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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") does not "apply to contracts of employment of seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has afforded § 1 a "narrow construction" and held that its residual clause ("any other class of workers") applies only to "contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–19 (2001). This Court has further clarified that "transportation workers" include only those classes of workers who "play a direct and 'necessary role in the free flow of goods' across borders." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1790 (2022) (quoting *Circuit City*, 532 U.S. at 121).

Properly framed, the question presented is whether § 1 applies to a business-to-business franchise agreement in which one business purchases from the other the rights to market, sell, and distribute baked goods within a defined intrastate territory.

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

Respondents Flowers Foods, Inc., Lepage Bakeries Park St., LLC, and C.K. Sales Co., LLC (collectively, "Flowers" or "Flowers Foods") produce a wide range of food products, including well-known brands of breads and snacks. Flowers has a unique business model. To facilitate local sales of Flowers products, Flowers subsidiaries like Respondent C.K. Sales contract with independent franchise businesses that purchase the right to market, sell, and distribute Flowers products within defined geographic territories. Those businesses, which are by contract "Independent Distributors," purchase Flowers products at one price and then resell those products to their customers at a higher price. Their profit margin is the difference between the products' purchase and sale prices, minus operating expenses. Independent Distributors can grow their profits by, among other things, increasing sales, cutting expenses, or purchasing additional territories. And they can capitalize on their successes by reselling some or all of their territories for more than the purchase price. But Independent Distributors carry risk, too. They can book losses if sales dwindle, expenses balloon, or the value of their territories decrease.

Petitioners are the owners of two Independent Distributors that purchased the rights to market, sell, and distribute Flowers products in territories located entirely within the State of Connecticut. Both signed arbitration agreements in connection with that purchase. Now, however, they insist that those arbitration agreements are unenforceable under § 1 of the FAA, which exempts from the FAA

"contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The District Court rejected that argument and granted Flowers' motion to compel arbitration, finding that Petitioners are not covered by § 1's "residual clause" (the "any other class of workers" phrase) because they are franchise business owners with a wide array of responsibilities that distinguish them from "transportation workers." *See* Pet.App.111a–115a; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–19 (2001) (holding that the residual clause is limited to "transportation workers"). The Second Circuit did not disturb that finding but affirmed on a different ground: that Petitioners are not covered by the residual clause because they do not work in the "transportation industry." *See* Pet.App.40a.

Still seeking to evade their agreements to arbitrate, Petitioners now ask this Court to intervene—just over a year after its last foray into § 1 in *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022). In so doing, Petitioners misstate the facts, characterizing themselves as mere truck drivers and ignoring the terms of their Distributor Agreements. They also misstate the law, insisting that *Saxon*—which involved an airline employee—somehow implicitly foreclosed the Second Circuit's "transportation industry" approach. *See* Pet. 19–21. Those sleights of hand do not make this case certworthy. Indeed, this Court's review is manifestly unwarranted for three related reasons.

First, Petitioners dramatically overstate the supposed circuit split. Only two Courts of Appeals have even considered whether § 1's residual clause

applies to workers outside the "transportation industry" post-*Saxon*. *See* Pet.App.38a–76a; *Fraga v. Premium Retail Servs., Inc.*, 61 F.4th 228, 235 (1st Cir. 2023). And although the First Circuit rejected the Second Circuit's "transportation industry" reasoning, it is far from clear that those courts actually disagree about the ultimate applicability of § 1 to the facts of this case. Moreover, the great weight of pre-*Saxon* authority is consistent with the Second Circuit's approach. And further percolation in light of *Saxon*—which Petitioners themselves claim changed the game—is well warranted.

Second, this is the wrong case for resolving any lingering confusion about the scope of § 1. *Saxon* left open whether "last leg" or other local delivery drivers, such as food delivery drivers, are engaged in interstate commerce for purposes of § 1, *see* 142 S. Ct. at 1789 n.2, and that question has arisen in numerous cases across the country. But this case does not implicate the "last leg" question, both because the Second Circuit did not decide whether Petitioners are engaged in interstate commerce for purposes of § 1 and because Petitioners look nothing like "last leg" drivers. This case is also a poor vehicle for addressing the "transportation industry" issue. Petitioners' argument assumes that they are mere "truck drivers," Pet. 1, 3, 8–9, 11–12, 14, 16–19, 23–24, which conflicts with the District Court's finding that Petitioners, who "are not even contractually obligated to transport [Flowers'] products personally," "are more akin to sales workers or managers who are generally responsible for all aspects of a bakery products distribution business." Pet.App.114a–115a. In all events, the

"transportation industry" issue is not remotely outcome determinative in this case because Petitioners' arbitration agreements are enforceable for at least four other independent reasons.

Third, the Second Circuit's "transportation industry" reasoning is correct. The unremarkable proposition that "transportation workers" must work in the "transportation industry" follows from § 1's text, which this Court has emphasized must be afforded a "narrow construction" and interpreted "by reference to the enumerated categories of workers": "seamen" and "railroad employees." *Circuit City*, 532 U.S. at 115. Because the terms "seamen" and "railroad employees" refer to workers in the transportation industry, so too must the residual clause. That construction of the residual clause is consistent with the history and purpose of § 1, which was enacted in the wake of transportation strikes that disrupted commerce nationwide and prompted the creation of industry-wide dispute resolution schemes. It is also consistent with *Saxon*, which even the First Circuit recognized did not address the residual clause's applicability to workers outside the "transportation industry." *See Fraga*, 61 F.4th at 235. And whereas the "transportation industry" approach appropriately limits § 1's residual clause to workers who resemble "seamen" and "railroad employees," Petitioners' rule would gut the FAA.

The petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration

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

2. Section 1 of the Act limits the scope of § 2. It provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In contrast to § 2, the Court has afforded § 1 "a narrow construction." *Circuit City*, 532 U.S. at 118.

This Court has interpreted § 1 in three key opinions, the most recent of which is barely a year old. First, in *Circuit City*, this Court rejected an interpretation of § 1 that would extend its "residual clause" to *all* "contracts of employment." 532 U.S. at 109. The residual clause, *Circuit City* explained, "should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 114–15. Consistent with those

principles, the Court held that § 1 "exempts from the FAA *only* contracts of employment of *transportation workers*." *Id.* at 119 (emphases added). Then, in *New Prime Inc. v. Oliveira*, the Court clarified that the phrase "contracts of employment" includes not only "contracts that reflect an employer-employee relationship," but also "contracts that require an independent contractor to perform work." 139 S. Ct. 532, 539 (2019) ("*New Prime II*"). Most recently, in *Saxon*, this Court held that § 1 applies to classes of workers who "load and unload cargo on and off planes traveling in interstate commerce." 142 S. Ct. at 1789. In reaching that conclusion, *Saxon* rejected the argument that every worker in the transportation industry necessarily qualifies as "transportation worker" for purposes of the residual clause. *See id.* at 1788. Instead, it held that § 1 applies only to classes of workers that "actually engage[] in interstate commerce in their day-to-day work." *Id.*

Consistent with those precedents, courts across the country have consistently applied § 1 only when four circumstances are present. *First*, as a threshold matter, the arbitration provision in question must appear in a "contract of employment"—*i.e.*, in an agreement by workers "to perform work." *New Prime II*, 139 S. Ct. at 539; *see Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 596 (4th Cir. 2023). *Second*, the party seeking to evade its agreement to arbitrate must work "within the transportation industry." *Hill v. Rent-A-Center, Inc.*, 398 F.3d 9 U.S.C. § 26, 1289–90 (11th Cir. 2005); *see* Pet.App.47a. *Third*, that party must belong to a "class of workers" that frequently performs work

"intimately involved with the commerce (*e.g.* transportation) of . . . cargo." *Saxon*, 142 S. Ct. at 1788–90; *see also Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801–02 (7th Cir. 2020) (Barrett, J.). *Fourth*, the transportation in which the class of workers is engaged must be "foreign or interstate"—*i.e.*, the class of workers must "play a direct and 'necessary role in the free flow of goods' *across borders*." *Saxon*, 142 S. Ct. at 1790 (quoting *Circuit City*, 532 U.S. at 121) (emphasis added).

3. The applicability of the FAA's "transportation worker" exemption "has no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.* ("*New Prime I*"), 857 F.3d 7, 24 (1st Cir. 2017). Even where the exemption applies, "enforcement of the arbitration agreement . . . under . . . state law, as if the FAA 'had never been enacted,' . . . furthers the general policy goals of the FAA favoring arbitration." *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004); *see also Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[W]e have little doubt that, even if an arbitration agreement is outside the FAA, the agreement still may be enforced . . . ."). Accordingly, courts have consistently enforced arbitration agreements under state law even where the "transportation worker" exemption applies. *See, e.g.*, *Espinosa v. SNAP Logistics Corp.*, No. 17 Civ. 6383, 2018 WL 9563311, at *5 (S.D.N.Y. Apr. 3, 2018) ("[E]ven if Plaintiff is exempt from the FAA, the application of the exemption does not preclude enforcement of the arbitration provision under New York state law."); *Breazeale v. Victim Servs., Inc.*, 198 F. Supp. 3d 1070, 1079 (N.D. Cal.

2016) ("When a contract with an arbitration provision falls beyond the reach of the FAA, courts look to state law to decide whether arbitration should be compelled nonetheless."); *Shanks v. Swift Transp. Co.*, No. L-07-55, 2008 WL 2513056, at *4 (S.D. Tex. June 19, 2008) ("The weight of authority shows that even if the FAA is inapplicable, state arbitration law governs."). Indeed, after this Court held in *Saxon* that § 1 applied, the district court still compelled arbitration on remand "because [the plaintiff] signed an enforceable contract under Illinois state law." *Saxon v. Southwest Airlines Co.*, No. 19-cv-403, 2023 WL 2456382, at *4–5 (N.D. Ill. Mar. 10, 2023).

B. Factual Background

1. Flowers Foods, through its baking subsidiaries, "is one of the largest producers of packaged bakery foods in the United States." Am. Compl., JA 14 ¶ 13.[1] Flowers' "subsidiaries . . . produce breads (including Wonder Bread), as well as buns, rolls, and snack cakes in 47 bakeries" across the country. Pet.App.41a. Through those baking subsidiaries, Flowers divides the market for its products into geographic territories, and then sells exclusive sales and distribution rights within each of those territories to independent franchise companies it refers to as "Independent Distributors." *See* Distributor Agreement, JA 86. Independent Distributors, in turn, market, sell, and distribute Flowers products to retail stores, convenience stories,

[1] Citations to "JA" are to the joint appendix filed in the Second Circuit.

and restaurants within their respective territories. *Id.* at 87.

Independent Distributors have a straightforward business model. At the most basic level, they purchase products from a Flowers subsidiary at one price and then resell those products to their customers at a higher price. *See* Pet.App.41a–42a; *see also* JA 89 ¶ 4.1. An Independent Distributor's running profits thus consist of the difference between the products' purchase price and their sale price, minus the Independent Distributor's business expenses. *See* Pet.App.42a. Independent Distributors can increase their profits by marketing and selling more products in their existing territories, keeping expenses in check, buying additional territories, or selling some or all of their existing ones. On the flipside, Independent Distributors can incur losses when marketing efforts flounder, commercial relationships falter, accounts shrink or shut down, or expenses get out of hand. In the meantime, the value of their territories (like any other asset) increases and decreases with their successes and failures.

