No. 23-51

In The Supreme Court of the United States

NEAL BISSONNETTE and TYLER WOJNAROWSKI, on behalf of themselves and all others similarly situated,

Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, and FLOWERS FOODS, INC.,

Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

THE INTEREST AND CONCERN OF AMICUS[1]

Amicus *National Academy of Arbitrators (NAA)* was founded in 1947 to ensure standards of integrity and competence for professional arbitrators of workplace disputes, including establishing canons of professional ethics,[2] and offering programs promoting the understanding and practice of arbitration.[3] As historians of the Academy observe, it has been "a primary force in shaping American labor arbitration."[4]

Arbitrators elected to Academy membership are only those with widely accepted practices and scholars who have made significant contributions to labor and employment relations. Currently, the Academy has more than 500 members in the United States and Canada. Members are prohibited from serving as advocates, consultants or associates for parties in the field,

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[1] Rule 37.6 statement: Counsel of record is the author of this brief on behalf of amicus. Other members of the organization assisted. No person or entity other than amicus made any monetary contribution to the preparation or submission of this brief.

[2] Gladys Gruenberg, Joyce Najita & Dennis Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* (1997). A special contribution developed with the Federal Mediation and Conciliation Service and the American Arbitration Association has been The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, at: https://naarb.org/code-of-professional-responsibility/.

[3] For the variety of topics discussed by arbitrators and advocates at the Academy's annual meetings, see https://naarb.org/proceedings-database/.

[4] Gruenberg, et al., *Fifty Years in the World of Work, supra*, at 26.

and from appearing as expert witnesses on behalf of labor or management.

The traditional function of labor arbitration has been to resolve disputes over the interpretation and application of collective bargaining agreements. More recently, arbitration has concerned the statutory rights of employees in the non-union workplace. The NAA has been a leader in developing professional standards and due process protections in those proceedings.[5] On several occasions, the NAA as amicus has contributed briefs to the Court in arbitration cases, including disputes regarding the Federal Arbitration Act (FAA).[6] In particular, the Academy has offered its views in both *Circuit City* and *Saxon*, two cases in which, as in this proceeding, the residual clause of Section 1 of the FAA is at issue. As relevant here, NAA members have decades of experience with transportation disputes under the Railway Labor Act (RLA) for the heavily unionized railroad and airline industries,[7] and in labor-management disputes under the National Labor

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[5] See, e.g., https://naarb.org/due-process-protocol/; https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/.

[6] 9 U.S.C. § 1. See, e.g., *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986); *Wright v. Universal Maritime Service Corp*., 525 U.S. 70 (1998); *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009); *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2019); *Sw. Airlines Co. v. Saxon*, 142 S.Ct. 1783 (2022).

[7] 45 U.S.C. § 151, et seq., and § 181, et seq.

Relations Act (NLRA).[8] In providing the Academy's perspective, amicus emphasizes that the organization supports arbitration as an institution because it is capable, when properly structured across a range of legal settings, of providing workplace justice in accord with legislative intent, judicial precedent, and historical practice.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus NAA supports petitioners in seeking reversal of the Second Circuit's decision in *Bissonnette v. LePage Bakeries*.[9] The Academy will show that a straightforward answer to the question before the Court can be found in *Circuit City* v. *Adams*,[10] and in *Southwest Airlines v. Saxon.*[11] In those decisions the Court applied the residual clause in Section 1 of the FAA, which exempts from the statute "seamen and railroad employees, or any other class of workers engaged in foreign or interstate commerce."[12]

In doing so, the Court determined that transportation workers are excluded from the FAA. In this case, respondent is asking the Court to add another element to the statutory text by arguing that, as the Second

[8] 29 U.S.C. § 151, et seq.

[9] 49 F.4th 655 (2d Cir. 2022).

[10] *Circuit City, supra*, 532 U.S. 105 (2001).

[11] *Saxon, supra*, 142 S.Ct. 1783 (2022).

[12] 9 U.S.C. § 1.

