No. 23-51

IN THE

Supreme Court of the United States

NEAL BISSONNETTE, ET AL.,
Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that the overly broad construction of the Federal Arbitration Act advanced by the court below undermines the right of American workers to pursue their statutory and common-law claims in a judicial forum.

SUMMARY OF ARGUMENT

The bill that became the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, was written by a committee of the American Bar Association ("ABA") to make arbitration agreements between merchants enforceable when entered into during the course of inter-

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

national and interstate commerce. However, the International Seamen's Union of America and the American Federation of Labor ("AFL") immediately objected that the ABA's proposal would result in the FAA being applied to workers. In response, advocates for the bill, including the ABA drafting committee and Commerce Secretary Herbert Hoover, advanced language to alleviate these concerns. That language exempted workers' employment contracts from the Act's application.

Nevertheless, this Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), came to the conclusion that all workers—except seamen, railroad employees, and transportation workers—were intended to be covered by the Act. The *Circuit City* Court came to its conclusion without considering any legislative history (although, as a result of subsequent scholarly research, the current historical understanding is much more robust). By not considering the legislative history at all, the Court never contemplated the fact that "railroad employees" were inserted into the existing language after "other class of workers" was already drafted by the ABA. Therefore, the string evaluation used in the Court's *ejusdem generis* analysis played no part in constructing the text at the time the FAA was written and, therefore, cannot inform the meaning of "other class of workers." Further, when the Court based its opinion by referencing maritime and railroad statutes, it similarly did not consider the fact that these were never part of the legislative record nor, as research has shown, considered by the ABA drafters of the FAA.

On the other hand, even if the holding by the Court is accepted and the § 1 exemption language is

deemed to focus exclusively on transportation workers, the exception would still apply to Petitioners. As this Court has said, the exemption is to be interpreted broadly, *New Prime v. Oliveira*, 139 S. Ct. 532 (2019), and applies to the actual work performed, rather than for whom it is performed. *Southwest Airlines Co. v. Saxon*, 496 U.S. 450 (2022).

The Second Circuit wrongly held that truck drivers employed by Respondents [hereinafter "Flowers"] are not exempt from the FAA, Nothing in the history behind the enactment of the FAA nor this Court's prior holdings supports calling Flowers' truck drivers "bakery workers" Pet. App. 3A rather than "transportation workers," and the FAA exemption was never intended to be guided by who paid workers rather than the type of work being per-formed.

ARGUMENT

I. The Underlying History and the Drafting of the Federal Arbitration Act Makes It Clear That Congress Meant to Exclude All Workers from the Act.

A. Background of the FAA.

By the beginning of the 20th century, arbitration between businesses had become common in the United States. Problematically though, arbitration encountered a substantial legal obstacle due to the relative lack of judicial enforceability of agreements. This

was because, under English common law, courts considered agreements between businesses to arbitrate future disputes to be revocable at any time.[2]

As arbitration clauses became a more prominent part of merchant-to-merchant contracts, business interests pushed for statutory remedies to combat this revocability. In 1920, the first such statute was enacted in New York.[3] After this proved successful, there was a push for a federal law that would be applicable in all federal courts.[4] This effort was led by the two men most responsible for the New York law: Julius Cohen, a lawyer who served as general counsel for the New York State Chamber of Commerce and who had written a book in 1918 on the subject, *Commercial Arbitration and the Law*; and Charles Bernheimer, a cotton goods merchant who chaired the Chamber's arbitration committee. Immediately after

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[2] *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 34 (1924) [hereinafter "1924 Hearings"] (statement of Julius Henry Cohen); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992); WESLEY A. STURGES, COMMERCIAL ARBITRATION AND AWARDS (1930).

[3] 1920 N.Y. Laws 803-07; S. Rep. No. 68-536, at 3 (1924). *See also* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 302 (2015).

[4] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275–76 (1926).

the New York law passed, Cohen and Bernheimer[5] began working on the passage of an equivalent federal bill.