2. Petitioners are the owners of two Connecticut corporations—Bissonnette Inc. and Blue Star Distributors Inc.—that purchased from Respondent C.K. Sales Co., LLC the rights to market, sell, and distribute Flowers products in defined geographic territories.[2] *See* JA 111, 149. Those territories are

[2] C.K. Sales Co., LLC is a wholly owned subsidiary of Respondent Lepage Bakeries Park Street, LLC, which is a wholly owned subsidiary of Respondent Flowers Foods, Inc.

located entirely within the State of Connecticut. *Id.* at 107, 145.

The relationship between C.K. Sales and Petitioners' companies are spelled out in substantively identical Distributor Agreements that are "governed by the laws of the State of Connecticut." *Id.* at 105 ¶ 20.11. They make crystal clear that the Independent Distributors are "independent business[es]," *id.* at 97–98 ¶ 16.1, and, accordingly, that C.K. Sales does not control "the specific details or manners and means of [their] business[es]," *id.* at 87–90 ¶¶ 2.6, 5.1.

Those general provisions are consistent with more specific ones. For example, the Agreements provide that Independent Distributors are "responsible for obtaining [their] own delivery vehicle(s) and purchasing adequate insurance thereon." *Id.* at 93 ¶ 9.1. They can make and use their own "advertising materials." *Id.* at 95 ¶ 13.1. They can use Flowers' "trade names and trademarks" as they see fit "in connection with [the] advertising, promoting, marketing, sale, and distribution of [Flowers] Products in the Territory." *Id.* at 101 ¶ 19.1. They can decide whether to dispose of stale products, sell them for non-human consumption, or sell them back to Flowers. *Id.* at 95 ¶¶ 12.1–12.3. And they can sell noncompetitive products from other companies. *Id.* at 89 ¶ 5.1.

Crucially, moreover, the Agreements "do[] not require that [the Independent Distributor's] obligations [t]hereunder be conducted personally, or by any specific individual in [the Independent Distributor's] organization" *Id.* at 98 ¶ 16.2.

Instead, Independent Distributors are "free to engage such persons as [they] deem[] appropriate" to perform all or some of the work they agreed to undertake. *Id.* ¶ 16.3.

3. The Distributor Agreements contain a "Mandatory and Binding Arbitration" provision that incorporates, as Exhibit K, a separate Arbitration Agreement. *See id.* at 101 ¶ 18.3 (Distributor Agreement); 117–19 (Arbitration Agreement). The Arbitration Agreement provides that "any claim, dispute, and/or controversy except as specifically excluded herein . . . shall be submitted to and determined exclusively by binding arbitration." *Id.* at 117. The covered claims specifically include "any . . . claims premised upon [an Independent Distributor's] alleged status as anything other than an independent contractor, tort claims . . . and claims for alleged unpaid compensation, civil penalties, or statutory penalties under either federal or state law." *Id.* at 118.

The Arbitration Agreement also contains a choice-of-law provision and a severability clause. The choice-of-law provision states that the "Arbitration Agreement shall be governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA." *Id.* at 119. The severability clause states that, "[i]f any provision of . . . this Arbitration Agreement [is] determined to be unlawful, invalid, or unenforceable, such provisions shall be enforced to the greatest extent permissible under the law, or, if necessary, severed, and all remaining terms and provisions shall continue in full force and effect." *Id.* at 118.

Petitioners also signed "Personal Guaranty" agreements, which were incorporated into their Distributor Agreements as Exhibit F. *Id.* at 112, 150. As part of the Personal Guaranty, each Petitioner expressly agreed and acknowledged that he would be personally "subject to the Arbitration Agreement attached hereto as Exhibit K." *Id.* at 112 (emphasis omitted).

C. Procedural History

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 Fair Labor Standards Act. *See* JA 19–21 ¶¶ 44–57. Flowers moved to dismiss or, in the alternative, to compel arbitration of Petitioners' claims based on their Arbitration Agreements.

The District Court granted Flowers' motion to compel arbitration and dismissed the case. In so doing, it rejected Petitioners' argument that the Agreements are unenforceable under § 1 of the FAA. Petitioners, the District 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.'" Pet.App.114a (quoting Defs.' Mem. at 22). Indeed, "Plaintiffs are not even contractually obligated to transport Defendants' products personally." *Id.* at 115a. Accordingly, the District Court found that Petitioners' Arbitration Agreements are enforceable under the FAA. *Id.* at 118a.

Because the District Court found that § 1 did not apply in light of Petitioners' role as franchise business owners, it did not resolve several other questions about § 1's applicability. The court suggested that agreements between two businesses may not qualify as "contracts of employment" under § 1, but it did not resolve that issue. *Id.* at 101a–102a n.2. Nor did it decide whether Flowers "can be characterized as operating in the transportation industry" at all. *Id.* at 110a n.8. And it simply assumed without deciding that purely intrastate transportation can suffice under § 1 so long as the workers are "transporting goods that have traveled interstate." *Id.* at 113a. In dicta, however, the District Court said that it could not compel arbitration under Connecticut law if it lacked the power to compel arbitration under the FAA. *Id.* at 108a–109a n.7.

2. The Second Circuit affirmed. It did so initially in an opinion issued before this Court decided *Saxon*. *See id.* at 2a–3a. After *Saxon*, the court issued a superseding opinion explaining why *Saxon* did not alter its analysis. *Id.* at 40a–41a.