Circuit held, the residual clause applies *only* in the "transportation industry." However, adding a "transportation industry" precondition would rewrite and narrow the residual clause to read, "or any other class of workers engaged in foreign or interstate commerce *in the transportation industry*."

If the FAA is revised in this manner, it would disrupt administration of the U.S. transportation system by creating conflicts with existing substantive laws, notably affecting millions who drive for a living.[13] Drivers not only work for freight-hauling companies such as the United Parcel Service and Federal Express, but also for the fleets of national retailers such as Amazon, Wal-Mart, Target, and others. Regional deliveries for a variety of consumer products also will be affected, as in this proceeding.

After new ground was broken by *Circuit City* and *Saxon*, perhaps it is not surprising that a jurisprudential morass has developed for parties and courts considering Section 1's residual clause. This dispute is a clear example of such confusion. Here, Flowers Foods, the parent company, faces conflicting rulings from two neighboring courts of appeals concerning the same work; that is, drivers delivering the company's products.[14]

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[13] https://www.census.gov/library/stories/2019/06/america-keeps-on-trucking.html. (Last revised July 27, 2022.)

[14] Compare *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (2d Cir. 2022) with *Canales v. CK Sales Co., LLC*, 67 F.4th 38 (1st Cir. 2023).

As a result, drivers in Massachusetts are subject to one rule while drivers in Connecticut are subject to another. The happenstance of a state line should not yield different readings of the FAA.

To assist the Court, the Academy proposes a workable solution by drawing upon substantive laws governing the American workplace that have long applied to transportation workers. This will bring greater coherence and predictability to the administration of the FAA's residual clause, and will limit potential conflicts with other laws. As a result, employers, workers, courts and arbitrators will benefit. This solution places heightened emphasis on the phrase "class of workers" in Section 1's residual clause consistent with existing sources of positive law.

When courts decide who is an exempt transportation worker under *Circuit City* and *Saxon*, judges are at risk of becoming *de facto* personnel officials, obliged to review job descriptions, assignment schedules, freight manifests, location tracking data, and other transportation evidence, to decide whether highly differentiated subcategories of workers are subject to the FAA. Imposing this hyper-technical task on the courts is contrary to the phrasing of the FAA's residual clause. Instead, the Academy offers a workable solution for applying that provision.

ARGUMENT

1. As Confirmed by Legislative History and Decisions of This Court, The Residual Clause Applies to Those Who Do the Work, Not for Whom the Work is Done.

Section 1 states that the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[15] The FAA was adopted in 1925 as a procedural reform to ensure the enforcement of executory arbitration agreements. The plain text of Section 1 exempts *classes of workers*, not enterprises in the transportation industry. The statutory choice of words is meaningful, as demonstrated by the FAA's legislative history and the exemption's context, which focused on resolving commercial disputes.[16]

The Section 1 exemption was rooted in objections made by labor unions led by Andrew Fursueth of the Seamen's Union, who also was the lobbyist for the American Federation of Labor. Fursueth's concern, shared by other labor officials, was expressed to the Senate committee marking up the bill, and dealt with the law's potential effect on workers. Specifically, he proposed a drafting change to exempt all workers engaged in procuring and making products as well as in

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[15] 9 U.S.C. § 1.

[16] Matthew W. Finkin, "*Workers Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. Lab. Law 282 (1996); Matthew W. Finkin, *Employment Contracts Under the FAA – Reconsidered*, 48 Labor Studies Journal 329 (1997).

their delivery and transport.[17] Secretary of Commerce Herbert Hoover advanced the final language that became the residual clause in Section 1.[18]

The Court first construed Section 1's residual clause in *Circuit City.* While the residual clause could be read to cover all classes of workers, the Court applied the doctrine of *ejusdem generis* to conclude that the residual clause excludes only "transportation workers."[19] *Circuit City's* analysis meant that the FAA's transportation worker exception in Section 1 did not cover either the retail store employee in that case or employees generally. The determining factor in *Circuit City* was how the exclusionary phrase in Section 1 should be understood; that is, broadly or narrowly.[20]

The Court adopted a narrow reading. Central to the *Circuit City* decision is the Court's reasoning that

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[17] Finkin, *Workers' Contracts, supra*, at 289.