B. 1922: The ABA Drafts a Federal Arbitration Bill, Which Is Introduced in Congress.

The congressional bill that would become the FAA was drafted by Cohen and reviewed by the American Bar Association's Committee on Commerce, Trade and Commercial Law.[6] The drafting process began at the ABA's annual meeting in 1920.[7] In 1922, the Committee reported to the ABA's general body that it had finished drafting its proposed federal arbitration statute.[8]

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[5] Bernheimer asserted that "[t]he statement I make is backed up by 73 commercial organizations in this country who have, by formal vote, approved of the bill before you gentlemen." *Hearing on S. 4213 and S. 4214 Before the S. Subcomm. of the Judiciary*, 67th Cong. 7–8 (1923) [hereinafter "1923 Hearings"]. *See also* Comm. on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153, 153 (1925). The 1923 Hearings were held during the 67th Congress, while the FAA was passed by the 68th Congress. However, the 1923 Hearings were before a subcommittee whose membership was the same in the 68th Congress.

[6] 1923 Hearings, *supra* note 5, at 2 (statement of Charles L. Bernheimer).

[7] 43 A.B.A. REP. 75 (1920). *See also* IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

[8] 45 A.B.A. REP. 293–95 (1922).

After adoption by the ABA, on December 20, 1922, Senator Sterling and Representative Mills introduced the federal arbitration bill in the form reported at the 1922 meeting of the American Bar Association.[9]

Julius Cohen broadly summarized the purpose of the ABA's proposed bill:

> A written provision for arbitration contained in any contract which involves maritime transactions (matters which would be embraced within admiralty jurisdiction), or interstate commerce as generally defined, is made "valid, enforceable and irrevocable," except upon the grounds for which any contract may be revoked.[10]

Notably, this original bill did not include an exemption for "contracts of employment."

C. The International Seamen's Union of America and the American Federation of Labor Voice Serious Concerns About the Proposed Bill.

The bill's treatment of labor disputes sparked strong opposition from the International Seamen's Union of America and the American Federation of Labor. Seamen's Union President Andrew Furuseth saw the bill as a mechanism for the "reintroduction of forced involuntary labor." He felt that the bill "would

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[9] *See* 67 Cong. Rec. 732, 797 (1922) (noting the introduction of H.R. 13522 and S. 4214).

[10] Cohen & Dayton, *supra* note 4, at 267. *See also* Committee on Commerce, *supra* note 5, at 153.

bring about compulsory labor for seamen, railroad workers and all engaged in interstate commerce, and would jeopardize the existence of labor and other organizations formed by workingmen."[11]

Both unions were staunch opponents of giving arbitrators authority over individual employment contracts. For instance, at the International Seamen's Union Annual Convention in 1924, attendees forcefully resolved to continue cooperation with the AFL "in preventing the enactment of any measure designed to fasten any species of compulsory arbitration upon any group of workers in America."[12]

D. 1923: Hearings Take Place on the Benefits of the FAA and the ABA Offers to Revise the Bill to Include an Exemption for Workers.

A subcommittee of the Senate Judiciary Committee held hearings on the bill in January 1923. The hearings make clear that the focus of the Act was merchant-to-merchant arbitration. Every example given by Bernheimer regarding the need for enforceability of arbitration agreements was of a case between merchants,[13] while other witnesses also described the bill

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[11] *Seamen Condemn Arbitration Bill*, N.Y. TIMES, Jan. 14, 1923, at 21; SZALAI, *supra* note 7, at 132; Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 284 (1996).

[12] 27 Proc. Ann. Convention Int'l Seamen's Union Am. 100 (1924).

[13] Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006).

solely with reference to disputes between businessmen.[14] In fact, Cohen, Bernheimer, and their colleagues took pains to tell Congress the limited scope of the proposed legislation.

When asked about the objections posed to the bill by the heads of the Seamen's Union and the AFL, W.H.H. Piatt, testifying at the 1923 Hearings in his capacity as chairman of the ABA Committee of Commerce Trade and Commercial Law (the committee that wrote the bill and presented it to Congress), pointedly testified:

> He has objected to it and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest . . . they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." *It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

[14] *Id. See also* Leslie, *supra* note 3, at 306–07.