Like the District Court, the Second Circuit held that Petitioners' Arbitration Agreements are not covered by § 1, and so are enforceable under the FAA. Its reasoning, however, was slightly different than the District Court's. Section 1, the Second Circuit reasoned, applies only to workers in the "transportation industry." *Id.* at 40a. It does not apply to individuals like Petitioners, who sell baked goods rather than transportation services. *See id.* In so holding, the court emphasized § 1's text. The "two examples that the FAA gives" of "'seamen' and

'railroad employees,'" the court explained, "are telling because they locate the 'transportation worker' in the context of a transportation industry." *Id.* at 46a. The court also cited a line of circuit precedent recognizing that "the FAA exclusion is limited to workers involved in the transportation industry." *Id.* at 46a–47a (citing *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972)). And it noted Eleventh Circuit cases reaching the same result. *See Id.* at 47a (citing *Hill*, 398 F.3d at 1288; *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1349 (11th Cir. 2021)). Because Flowers and its Independent Distributors traffic "in breads, buns, rolls, and snack cakes[,] not transportation services," and because customers "pay for the baked goods themselves," not for their movement, the court held that § 1 did not apply. *Id.* at 49a.

Having resolved Petitioners' appeal on the "transportation industry" ground, the Second Circuit did not reach—and so neither "reject[ed] [n]or adopt[ed]"—the District Court's finding that Petitioners are not transportation workers for the additional reason that, as franchise business owners, their job descriptions differ dramatically from those of "seamen" and "railroad employees." *Id.* at 40a. Nor did it reach other arguments about why § 1 did not apply. It did not decide whether business-to-business contracts can qualify as "contracts of employment." It did not "consider whether this case could be decided on the ground that the interstate element of the exclusion is not satisfied." *Id.* at 49a n.5. And it did not decide whether arbitration was

separately available under Connecticut law. *Id.* at 45a.

The late Judge Pooler dissented. She concluded that § 1 applies because Petitioners "are commercial truck drivers" who "handle goods traveling in interstate commerce every day." *Id.* at 64a–65a. According to Judge Pooler, the nature and terms of the Distributor Agreements, Petitioners' status as franchise business owners, and the fact that Petitioners never cross state lines in the course of their work made no difference. *See id.* at 64a–67a. She also rejected the majority's interpretation of § 1 as applicable only to workers in the "transportation industry" and, in any event, asserted that "plaintiffs *do* work in a transportation industry" because they drive trucks. *Id.* at 67a–73a.

3. The Second Circuit denied Petitioners' request for rehearing en banc. *Id.* at 78a. Three judges dissented from denial, arguing that the majority's "transportation industry" approach is inconsistent with *Saxon*. *Id.* at 79a–84a. Judge Pooler filed a statement with respect to the denial. *Id.* at 90a. And Judge Jacobs wrote an opinion concurring in the denial, emphasizing 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. He also responded to the dissenters' charge about *Saxon*, noting that "[t]he self-evident premise of *Saxon* was that an airline is a transportation industry." *Id.* at 86a–87a.

REASONS FOR DENYING THE PETITION

I. THE TRANSPORTATION INDUSTRY SPLIT IS SHALLOW AND WARRANTS FURTHER PERCOLATION POST-*SAXON*.

In the year since this Court last decided a § 1 case, only two Courts of Appeals have considered the Question Presented—and two of those three cases involved Flowers' unique business model. Although those courts have given different answers to the question whether the residual clause is limited to transportation industry workers, it is far from clear that they actually disagree about the arbitrability of this case. Moreover, the majority of pre-*Saxon* cases are consistent with the Second Circuit's ruling. Further percolation in light of *Saxon* is therefore well warranted.

A. Since *Saxon*, the Second and First Circuits are the only Courts of Appeals that have even considered whether workers outside the "transportation industry" can qualify as "transportation workers" under § 1's residual clause. In the decision below, the Second Circuit correctly recognized that they cannot. *See* Pet.App.40a. That ruling was consistent with a half-century of Second Circuit cases. *See Maryland Cas.*, 107 F.3d at 982; *Erving*, 468 F.2d at 1069.

While the First Circuit has rejected the Second Circuit's "transportation industry" reasoning, *Fraga*, 61 F.4th at 234—including in another case involving Flowers' Distributor Agreements, *Canales v. CK Sales Co.*, 67 F.4th 38, 45 (1st Cir. 2023)—it has never opined on other issues that would preclude § 1's application here. In particular, the First Circuit

expressly declined to decide whether Flowers' Independent Distributors are engaged in interstate commerce for purposes of § 1, or even whether they have "contracts of employment" at all. *Id.* at 44–45 (deeming those arguments waived). And on remand from the First Circuit's ruling, a district court is currently considering whether to order arbitration based on state law. *See* Order, Dkt. 37, *Canales v. CK Sales Co., LLC*, No. 1:21-cv-40065 (D. Mass. July 17, 2023) (directing parties to answer or file a motion to address "issue of state arbitration law"). The Second Circuit never reached the interstate commerce, "contract of employment," or state law questions in the decision below, either. Accordingly, it is not even clear that the two courts disagree about the ultimate enforceability of the arbitration agreements at issue in this case.

B. Attempting to convert two Circuits' disagreement about a single aspect of a multifaceted analysis into a widespread circuit split, Petitioners cite decisions from the Eleventh and Seventh Circuits. *See* Pet.14–16 (citing *Hamrick*, 1 F.4th at 1346; *Int'l Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012)). But neither court "has [ ] revisited the [§ 1] issue since *Saxon*" was decided, Pet. 14—which is central to Petitioners' argument on the merits. Pet. 19 (arguing that the decision below is wrong, first and foremost, "because it defies this Court's clear command in *Saxon*").