[18] *Id.* at 297. Reading Section 1's residual clause to cover workers beyond the transportation industry is consistent with the evolving structure of American industry more than a century ago during a period of industrial consolidation and vertical integration. Alfred Chandler, *The Visible Hand: The Managerial Revolution in American Business* (1977). For example, many companies, "including the meatpacking, brewing, cotton oil, and sugar companies, owned their own ships, fleets of railway cars, and other transportation equipment." *Id.* at 350. Oil, chemical and steel enterprises also had ships, rail cars and other transportation facilities. (*Id.* at 352, 355, 360.)

[19] *Circuit City, supra*, 532 U.S. 105 (2001).

[20] *Id.* at 115-116, distinguishing the broad scope of "affecting commerce" and "involving commerce" for enforcement under Section 2 of the FAA from the more narrow scope of the exclusion for those "engaged in commerce" under Section 1.

Congress crafted the residual clause to protect dispute resolution systems already established, and those soon to be developed, citing in particular the Transportation Act of 1920, and the RLA enacted in 1926 and amended in 1936.[21]

Since *Circuit City*, the Court has ruled on Section 1's residual phrase in two other cases. In *New Prime v. Oliveira* in 2019, the Court unanimously found that truck drivers treated as independent contractors were excluded from coverage as "workers" even though they were not classified as employees.[22] And in *Saxon* in 2022, the Court, again unanimously (with Justice Barrett not participating), ruled that ramp agent supervisors who load and unload baggage on planes, but who do not cross state borders, were excluded from the FAA.[23] In *Saxon*, the Court prescribed a two-step analysis to assess the actual work performed by employees, and whether, by such work, the employees were engaged in interstate commerce.

As the dissenting opinion in *Bissonnette* demonstrates, the company's delivery drivers perform on a daily basis the quintessential functions of transportation work by bringing company products to market.[24]

The teaching of the Court's Section 1 decision in *Saxon* is particularly apt, with the Court finding that

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[21] *Id.* at 120.

[22] *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019).

[23] *Saxon, supra*, 142 S.Ct. 1783 (2022).

[24] *Bissonnette, supra*, 49 F.4th at 667.

Saxon, a baggage handler and supervisor, was exempt because she was a "member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally."[25] The lesson from *Saxon* is that it is *what drivers do, not whose products they carry*, that exempts them from FAA coverage. Accordingly, drivers for Flowers Foods are members of a class of workers transporting goods for the company; their status is *not* based on what Flowers Foods "does generally."

As the Court stated in *Saxon*, the FAA's use of the term "workers" in the residual clause "directs the interpreter's attention to 'the performance of work,' " and the statute's use of "engaged" "emphasizes the actual work that the members of the class, as a whole, typically carry out."[26] If the Second Circuit's transportation industry test is approved, long-haul truck drivers who transport goods for Amazon, an online retail marketplace, or Macy's, a retail department store, would not be exempt because they deliver goods for businesses in the retail industry. This interpretation not only would be at odds with this Court's decisions, but also with decisions of circuit courts that have found that an interstate truck driver is "[i]ndisputably . . . a transportation worker under §1 of the FAA."[27]

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[25] *Saxon, supra*, 142 S.Ct. at 1788.

[26] *Id*., quoting *New Prime*, *supra*, 139 S.Ct at 541.

[27] *Lenz v. Yellow Transportation*, 431 F.3d 348, 351 (8th Cir. 2005). *See also Canales v. CK Sales Co., LLC, supra*, 67 F.4th 38, 45-46; *Int'l Bhd. of Teamsters Local 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012) ("a trucker is a transportation

2. Disputes Over Section 1's Residual Clause Have Created a Jurisprudential Morass.

The Second Circuit's misreading of the FAA and this Court's opinions demonstrates, as have other cases, that lower courts would benefit by further guidance on how to decide whether a worker is exempt from the FAA. An examination of the evolving law regarding the exception crafted in *Circuit City*, and refined in *New Prime* and *Saxon*, reveals a confusing morass of lower court decisions. As Section 1 litigation has unfolded, disputes have arisen over what is essentially the same kind of work; that is, people who drive or who otherwise support the performance of transportation work. Examples are offered here to illustrate this point.[28]

Some decisions have focused on traveling across state lines as a measure, often with qualifiers such as how frequent, how far, and how long workers undertake such activity.[29] Courts also have examined where workers are placed in the supply chain, as "last leg"

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worker regardless of whether he transports his employer's goods or the goods of a third party").