1923 Hearings, *supra* note 5, at 9 (emphasis added).

This response from Piatt was followed by questioning from Senator Walsh of Montana, who wanted to know whether the intended legislation would apply to contracts that were not really voluntary:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all. . . . It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court and has to have it tried before a tribunal in which he has no confidence at all.

Id. Piatt responded that this was not the purpose of the bill and that the ABA had written the bill only to enforce arbitrations between businesses:

> I would not favor any kind of legislation that would permit the forcing of man [sic] to sign that kind of a contract. . . . I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods.

Id. at 10.

Thus, the testimony before the committee, including from the chair of the ABA committee that drafted the bill, makes it clear the FAA was only meant to apply to contracts between merchants. Moreover, Mr. Piatt and the other ABA drafters had no objection to excluding workers, because they did not believe their bill was intended to cover employment contracts at all. Piatt therefore suggested adding language that: "nothing herein contained shall apply to *seamen or any class of workers* in interstate and foreign commerce." (emphasis added) This exclusion tracked Julius Cohen's description of the bill as dealing with admiralty and interstate commerce. 1924 Hearings, *supra* note 2, at 15 (statement of Julius Cohen).

E. Herbert Hoover Sends the Committee a Letter Regarding the Bill, Which Specifically Adds Railroad Employees to the Exemption.

Secretary of Commerce Herbert Hoover had heavily advocated for the passing of the FAA for a long time, pointing to the New York Arbitration Act's ability to relieve congestion within the New York court system. But Hoover was also lobbied by railroad worker unions to have railroad employees expressly excluded from the mandates of the federal bill. These unions felt that they could not rely solely on the efforts of the AFL, because up through 1926, the "Big Four" railroad labor organizations (Brotherhood of Locomotive Engineers, Order of Railway Conductors of Amer-

ica, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railroad Trainmen) were in competition with the AFL.[15]

Therefore, Hoover wrote the Committee, noting that he recognized the objection to the "inclusion of workers' contracts in the law's scheme." 1923 Hearings, *supra* note 5, at 14 (letter of Secretary of Commerce Herbert Hoover). Hoover recommended that language be added to the proposed bill, stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id*. Hoover explained that his proposal was designed to take "workers' contracts" out of the law's scheme altogether, satisfying the unions who had sought that very end.[16]

F. 1925: The ABA Revises the Bill with Hoover's Proposed Language and the Bill Is Passed into Law.

Later in 1923, the ABA Committee made Hoover's change to the draft bill,[17] inserting in Section 1

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[15] *Organization and Membership of American Trade Unions*, 23(2) MONTHLY LAB. REV. 8, 12 (Aug. 1926) ("These organizations have always maintained their position independent of the American Federation of Labor, and have so thoroughly controlled their field that no question of jurisdiction or dual unionism has arisen.").

[16] *See* Finkin, *supra* note 11, at 297; RAY L. WILBER & ARTHUR M. HYDE, THE HOOVER POLICIES (1937); HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920-1933 (1952).

[17] MACNEIL, *supra* note 2, at 91.

the exemption language: "but 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."[18] The ABA general body approved the draft of the bill containing the exemption language at its annual meeting in 1923.

When the bill was reintroduced in the next session of Congress, Congress took up the ABA's revised draft with Secretary Hoover's language used for the exemption clause. This inclusion was lauded by the Seamen's Union, the AFL and the railroad unions, all of whom felt that the exemption language completely dealt with their objections. As stated at the proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor:

> Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provided that "nothing herein contained shall apply to contracts of employment of seamen, railroad employe[e]s or any other class of workers engaged in foreign or interstate commerce." *This exempted labor from the provisions of the law, although its sponsors denied there was any*

[18] *Id.* In its report, the Committee stated that this change was made "[i]n order to eliminate th[e] opposition" of the International Seamen's Union. 46 A.B.A. Rep. 287 (1923). Indeed, after the exemption was inserted in 1923, one of the leading proponents of the bill, Charles Bernheimer, stated that "we are not . . . convinced that it would not be in the interests of labor to have them included." Even so, he conceded that "all industrial questions have been eliminated" in order to appease labor's concerns. SZALAI, *supra* note 7, at 153.

intention to include labor disputes.