In any event, Petitioners overstate the relevance of the Seventh Circuit's ruling in *Kienstra* and understate the breadth of the pre-*Saxon* consensus in favor of the Second Circuit's approach. *Kienstra*

addressed § 1 in the context of a challenge to appellate jurisdiction. *See* 702 F.3d at 955. The opinion does not grapple with § 1's text, history, or context. It does not speak to the "transportation industry." And the plaintiffs were differently situated than Petitioners. Whereas the *Kienstra* plaintiffs were "truckers" who merely "delivered [the defendant's] goods," Petitioners are franchise business owners who receive remuneration based on the bakery products they sell rather than by the miles they drive. *Id.* at 957. Perhaps for these reasons, the First Circuit did not even mention *Kienstra* or otherwise suggest that the Seventh Circuit had taken a position on the "transportation industry" issue. *See Fraga*, 61 F.4th at 233–35; *Canales*, 67 F.4th at 45.

On the flipside, the Eleventh Circuit has long held that a plaintiff must be "employed in the transportation industry" to qualify as a "transportation worker" under § 1. *Hamrick*, 1 F.4th at 1349; *see also Hill*, 398 F.3d at 1288.[3] And although other Courts of Appeals have not addressed the issue so clearly, many do consider whether a plaintiff works in the transportation industry as part of the § 1 analysis. *See, e.g.*, *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348, 352 (8th Cir. 2005) (asking "whether the employee works in the

[3] The two California Court of Appeals cases Petitioners cite both described the Eleventh Circuit's "transportation industry" standard and found that the plaintiffs satisfied it. *See Muro v. Cornerstone Staffing Sols., Inc.*, 20 Cal. App. 5th 784, 791–92 (2018) (finding that employer was part of the transportation industry as defined by Eleventh Circuit); *Garrido v. Air Liquide Indus. U.S. LP*, 241 Cal. App. 4th 833, 840–41 (2015) (same).

transportation industry"); *Waithaka v. Amazon.com*, 966 F.3d 10, 22 (1st Cir. 2020) ("The nature of the business for which a class of workers perform their activities must inform that assessment."); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 917 (9th Cir. 2020) (same). Moreover, with the exception of the First Circuit cases, "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." Pet.85a & n.2 (Jacobs, J., concurring) (collecting cases).

None of those other courts has reconsidered its approach in light of *Saxon*. As explained below, Petitioners are simply wrong that *Saxon* undermines the Second Circuit's reasoning that "transportation workers" must work in the transportation industry. *See infra* Part III.C. But even if Petitioners are correct about *Saxon*'s impact, further percolation in light of that ruling is well warranted.

II. THIS CASE WOULD BE A TERRIBLE VEHICLE FOR CLARIFYING THE SCOPE OF § 1 POST-*SAXON*.

Even if this Court were inclined to revisit § 1 before the Courts of Appeals have had a fair chance to consider *Saxon*'s meaning, this is the wrong case for it to take. This case does not implicate the heavily litigated "last leg" question *Saxon* left open. 142 S. Ct. at 1789 n.2. And this case is a poor vehicle for addressing the "transportation industry" question both because of the parties' unique franchise agreement and because arbitration is required here for four other independent reasons.

A. Petitioners have one thing about § 1 right: The scope of the residual clause has engendered a lot of litigation. Almost none of that litigation, however, has had anything to do with the question Petitioners present here about the applicability of the residual clause to workers outside the transportation industry. Apart from cases involving Flowers Foods' unique, franchise-based business model, Petitioners identify only a handful of (largely non-Circuit Court) cases addressing that question, and most of those cases addressed the "transportation industry" question tangentially at best. In fact, of the five cases Petitioners cite for the propositions that "[t]his issue is not going away" and that courts "routinely" address it, *see* Pet. 18–19, *none* resolved the parties' dispute on "transportation industry" grounds.[4]

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[4] *See Rittmann*, 971 F.3d at 915–16 (holding that Amazon's "last mile" delivery drivers are § 1 transportation workers because they form part of a "continuous interstate transportation" network); *Valdez v. Shamrock Foods Co.*, No. 5:22-cv-1719, 2023 WL 2624438, at *3 (C.D. Cal. Mar. 16, 2023) (denying motion to arbitrate because the plaintiff "acted as a 'last mile' delivery driver" delivering goods that had traveled in interstate commerce); *Reyes v. Hearst Commc'ns., Inc.*, No. 21-cv-3362, 2021 WL 3771782, at *2–3 (N.D. Cal. Aug. 24, 2021) (holding that a worker who delivered publications that came from out of state was a transportation worker under "last mile" delivery driver doctrine), *aff'd*, 2022 WL 2235793 (9th Cir. June 22, 2022); *Garrido*, 241 Cal. App. 4th at 840–41 (holding § 1 applies to worker who transported products across state lines for a company "at least somewhat involved in the transportation industry"); *Teamsters Loc. 331 v. Phila. Coca-Cola Bottling Co.*, No. 06-6156, 2007 WL 4554240, at *2 (D.N.J. Dec. 20, 2007) (finding that the court had jurisdiction to enforce arbitration award under the Taft-Hartley Act and that the exclusion contained in § 1 "does not impact this finding").

