there is no indication" that the local deliveries in *Lopez* were "a constituent part of any interstate journey." BIO 13. That argument is demonstrably wrong. According to the Fifth Circuit, the defendant "processe[d], distribute[d], and deliver[ed] … products to clients nationwide"; Lopez's "job duties included picking up [those products] from a Houston warehouse and delivering them to local clients"; and the products "arrived at the warehouse from out of state." 47 F.4th at 430. This case is indistinguishable. *See* Pet.App.5a; *Bissonnette*, 601 U.S. at 249.

Finally, Brock insists that the Fifth Circuit would consider him a "transportation worker" for purposes of § 1 because it has held that drivers like Brock "engage in transportation 'in interstate or foreign commerce'" under the motor carrier exemption to the Fair Labor Standards Act ("FLSA"). *Ash v. Flowers Foods, Inc.*, No. 23-30356, 2024 WL 1329970, at *2 (5th Cir. Mar. 28, 2024) (quoting 29 C.F.R. § 782.2(a)); *see* BIO 13. The FLSA's motor carrier exemption, however, does not inform the meaning of FAA § 1. As courts across

[2] The court observed that Lopez was further removed from seamen and railroad employees because he had "a more customer-facing role." *Lopez*, 47 F.4th at 433. But that fact did not play into the court's interstate commerce analysis. In any event, Brock plays a sales and customer-service role, too. *See* Pet.App.4a; *Bissonnette*, 601 U.S. at 250.

the country uniformly recognize, ""the phrase 'engaged in commerce' in the [FLSA]" has "nothing to do with the [§ 1] exemption." *Hamrick*, 1 F.4th at 1347; *Freeman v. Easy Mobile Labs, Inc.*, No. 16-CV-00018, 2016 WL 4479545, at *2 n.2 (W.D. Ky. Aug. 24, 2016) (FLSA exemption "irrelevant … regarding the issue of whether [a plaintiff] is excepted from arbitration under Section 1 of the FAA"); *Guy v. Absopure Water Co.*, No. 20-12734, 2023 WL1814212, at *7 n.8 (E.D. Mich. Feb. 8, 2023) (FLSA exemption and § 1 are "entirely different issue[s]").

b. As for *Hamrick*, Brock does not dispute the Eleventh Circuit's clear holding that local-delivery drivers are not "actually engage[d] in foreign or interstate commerce" for purposes of § 1. 1 F.4th at 1349-50. That court could hardly have been clearer in rejecting the Tenth, First, and Ninth Circuits' rule. *See id.* at 1350.

Unable to distinguish *Hamrick*, Brock suggests that it is no longer good law in light of *Saxon* and *Bissonnette*. BIO 14-15. Courts in the Eleventh Circuit disagree. *See, e.g.*, *Nunes v. LaserShip, Inc.*, No. 22-cv-2953, 2023 WL 6326615, at *3 (N.D. Ga. Sept. 28, 2023) ("*Saxon* does not overrule *Hamrick*."); *Pasche v. Total Quality Logistics, LLC*, No. 8:23-cv-01812, 2024 WL 4234937, at *3 (M.D. Fla. Sept. 19, 2024) (treating *Hamrick* as controlling). For good reason: Both *Saxon* and *Bissonnette* "explicitly left open the question of whether 'last leg' delivery drivers … fall within § 1's exemption." *Nunes*, 2023 WL 6326615, at *3; *see Saxon*, 596 U.S. at 457 n.2; *Bissonnette*, 601 U.S. at 252 n.2, 256. Neither calls *Hamrick*'s "interstate commerce" holding into question.

To the contrary, that holding is entirely consistent with *Saxon*, *see* 596 U.S. at 457-58 (workers must be "actively" and "directly involved in transporting goods across state or international borders"). *Hamrick*'s focus on workers rather than goods is consistent with *Saxon*, too. *See id.* at 456 ("The word 'workers' directs the interpreter's attention to 'the *performance* of work.'" (quoting *New Prime Inc. v. Oliveira*, 586 U.S. 105, 116 (2019))). To be sure, *Bissonnette* rejected *Hamrick*'s separate holding that § 1 requires involvement in the "transportation industry." *See* 601 U.S. at 256. But *Hamrick*'s transportation industry holding was entirely separate from its "interstate commerce" analysis. *See Hamrick*, 1 F.4th at 1346 (framing the two requirements as distinct "elements"). As to the latter, *Hamrick* remains "binding, on-point" authority. *Nunes*, 2023 WL 6326615, at *3.