45 Proc. Ann. Convention Am. Fed'n Lab. 52 (1925) (emphasis added).[19]

One would be hard-pressed to believe that the AFL, with a vast membership "divided into 115 national and international unions,"[20] would have celebrated its achievement to its membership if the exemption did not apply to the vast majority of AFL members.

On February 12, 1925, President Coolidge signed the FAA into law after it passed through Congress without opposition. The only objection ever raised to the Act was that it should not cover workers. Julius Henry Cohen, the FAA's principal drafter, described the added amendment as having the effect of "leav[ing] out labor disputes," but he did not view the amendment as materially altering the bill in any way.[21]

In any case, because employment-related litigation comprised only a fraction of cases during the 1920s, legislators viewing the Act as a form of docket relief would have been unlikely to argue against a

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[19] *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 127 (2001) (Stevens, J., dissenting).

[20] Jay Newton Baker, *The American Federation of Labor*, 22 YALE L.J. 73, 74 (1912).

[21] SZALAI, *supra* note 7, at 134–35.

broad construction of the employment exemption.[22] In the end, when passed as law in 1925, neither the drafters, the Secretary of Commerce, organized labor, nor members of Congress believed that the FAA applied to employment contracts.

II. By Failing to Consider the Drafting and Legislative Process Surrounding the FAA, the Decision by the *Circuit City* Court Is Based Upon Factually Incorrect Assumptions and Incorrect Analysis.

Generally speaking, the historical and legislative context of an act's passage should be important to a proper understanding of the act. Here, as detailed in Part I above, the exemption language at issue was designed to obtain organized labor's approval for the legislation. Organized labor, including the vast AFL, felt that if the FAA applied to workers, the disparity in bargaining power would permit employers to coerce potential employees to enter into unfair employment agreements subject only to an arbitrator's purview.

To cure this, the drafters—whose primary desire was the enforceability of arbitration agreements between merchants—assured both organized labor and Congress that the bill would not cover contracts between employers and employees.

However, rather than following the clear intention of the ABA drafters, then-Secretary of Commerce

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[22] *See* Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 295 (1991).

Hoover, and Congress, the Court in *Circuit City* held that the exemption language excluded from coverage only seamen, railroad employees, and transportation workers. 532 U.S. at 114–15, 119. In doing so, three quarters of a century after the Act was passed, the Court eschewed historical review by stating that it had no need to "assess the legislative history of the exclusion provision" because the Court "[does] not resort to legislative history to cloud a statutory text that is clear." *Id.* at 119 (citing *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994)). As Justice Stevens noted in his dissent: "When [the Court's] refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority." *Id.* at 132 (Stevens, J., dissenting).

In undertaking this "textual" analysis, *Circuit City* applied the canon of construction *ejusdem generis*. Theoretically, *ejusdem generis* requires that where there are specific terms followed by a general term, the general term is construed to include only objects similar to the specific terms. The Court held that with respect to the exclusionary language of § 1 of the FAA, "any other class of workers engaged in foreign or interstate commerce" "should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." The Court's conclusion was that because "seamen" and "railroad employees" both work in transportation, "other class of workers" must mean "transportation workers." 532 U.S. at 109–11.

However, the original exemption proposed by the ABA included only seamen and "workers" in commerce. It is illogical for *Circuit City* to apply *ejusdem generis* when the word "seamen" was the only other "descriptor" at the time that "class of workers" was introduced into the clause. It was only Secretary Hoover's subsequent addition of "railroad employees" that turned the phrase into a string. How then could that language explain the meaning of the word "workers" when "workers" was already a part of the proposed statute before the words "railroad employees" were added?

Further, the Court applied *ejusdem generis* incorrectly. The common characteristic that the "other workers" in this clause shared with seamen and railroad employees in 1925 was that they were all workers employed in "commerce," not necessarily that they were specifically transportation workers. Consider the sentence: "On an African safari, one needs to fear lions, leopards, and other predators." The operative concept here is what is to be "feared," not, as the court employed *ejusdem generis*, what is similar between lions and leopards. While both are cats, the use of the words "other predators," would not be interpreted to include only other cats, like servals, but other animals to be feared, such as hyenas, wild dogs, and crocodiles.