Instead, the real hot topic is whether local-delivery, or so-called "last leg," drivers engage in interstate commerce within the meaning of § 1. *See, e.g.*, *Rittmann*, 971 F.3d at 915–16, 919 (holding that Amazon "delivery providers fall within the exemption" despite not crossing state lines because they form part of a "continuous interstate transportation" network); *Wallace*, 970 F.3d at 802 (holding that local food delivery drivers do not engage in sufficient interstate transportation for § 1 to apply); *Immediato v. Postmates, Inc.*, 54 F.4th 67, 78 (1st Cir. 2022) (holding that couriers who deliver goods from restaurants and retailers do not qualify for exemption because "they do so as part of separate intrastate transactions"); *Lopez v. Cintas Corp.*, 47 F.4th 428, 432–33 (5th Cir. 2022) (holding local delivery drivers lack "direct and necessary role" in interstate commerce for § 1 to apply); *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135, 1137–38 & n.1 (9th Cir. 2023) (recognizing disagreement with *Lopez* and holding that drivers delivering supplies to pizza franchisees within California are covered by § 1 because they "transport [interstate] goods for the last leg to their final destinations").

That question is not implicated here. The Second Circuit resolved this case on "transportation industry" grounds without deciding whether Petitioners are engaged in interstate commerce for purposes of § 1. In any event, Petitioners are not "last leg" drivers at all. Unlike the plaintiffs in "last leg" cases, Petitioners operate independent, intrastate businesses. And they have a wide array of

responsibilities, none of which they are required to perform personally. *See* Pet.App.114a–15a.

B. The unusual facts of this case also make it a poor vehicle for addressing the "transportation industry" issue. Petitioners are not, as they claim, "commercial truck drivers" who happen to work for a company that sells something other than transportation services. Pet. 1. To the contrary, the District Court found that Petitioners' "Distributor Agreements evidence a much broader scope of responsibility that belies the claim that they are only or even principally truck drivers." Pet.App.113a; *id.* at 40a (not disturbing that finding and neither "reject[ing] [n]or adopt[ing]" the District Court's analysis). Indeed, Petitioners' Distributor Agreements make clear that Petitioners need not personally perform *any* work at all—driving or otherwise. JA 98 ¶ 16.2. Accordingly, even assuming § 1 might apply to a delivery driver who works outside the transportation industry but who is "responsible for transporting goods that have traveled interstate," Pet.App.113a., Petitioners are not such drivers. *Id.*

Perhaps that is why Petitioners prefer to ignore the facts found by the District Court and discuss, instead, a hypothetical case involving a truck driver hired by a retail store to deliver goods. *See* Pet. 18–19. This case is not that hypothetical. Petitioners are franchisees that make money by selling "breads, buns, rolls, and snack cakes" in their exclusive territories. Pet.App.49a. They need not perform any transportation work personally.

C. Finally, the "transportation industry" issue is not remotely outcome determinative in this case. Indeed, there are at least four other independent reasons why Petitioners must arbitrate their claims.

First, as a threshold matter, the Distributor Agreements are not "contract[s] of employment" as required by § 1. Neither the District Court nor the Court of Appeals meaningfully addressed the "contract of employment" issue. But as this Court recognized in *Gilmer*, § 1 applies only to arbitration clauses "contained in a contract of employment." 500 U.S. at 25 n.2. And for purposes of § 1, "contracts of employment" are agreements by workers "to perform work." *New Prime II*, 139 S. Ct. at 539; *see also, e.g.*, *R & C Oilfield Servs., LLC v. Am. Wind Transp. Grp., LLC*, 447 F. Supp. 3d 339, 347 (W.D. Pa. 2020) ("contracts of employment" are contracts for "work by workers"). As the Fourth Circuit recently recognized, agreements "for certain business services to be provided by one business to another" do not fit that bill. *Amos*, 74 F.4th at 596; *see also, e.g.*, *R & C Oilfield Services*, 447 F. Supp. 3d at 347–48 (agreement "between two businesses" is not a "contract of employment"); *D.V.C. Trucking, Inc. v. RMX Global Logistics*, No. 05-CV-00705, 2005 WL 2044848, at *3 (D. Colo. Aug. 24, 2005) ("an arm's length business contract for carrier services" is not a "contract of employment" under § 1).

Second, Petitioners do not belong to a "class of workers" engaged to perform transportation work. *See Saxon*, 142 S. Ct. at 1789. To the contrary, and as the District Court found, they are franchise business owners with a "much broader scope of responsibility" than mere truck drivers.

Pet.App.113a; *see supra* at 11. Accordingly, they do not resemble the "seamen" and "railroad employees" covered by § 1.

Third, Petitioners are not engaged in interstate commerce for purposes of § 1 because they work exclusively intrastate. Petitioners own geographically defined territories, and their companies market, sell, and distribute Flowers products only within the borders of Connecticut. Pet.App.111a n.9 & JA 107, 145. For purposes of § 1, they therefore play no role—much less a "direct and necessary" one, *Saxon*, 142 S. Ct. at 1790—in the flow of those products across state lines.

Finally, even assuming that § 1 applied, the Arbitration Agreements are separately enforceable under Connecticut law. Section 1 excludes a limited class of arbitration agreements from the FAA's coverage. But it "has no impact on other avenues (such as state law) by which a party may compel arbitration." *New Prime I*, 857 F.3d at 24. Here, the Arbitration Agreements make clear that Connecticut law applies "to the extent Connecticut law is not inconsistent with the FAA." JA 119. There is no dispute that the Agreements are enforceable under Connecticut law. And far from being "inconsistent with the FAA," enforcing the Agreements would advance federal and state policies favoring arbitration, as well as the parties' unambiguous intent to arbitrate disputes like this one.

III. THE DECISION BELOW IS CORRECT

In any event, further review is unwarranted because the Second Circuit's decision is correct. The court's "transportation industry" approach follows

directly from the statutory text. It reflects the history and purpose of the FAA. It is consistent with *Saxon*. And it appropriately excludes classes of workers who look nothing like the "seamen" and "railroad employees" mentioned in § 1. Petitioners' "way leads to non-exclusive lists of factors, tests, and elements" that would be a nightmare for courts to apply. Pet.App.88a (Jacobs, J., concurring).