[28] A comprehensive review of inconsistent and problematic Section 1 outcomes is provided in Tamar Meshel, *Employment Arbitration: Recent Developments and Future Prospects*, 39 Ohio State J. Dis. Res. (forthcoming 2024), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4480671.

[29] Compare *Singh v. Uber Technologies*, *Inc.*, 67 F.4th 550 (3d Cir. 2023), *Cunningham v. Lyft,* 17 F.4th 244 (1st Cir. 2021), *Capriole v. Uber Techs., Inc.*, 7 F.4th 854 (9th Cir. 2021) and *Osvatics v. Lyft*, 535 F.Supp.3d 1 (D.D.C. 2021) with *Islam v. Lyft*, 524 F.Supp.3d 338 (S.D.N.Y. 2021).

drivers,[30] or as drivers from in-state warehouses to franchise stores,[31] or as food delivery drivers from local restaurants to customers,[32] or as drivers for hire who carry passengers from one location to another,[33] or, as here, as drivers who distribute goods made in one state for pickup and delivery to ultimate destinations in another state.[34]

Other cases concern work that supports transportation activity or is ancillary to such work; for example, an airport pre-departure security agent,[35] or a field service supervisor monitoring driver performance.[36] In still other cases, courts have wrestled with whether the FAA contemplates a dividing line between passengers and goods,[37] or if a trucker is a transportation worker,

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[30] Compare *Waithaka v. Amazon.Com*, 966 F.3 10 (1st Cir. 2020); *Rittmann v. Amazon.com*, 971 F.3d 904 (9th Cir. 2020), and *Fraga v. Premium Retail Services Inc.*, 61 F.4th 228 (1st Cir. 2023) with *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021).

[31] Compare *Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023) with *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022).

[32] *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020).

[33] See n. 29, *supra*.

[34] Compare *Bissonnette v. LePage Bakeries Park St., LLC, supra*, 49 F.4th 655 with *Canales v. CK Sales Co., LLC, supra*, 67 F.4th 38.

[35] *Perez v. Global Airport Sec. Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001).

[36] *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004).

[37] *Singh v. Uber Technologies, Inc.*, 939 F.3d 210 (3d Cir. 2019).

whether transporting goods for an employer or a third party.[38]

Terms the Court used in *Circuit City* and in *Saxon*, offered as helpful modifiers to describe work covered by Section 1's residual clause, unfortunately appear to have had an opposite effect, underscoring the line-drawing headaches for those seeking clarity. These terms highlight the proximity of workers to commerce; for example, direct, necessary, actively engaged, and intimately involved, among others.[39] As shown by the litigation history for Section 1 cases, these terms do not provide clear direction for employers, for workers or for courts when assessing workplace policies and practices. *Bissonnette* has raised a new question as to the type of industry in which a worker works.

The Academy's perspective is that, in the absence of this Court providing corrective guidance, years of piecemeal litigation are likely to persist. Increasingly, courts will conduct threshold hearings and trials to determine whether arbitration is warranted for employees who claim to be transportation workers and for

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[38] *Int'l Bhd. of Teamsters Local 50 v. Kienstra Precast, LLC*, 702 F.3d at 954, 957 (7th Cir. 2012).

[39] These terms, used in several passages in *Circuit City* and *Saxon*, recall the analysis of Section 1's residual clause in *Tenney Engineering, Inc. v. United. Elec. & Mach. Workers of America*, 207 F.2d 450, 452 (3d Cir. 1953) (residual clause applies only to " . . . those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it").

employers asserting they are *not* in the transportation industry.[40] The Academy believes that preserving the professional value and efficacy of arbitration, and avoiding conflict with other substantive laws governing the workplace, is undermined by ongoing uncertainty over how Section 1's residual clause should be applied.