* * *

As multiple Courts of Appeals have recognized, the circuits are squarely divided over § 1's application to local delivery drivers. In the Tenth, First, and Ninth Circuits, § 1 covers anyone who handles goods that are traveling in interstate commerce. Applying that rule, the Tenth Circuit held that Brock was engaged in interstate commerce and thus refused to enforce his agreement to arbitrate. In the Fifth and Eleventh Circuits, however, workers must themselves engage in foreign or interstate commerce for § 1 to apply. Under that rule, Brock is not engaged in interstate commerce under § 1 and his arbitration agreement is enforceable.

II. THE QUESTION PRESENTED IS IMPORTANT.

Brock makes no attempt to argue that the Question Presented is insufficiently important to warrant this Court's review. He cannot. The proliferation of last-mile litigation is indisputable, *see* Pet. 13-19, 21; BIO 11, and the disuniformity it has engendered is troubling in light of the FAA's goals, *see* Pet. 20-21. The implications of the Tenth Circuit's rule are also staggering. *See id.* at 21-22.

Brock argues only that this Court has previously denied petitions presenting this question—most recently over Justice Kavanaugh's dissenting vote. *See* BIO 15; A*mazon.com, Inc. v. Miller*, 144 S. Ct. 1402 (2024) (noting that "Justice Kavanaugh would grant the petition for writ of certiorari"). But three of the four petitions Brock cites were filed by a single defendant with an opaque business model. *See Amazon.com, Inc. v. Rittmann*, 141 S. Ct. 1374 (2021); *Amazon.com, Inc. v. Waithaka*, 141 S. Ct. 2794 (2021); *Miller*, 144 S. Ct. 1402. Two predate the split. *See Rittman*, 141 S. Ct. 1374; *Waithaka*, 141 S. Ct. 2794; BIO 15 n.5. None was as clean a vehicle as this petition. *See* Pet. 28. And the distribution model at issue here is ubiquitous and cuts across industries, as *Lopez* and *Hamrick* demonstrate.

III. THIS PETITION IS AN IDEAL VEHICLE.

This case presents an unusually good opportunity for the Court to resolve the last-mile question. *See* Pet. 28-29. The District Court and Court of Appeals both assumed that Brock belongs to a class of workers who *never* cross state lines and who *never* load or unload goods from vehicles traveling interstate. *See* Pet. 28; Pet.App.5a, 12a, 39a, 49a. And answering the

Question Presented will resolve whether this case should be arbitrated or litigated. *See* Pet. 28-29. Brock disputes neither point. Instead, he attempts to manufacture vehicle problems that are entirely illusory.

First, Brock asserts that the parties disagree as to which kind of worker Brock is—a "last-mile truck driver[]" or a "worker[] who deliver[s] goods from local retailers to local customers, like [a] restaurant-delivery" worker[]—suggesting that Flowers views Brock as the latter. BIO 15. But Brock is no restaurant-delivery driver. He delivers goods that have traveled across state lines from local warehouses to local retailers, *see* Pet.App.5a—just like the plaintiffs in the cases comprising the split. *See Lopez*, 47 F.4th at 430; *Hamrick*, 1 F.4th at 1349-50; *Rittman v. Amazon.com, Inc.*, 971 F.3d 904, 907 (9th Cir. 2020); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 22 (1st Cir. 2020); *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135, 1137-38 (9th Cir. 2023). The sole question here is whether those facts satisfy § 1.

Brock next asserts that one of Flowers' arguments in the Tenth Circuit—that Brock is not a seaman, railroad employee, or other transportation worker under § 1 because he is a franchise business owner—somehow poses a vehicle problem. BIO 15-16. But the Tenth Circuit rejected this argument (Pet.App.22a; BIO 16), and Flowers did not petition for certiorari on this (separate and distinct) ground. *See* Pet. i. The Court would thus take the case on the assumption that Brock "serves as Flowers's last-mile driver" (Pet.App.22a). *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011) ("Because Matrixx does not challenge the Court of Appeals' holding that

the scienter requirement may be satisfied by a showing of 'deliberate recklessness,' ... we assume, without deciding, that the standard applied by the Court of Appeals is sufficient."); *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67 (2009) (Court "assume[s] without deciding that the Court of Appeals was correct" when an issue is not necessary to resolve the question presented).