A. Section 1's text makes clear that the "transportation workers" covered by the provision's residual clause are, first and foremost, "workers involved in the transportation industry." Pet.App.47a.

Consistent with ordinary canons of statutory interpretation, § 1's residual clause is "controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Circuit City*, 532 U.S. at 115; *see also Saxon*, 142 S. Ct. at 1789–90 (explaining that *Circuit City* "relied on two well-settled canons of statutory interpretation": meaningful variation and *ejusdem generis*). Those enumerated categories, "seamen" and "railroad employees," "are telling because they locate the 'transportation worker' in the context of a transportation industry." Pet.App.46a. As *Saxon* recognized, the word "seamen" refers to a "subset of workers engaged in the *maritime shipping industry*," *Saxon*, 142 S. Ct. at 1791 (emphasis added). Likewise, the term "railroad employee" speaks not only to the role of the individual worker but also to the industry in which he works. Because "seamen" and "railroad employee" refer to "subset[s] of workers" in the transportation industry, *id.*, the residual clause should be understood the same way.

Petitioners' contrary arguments are meritless. Petitioners first claim that, in the context of entirely different statutory regimes, anyone who transports goods in interstate commerce can be considered "'engaged in interstate commerce' even if they [do not] work for a transportation company." Pet. 21. That is of course true with respect to provisions that do *not* contain the "seamen" and "railroad employees" examples that this Court has deemed dispositive in interpreting § 1. *Cf. Circuit City*, 532 U.S. at 115–16 (noting that the meaning of phrases involving "interstate commerce" varies widely from statute to statute, depending on whether other indicia of meaning "express[] congressional intent to regulate to the outer limits of authority under the Commerce Clause"). It is not true with respect to § 1, which *does* contain that language. The uncontroversial proposition that the "transportation of interstate goods was (and is) universally understood to be interstate commerce, regardless of who undertakes it," Pet. 21, has nothing to with the question of who qualifies as a "transportation worker" for purposes of § 1. Petitioners' cases—none of which involves § 1 or any other statute containing the crucial "seamen" and "railroad employees" language, *see* Pet. 21–22[5]—don't either.

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[5] *See Mich. Pub. Utils. Comm'n v. Duke*, 266 U.S. 570, 574–75 (1925) (interpreting the *Commerce Clause* and holding that the Michigan Public Utilities Commission could not require a private carrier engaged in interstate transportation to obtain a permit); *Rossi v. Pennsylvania*, 238 U.S. 62, 66 (1915) (interpreting the *Wilson Act* and holding that a state cannot punish an out-of-state seller of intoxicating liquor); *United States v. Simpson*, 252 U.S. 465, 466 (1920) (interpreting *a*

Petitioners' cursory attempts to grapple with the terms "seamen" and "railroad employees" fall flat for similar reasons. Petitioners point to cases involving entirely different statutory schemes in which individuals were considered "seamen" even if they were not employed by a shipping company. *See* Pet. 22. But none of those cases involved § 1 or a statute remotely resembling it.[6] Moreover, Petitioners (unsurprisingly) identify no case in which the term "railroad employee" was deemed to include anyone other than the employees of railroads. The fact that

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federal law prohibiting the transportation of liquor in interstate commerce and holding that the transportation of five quarts of whisky for personal use was unlawful); *Caldwell v. North Carolina*, 187 U.S. 622, 631–32 (1903) (interpreting the *Commerce Clause* and holding that a North Carolina statute regulating nonresident portrait companies was unconstitutional).

[6] *See Alaska Packers' Ass'n v. Indus. Accident Comm'n*, 276 U.S. 467, 468–69 (1928) (rejecting the argument maritime law precluded a *California workers compensation award* because the employee worked in part on land and "[t]he work was really local in character"); *Haavik v. Alaska Packers Ass'n*, 263 U.S. 510, 513–14 (1924) (rejecting *due process and privileges and immunities* challenges to an Alaska tax); *The Paquete Habana*, 175 U.S. 677, 683–84, 686–714 (1900) (interpreting the *Act of 1891* as not imposing "a pecuniary limit upon the appellate jurisdiction" and then holding that two vessels were improperly captured and treated as prizes of war); *N. Coal & Dock Co. v. Strand*, 278 U.S. 142, 144 (1928) (holding that state compensation law was preempted by the *Merchant Marine Act* because the worker "was upon the water in pursuit of his maritime duties when the accident occurred"); *Ellis v. United States*, 206 U.S. 246, 255–59 (1907) (upholding *federal labor law limiting hours worked by certain employees* against constitutional challenges and interpreting the law to not apply to seamen).

some companies may have occasionally employed their own railroad workers, *see id.* at 23,[7] says nothing about whether those workers would have been considered "railroad employees" under § 1.

B. If there were any doubt about the meaning of § 1's text, the provision's history and purpose should eliminate it. At the time the FAA was enacted, the country had been deeply impacted by transportation strikes, which threatened to disrupt other industries that depended on transportation services for their livelihoods. *See, e.g.*, A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Pol. Econ. 540 (1901); Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 1, 6 (1922). As a result, "Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers" and had already adopted "grievance procedures . . . for railroad employees." *Circuit City*, 532 U.S. at 121 (citing the Shipping Commissioners Act of 1872, 17 Stat. 262, and the Transportation Act of 1920, 41 Stat. 456). "[T]he passage of a more comprehensive statute providing for the mediation and arbitration of

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[7] *See Hemphill v. Buck Creek Lumber Co.*, 54 S.E. 420, 420–21 (N.C. 1906) (interpreting *North Carolina "fellow servant" law* depriving "any railroad operating in this state" of the defense of assumption of risk in certain circumstances to apply to railroads that are not common carriers); *Schus v. Powers-Simpson Co.*, 89 N.W. 68, 70 (Minn. 1902) (same as to *Minnesota "fellow servant" law*); *Procter & Gamble Co. v. United States*, 225 U.S. 282, 293 (1912) (ordering dismissal of challenge to Interstate Commerce Commission order on jurisdictional grounds because the statute only authorized review of affirmative orders).

railroad labor disputes"—later extended to cover airline labor disputes—"was [also] imminent[.]" *Id.* (citing the Railway Labor Act of 1926, 44 Stat. 577).