3. A Workable Solution is Available Based on Existing Substantive Law and Workplace Practices.

A workable solution is available to deal with continuing confusion about Section 1's residual clause. One option would return to the plaintiff's position and that of the dissent in *Circuit City* favoring a Section 1 exclusion of *all* workers from FAA enforcement. Although there is scholarship on FAA history that points to this conclusion, the majority in *Circuit City* held otherwise, finding the legislative record too sparse.[41]

Amicus, however, does not propose to overrule *Circuit City*, or to modify *Saxon*, but to assist with their consistent application. To do so, the Academy suggests a reorientation of the Court's Section 1 jurisprudence, away from applying the FAA as a type of employment statute. Instead, the Academy urges reliance

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[40] *Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228, 237 (1st Cir. 2023); Section 4 of the FAA allows for summary disposition or for jury trials when "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue. . . ." (9 U.S.C. § 4.)

[41] *Circuit City, supra*, 532 U.S. at 120.

on substantive employment and labor laws that have long determined classes of workers within the interstate nature of the American workplace, including transportation workers. In this manner, the Academy offers a road map out of the jurisprudential morass in the wake of the Court's Section 1 decisions.

The road map includes, as shown above, the Court's reinforcement in this case that the transportation worker exemption is based on the work undertaken, not the industry for which it is performed. Although the record established in *Bissonnette* that the company's drivers traveled extensively in distributing out-of-state products to customers in another state, the Second Circuit held that the drivers were not exempt transportation workers because the company is in a bakery business, not a transportation business. By using a "transportation industry" test, the Second Circuit was not examining actual work performed by the class of workers at issue – that is, workers transporting company products – as instructed by *Saxon.*

Beyond reinforcing this point, the road map proposed by amicus illuminates the *content* of the transportation worker exemption by reference to relevant statutory sources and practices that already identify transportation work. *Circuit City*'s construction of the residual clause was tied to an analysis of the *scope* or *breadth* of the clause in limiting its reach to transportation workers. But once that task was accomplished – assessing whether the scope of the residual phrase covers all workers or only transportation workers – another analysis was required to determine the *content*

of "any other class" of transportation workers. In *Saxon*, the Court provided initial direction by approving a general test for *content*, stating that membership in a transportation "class of workers" is based on what the employee does and not the employer's general business.[42]

To more precisely determine the *content* of work excluded under Section 1, amicus emphasizes the importance of substantive law and historical practice derived from workplace experience by reference to U.S. employment and labor laws developed when the FAA was enacted, or soon after, as *Circuit City* instructs. Within this framework, there are a number of guideposts to the *content* of "any other class of workers" to be excluded from the FAA. In this respect, the Academy notes that the word "class" is a statutory modifier with a broader meaning than "job," "position," "function," "occupation," or even "classification," words that are not found in the FAA. Three examples are offered as sources shedding light on who is in "any other class of workers."

A first relevant source is the highly refined analysis of the American workplace provided by the Occupational Outlook Handbook issued by the United States Department of Labor (DOL Handbook).[43] The DOL's Handbook is an important aspect of the agency's work, which includes responsibility for enforcing the Fair

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[42] *Saxon, supra*, 142 S.Ct. at 1788.

[43] https://www.bls.gov/ooh/transportation-and-material-moving/. (Last modified Sept. 6, 2023.)

Labor Standards Act[44] and other employment laws and policies.[45]

The Handbook began as a DOL project in the 1930s and was formally in place a decade later to assist veterans and others as the economy emerged from the Second World War.[46] It served then, and still does, to offer career guidance and a comprehensive understanding of the workplace by drawing upon position profiles, job duties, and compensation, among other features of work.