In any event, not even Brock suggests that the Court must resolve the franchise issue to resolve the Question Presented. The two issues are entirely distinct—the first is about who is a transportation worker while the latter is about the meaning of "engaged in foreign or interstate commerce." Thus, neither the petition nor the BIO invokes Brock's franchisee status in arguing the merits. And the only case Brock cites in suggesting that Brock's status is a vehicle issue involved food-delivery drivers, not franchisees. *See* BIO 16 (citing *Immediato v. Postmates, Inc.*, 54 F.4th 67, 75-78 (1st Cir. 2022)).

What matters to resolving the Question Presented is the work Brock performed. And as to that issue, the relevant facts are undisputed: Brock never crossed state lines; he never loaded or unloaded goods from vehicles that traveled across state lines; and the products he carried originated from out of state. Those facts cut across each case in the split. And they tee up the Question Presented perfectly.

IV. THE DECISION BELOW IS WRONG.

Both § 1's text and this Court's precedents compel the conclusion that workers must be "actively" and "directly involved in transporting goods across state or international borders" for § 1 to apply. *Saxon*, 596

U.S. at 457-58; *see* Pet. 23-25. The Tenth, First, and Ninth Circuits' contrary rule has no basis in text or precedent. *See* Pet. 25-26. It would turn the FAA upside-down, transforming a narrow exemption for maritime shipping and railroads into a broad carveout that would preclude arbitration throughout the national economy. *See id.* at 26-27.

Brock does not even attempt to engage with § 1's text. Nor can he reconcile his position with *Saxon* and *Bissonnette*. Indeed, Brock rejects the proposition that § 1's applicability turns on the "'actual work that the members of the class typically carry out,' not the goods they transport"—insisting that such a rule "makes no sense." BIO 19 (quoting Pet. 26). Unfortunately for Brock, the language he dismisses is this Court's, not Flowers'. *See* Pet. 26 (quoting *Saxon*, 596 U.S. at 456). Section 1's text "is directed at what the class of workers is engaged in, and not what it is carrying." *Hamrick*, 1 F.4th at 1350; *see* Pet. 23. So "to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.).

With no support in § 1's text or this Court's precedents, Brock relies primarily on pre-FAA cases holding that drivers "who transport goods on an intrastate leg of an interstate journey—are 'engaged in interstate commerce'" under the Commerce Clause. BIO 17-18 (quoting *Rearick v. Pennsylvania*, 203 U.S. 507, 512-13 (1906)). But this Court held in *Circuit City Stores, Inc. v. Adams* that § 1's text does not signal a "congressional intent to regulate to the outer limits of [Congress's] authority under the Commerce Clause";

the phrase has "a more limited reach." 532 U.S. 105, 115-16 (2001).

Brock also insists that "seamen" and "railroad employees" include "workers responsible for an intrastate leg of an interstate journey." BIO 18. But Brock's primary authority, *Pacific Mail S.S. Co. v. Joliffe*, 69 U.S. 450 (1864), involved a worker who offered to pilot out "to sea" a steamship "about to proceed to Panama." *Id.* at 455-56. That worker had the nexus to interstate commerce lacking here. Brock's remaining authorities are similarly unpersuasive. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), held only that individuals "who worked on board vessels" were considered seamen. *Id.* at 344. And *Phila. & Reading Ry. Co. v. Hancock*, 253 U.S. 284 (1920), held only that intrastate train operators were engaged in interstate commerce for purposes of the Federal Employers Liability Act ("FELA"), *id.* at 285, which this Court has recognized sweeps more broadly than § 1, *see Circuit City*, 532 U.S. at 116 (citing *The Employers' Liability Cases*, 207 U.S. 463, 498 (1908), and explaining that FELA, unlike § 1, "came close to expressing the outer limits of Congress' power").

Finally, Brock dismisses Flowers' concerns about the reach of the Tenth, First, and Ninth Circuits' rule, observing that "[p]et shop workers and grocery clerks don't transport anything." BIO 20. But Brock ignores this Court's holdings in *Saxon* that merely unloading a vehicle traveling in interstate commerce triggers § 1, *see* 596 U.S. at 457, and in *Bissonnette*, that § 1 extends beyond the transportation industry, *see* 601 U.S. at 252. If, as Brock argues, mere local transportation of goods traveling interstate

constitutes "engage[ment] in interstate commerce," then retail workers who frequently unload goods from those vehicles are covered by § 1. *Saxon*, 596 U.S. at 456. That is the result this Court rejected in *Bissonnette*. *See* 601 U.S. at 256.

CONCLUSION

The petition should be granted.

July 16, 2025

Respectfully submitted,

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