Section 1 was intended to ensure that the FAA would not preempt these "established or developing statutory dispute resolution schemes covering specific workers." *Id.* For that reason, Congress exempted "contracts of employment" for workers in industries that were or would soon be covered by those alternative schemes from the FAA's coverage. Conversely, Congress did not exempt "workers who incidentally transport[] goods interstate as part of their job in an industry that would otherwise be unregulated." *Hill*, 398 F.3d at 1289. Congress had no reason to expect that those workers would be covered by an alternative dispute resolution scheme. And a strike among those workers would not impact other businesses in the way transportation-worker strikes do. Whereas a strike among airline employees, for example, would affect every business that depends on that airline for transporting its goods and employees, a strike among Flowers Independent Distributors would, at most, affect only Flowers, its Distributors, and their customers.

Accordingly, § 1 encompasses workers in businesses that "peg[ ] [their] charges chiefly to the movement of goods or passengers" and whose "predominant source of commercial revenue is generated by that movement." Pet.App.48a. Shipping companies, trucking companies, and airlines are all prime examples. When you pay a shipping company, a long-distance moving company, or an airline, you are buying transportation. The individuals who work for those businesses resemble

"seamen" and "railroad employees." And strikes among those workers have the potential to disrupt commerce nationwide.

The transportation industry does not include businesses who produce or provide other products and services, even if their workers may "incidentally transport[] goods interstate." *Hill*, 398 F.3d at 1289. That means § 1 does not apply to "an interstate traveling pharmaceutical salesman," as his business is selling pharmaceuticals, not transporting goods. *Id.* at 1290. It does not apply to a Rent-A-Center employee who spends some of her time delivering furniture, as her business is renting furniture, not transporting goods. *Id.* at 1289–90. And it does not apply to Flowers' Independent Distributors, who sell "breads, buns, rolls, and snack cakes—not transportation services." Pet.App.49a.

C. The Supreme Court had no occasion to address the "transportation industry" issue in *Saxon*, because "the plaintiff worked for an airline" that was clearly "in the business of moving people and freight." *Id.* at 48a. Nevertheless, *Saxon*'s analysis is entirely consistent with the proposition that a "class of workers" must at least work in the transportation industry to qualify as "transportation workers." To be sure, *Saxon* further "teaches[] [that] not *everyone* who works in a transportation industry is a transportation worker." *Id.* (emphasis added) (discussing *Saxon*). Working within the transportation industry, in other words, is a necessary condition for qualifying as a "transportation workers" but not a sufficient one. "[T]he distinctions drawn in *Saxon*" *among* transportation industry workers "do not come into

play" where, as here, an individual works in a different industry entirely. *Id.*

Petitioners' contrary argument is meritless. Both Courts of Appeals addressing this issue post-*Saxon* recognized that *Saxon* says nothing one way or the other about whether "transportation workers" must work in the transportation industry. *See id.* at 48a ("That point needed no elaboration in *Saxon* because there the plaintiff worked for an airline."); *Fraga*, 61 F.4th at 235 ("*Saxon*'s holding does not strictly foreclose the possibility that being employed in the transportation industry may be a necessary threshold criterion for qualifying as a transportation worker."). And the attorney representing the plaintiff in *Saxon* conceded this very point at oral argument. "[I]f you look, in 1925," she argued, "railroad employees and seamen were really people who worked in industries that shipped goods for the public." *Saxon*, 142 S. Ct. 1783 (No. 21-309), Tr. 57:23–58:1. "[I]f we're talking about a company that is shipping its own goods," she continued, "those people likely wouldn't have been railroad employees or seamen at the time. And, similarly, those people likely . . . wouldn't be exempt from the statute here." *Id.* at 58:1–6; *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").

D. "The specification of workers in a transportation industry is [also] a reliable principle for construing [§ 1's residual] clause[.]" Pet.App.46a (emphasis omitted). To be sure, for workers within

that industry the § 1 analysis does not stop there. Courts still must consider whether the agreement in question is a "contract of employment" and whether the plaintiff in question belongs to a "class of workers" that frequently engages in interstate transportation. But the "transportation industry" approach easily filters out workers who have nothing in common with the "seamen" and "railroad employees" targeted by § 1.

Petitioner's rule, by contrast, would stretch § 1 far beyond its intended bounds. Today, almost everything we use and consume travels in interstate commerce in some sense before it arrives in our households. If § 1 encompassed every worker involved in the local distribution of those goods, then many workers who look nothing like "seamen" or "railroad employees" would qualify. Take, for example, a paperboy, who receives newspapers from out of state and then cycles around his neighborhood dropping them off at subscribers' homes. *See Reyes v. Hearst Commc'ns. Inc.*, No. 21-cv-03362, 2021 WL 3771782, at *2 (N.D. Cal. Aug. 24, 2021) (finding that a newspaper delivery person was a "transportation worker"). Or consider "the milkman in the morning, the chef in a food truck, [or] the person who delivers a pepperoni with extra cheese." Pet.App.86a. None of those workers looks anything like the "seamen" and "railroad employees" § 1 was designed to capture.

CONCLUSION

The petition for a writ of certiorari should be denied.

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