For Section 1 disputes, the DOL's analysis, as applied here, clarifies who is an FAA-exempt transportation worker by identifying who is in this class; namely, air traffic controllers, pilots and flight attendants, bus drivers, delivery truck and sales drivers, hand laborers and material movers, material moving machine operators, heavy truck and tractor-trailer drivers, railroad workers, taxi, shuttle and chauffeur drivers, and water transportation workers. In all, millions of U.S. workers transport people or things, or directly assist those who do. As such, the DOL's list of occupations, taken together, encompasses a *class of transportation workers* who, based on the FAA's text and *Circuit City*, could be

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[44] 29 U.S.C. § 203, et seq.

[45] https://www.dol.gov/general/aboutdol/majorlaws. The Handbook also is used by agencies and courts as a source of expert information. (See, e.g., *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 145-147 (1st Cir. 2007) (relying on Handbook to decide non-immigrant work visa).

[46] https://www.bls.gov/opub/mlr/2019/article/pdf/70-years-of-the-occupational-outlook-handbook.pdf.

deemed exempt from arbitration enforcement under Section 1's residual clause.

A second example the Court can draw upon for a Section 1 road map is precedent under the NLRA.[47] The NLRA, as a substantive federal law that applies to private sector employment generally, was enacted, in part, to deal with labor strife in transportation, and covers drivers and other transportation-related workers.[48] Bakery-sales drivers are among the many transportation workers subject to the NLRA from its early years.[49] Indeed, the National Labor Relations Board (NLRB) has determined that respondent's route

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[47] 29 U.S.C. § 151, et seq.

[48] The NLRA was passed in a period of widespread labor unrest in 1934 and 1935, particularly strikes involving truck drivers in Minneapolis and dockworkers in San Francisco, that increased concerns over industrial peace and efforts to promote a statutory means of resolving labor disputes. (Irving Bernstein, *The Turbulent Years*, at pp. 217-351 (1969).) As one example, Rep. William Connery, a sponsor with Sen. Robert Wagner of the NLRA, expressly referred to truck driver and dockworker strikes in May 1934 in urging adoption of new labor legislation. (78 Cong.Rec. 9888-89 (May 29, 1934).) A DOL analysis shows the significant scale of transportation-related strikes in 1934. (https://www.bls.gov/wsp/publications/annual-summaries/pdf/work-stoppages-1934-and-1935.pdf.)

[49] See, e.g., *Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769 (1942); *National Labor Relations Bd. v. Continental Baking Co.*, 221 F.2d 427 (8th Cir. 1955). This application of the NLRA is consistent with the seminal decision of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In that case, the Court applied the NLRA to a steel company with an integrated transportation network employing more than 80,000 workers. (*Id.* at 26-27.)

drivers would be an appropriate unit for collective representation.[50]

Unlike the evolving law under the FAA's residual clause, transportation workers under the NLRA are not parsed into a series of discrete occupational subcategories depending on how much or how long workers are in transit, or their placement in a supply chain. Instead, the NLRA's jurisdictional reach is limited by Congress's statutory definitions for "employee" and "employer," such as who is a supervisor,[51] and by the business volume thresholds established by the NLRB.[52] For example, workers providing interstate transportation services for passengers or goods, or essential links in such services, are subject to the NLRA, except that coverage is limited to businesses exceeding $50,000 in gross annual volume.[53]

A third example to assist in determining the *content* of the Section 1 exclusion is the RLA, a key statute shaping the majority's reading of the FAA in *Circuit City*. Those subject to the RLA as "railroad employees" constitute a specific "class of workers" expressly listed in the FAA's residual clause, whether working with

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[50] See *LePage Bakeries*, NLRB Case No. 1-RC-21501 (2002); *LePage Bakeries*, NLRB Case No. 1-RC-21877 (2005).

[51] 9 U.S.C. § 151(2), (3), (11).

[52] *The Developing Labor Law: The Board, The Courts, And The National Labor Relations Act*, ch. 27 (John E. Higgins ed., 2022) (ebook).

[53] *Id.*, § 27.IV.B.

railroads or airplanes.[54] While the RLA applies to those workers, its relevance to this proceeding is amplified because the statute reflects a broad understanding of the *content* of transportation work as covering many workers who are not obviously on trains or planes, or loading them.[55] In this respect, the RLA is instructive regarding transportation-related work for those who are *not* in the transportation industry, as in this case.[56] Unfortunately, the Court's rejection of an airline industry basis for the Section 1 exclusion in *Saxon* can be

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[54] Section 151 of the RLA defines an "employee" as "every person . . . who performs any work" for a carrier covered by the statute. (45 U.S.C. § 151, Fifth.) Section 181 covers "every air pilot or other person who performs any work as an employee or subordinate official of such carrier." (45 U.S.C. § 181.) Section 181 also states that air carriers and their employees are "engaged in interstate or foreign commerce," text which parallels the FAA exemption. (*Id.*)

[55] The breadth of the RLA's application to covered workers tracks the Esch-Cummins Transportation Act of 1920, cited favorably by the Court in *Circuit City, supra*, 532 U.S. at 120. That legislation in Section 400(3) defined "transportation" as including,

> . . . *all services* in connection with the receipt, delivery, elevation, and *transfer in transit*, ventilation, refrigeration or icing, storage, and *handling of property transported*. (41 Stat. 456, 475; emphasis added.)

[56] Under 45 U.S.C. Section 153(h), the RLA covers not only those working on train cars, but also yard-service personnel, machinists, coach cleaners, shop laborers, and store employees, among others. For employees of air carriers, there are currently several positions subject to the RLA in addition to those directly involved in flying, including engineers, mechanics, fleet and passenger service staff, office clerical, dispatchers, and instructors. (*The Railway Labor Act*, § 4.II.E.2 (Douglas W. Hall & Marcus Migliore eds., 2023) (ebook).)

read, mistakenly, to reject the *class of workers* covered by the RLA or engaged in analogous work.[57]

The examples offered by the Academy are not the only potential sources to assist in determining the *content* of the Section 1 transportation worker exclusion. Guidance also may be drawn from wage and hour, discrimination, health and safety, workers' compensation, and other substantive fields of law. Amicus knows from the experience of its members that American law is rich in the detail it provides about who is engaged in transportation work in a variety of employment fields. This well-established detail offers a solid foundation to determine the content of the Section 1 exemption, without turning to the FAA as a substitute employment law, something the statute was never intended to be. For amicus, these traditional sources of law can provide *prima facie* support for a presumption that an exemption is warranted under Section 1's residual clause.

CONCLUSION

Circuit City delineated the *scope* of Section 1's residual clause by excluding transportation workers, and not all workers. Congress could decide otherwise, but it has not. *Saxon* assisted in determining the *content* of Section 1's exclusion by placing the focus on actual work performed and on engagement in commerce, and by deciding that an industry-based exception was at

[57] *Saxon, supra*, 142 S.Ct. at 1790-1791.

odds with the FAA. In the aftermath of *Circuit City* and *Saxon*, courts and litigants have struggled to refine the *content* of the exclusion. Amicus proposes that a workable solution for this difficulty can be found in already-existing substantive laws governing the workplace that apply to transportation workers.

The Academy acknowledges that there will be a measure of litigation if the Court clarifies the transportation worker exemption as proposed here. Some amount of line-drawing will continue; for example, disputes about what is transportation or transportation-related work, or over who is covered by a statute. But, even so, if the Academy's perspective is adopted, courts and parties will have well-established substantive law and practice to guide decision-making, and they will be spared the seemingly never-ending task of defining the content of the residual clause. They also will be spared potential conflicts that can arise between the procedural reach of the FAA and substantive legal doctrine in the American workplace.

The Court's cautionary reminder in *New Prime* applies here. Respondent seeks refuge in FAA policy because it is "[u]nable to squeeze more from the statute's text."[58] As in *New Prime*, the Court in making its antecedent statutory inquiry should refrain from exercising its authority to "pave over bumpy statutory texts

[58] *New Prime, supra*, 139 S.Ct. at 543.

in the name of more expeditiously advancing a policy goal."[59]

Date: November 20, 2023

Respectfully submitted,

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[59] *Id*.