Nowhere in the legislative history is it suggested that "other class of workers" should be limited to transportation workers rather than, as the text clearly states, "any other class of workers engaged in foreign and interstate commerce." Not once are the words "transportation workers" ever used. Indeed, this conclusion ignores the fact that the AFL, which

was the nation's largest umbrella union, represented employees vastly beyond the transportation sector.

A second reason, given by *Circuit City* is that it "assumed" that Congress excluded only seamen, railroad employees, and transportation workers, because the former two categories had federally legislated arbitration provisions. 532 U.S. at 120–21. The Court reasoned that Congress must have excluded them because there was no need to make arbitration enforceable for them.[23] *Id.* Unexplained is why the unions lobbied so vigorously against being included within the confines of the Act. Furthermore, there is no mention in any hearing that Congress even took note of these arbitration laws at the time, and research shows that these laws were never considered by the ABA drafting committee.

In this context particularly, *Circuit City*'s conclusion that all workers, except seamen, railroad employees, and transportation workers, were intended to be covered by the Act makes little sense. According to *Circuit City*, Congress decided to *exclude* those workers most likely to be involved in the admiralty and interstate commerce matters underlying the contracts at the heart of the FAA, but to *include* all employment contracts of workers less likely to have jobs involved directly in interstate commerce. This is illogical. Clearly, the purpose of the exclusion, evident from the legislative history, is that the FAA was never intended to apply to employment contracts at all.

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[23] *See* JOHN J. GEORGE, MOTOR CARRIER REGULATION IN THE UNITED STATES 215 (1929).

Rather than the tortured logic, untethered to history, exhibited in the *Circuit City* decision, Justice Gorsuch later made clear that the FAA "should be interpreted as taking [its] ordinary meaning . . . [which is the] meaning at the time Congress enacted the statute." *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations in original) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)). This, in fact, is consistent with what Julius Cohen (the primary drafter of the FAA) wrote in 1926: "[The FAA] must be read in the light of the situation which it was devised to correct and of the history of arbitration and of similar statutes in the recent past."[24] The *Circuit City* Court failed to do this.

III. Assuming *Circuit City* Is Correct and Congress Meant Only to Exempt Transportation Workers, This Court Has Held Consistently That the Scope of Exempted Workers Must Be Viewed Broadly.

When *Circuit City* addressed the § 1 exemption without the benefit of the fulsome history which has resulted from scholarly research over recent years, the Court concluded "other class of workers" meant all other "transportation workers" without any limitation based on who employed those workers. 532 U.S. at 109–11. This qualification was to be viewed broadly, as Congress fully intended "to exercise [its] commerce power to the full." *Id.* at 112 (citation omitted) According to *Circuit City*, the plain language of the exemp-

[24] Cohen & Dayton, *supra* note 4, at 266.

tion centered on the *type* of work being performed, rather than the status of the person performing it or who pays for it.

If the *Circuit City* Court's *ejusdem generis* analysis is correct, transportation workers must be defined as broadly as seamen and railroad employees are defined. These designations have been consistently defined very broadly. "Seamen" is a term of art, meaning "a person employed on board a vessel in furtherance of the vessel's purpose." *McDermott Int'l., Inc. v. Wilander*, 498 U.S. 337, 346 (1991). Similarly, "railroad employee" includes "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service)." Railway Labor Act of 1926, 45 U.S.C. § 151.[25]

This is consistent with long-standing federal interpretation of these terms. For instance, courts interpreting § 1 have typically looked to judicial interpretations of "seamen" from the Jones Act, which treats the term broadly.[26] As this Court has explained, the broad definition of "seaman" as a person "employed on board a vessel in furtherance of [the vessel's] purpose," was the definition of seaman under maritime law

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[25] *See* Jose Aparicio, *The Arbitration Hack: The Push to Expand the FAA's Exemption to Modern-Day Transportation Workers in the Gig Economy*, 54 U.S.F. L. REV. 397, 421–22 (2020) (footnotes omitted).

[26] *E.g.*, *Tran v. Texan Lincoln Mercury, Inc.*, No. H-07-1815, 2007 WL 2471616 (S.D. Tex. Aug. 29, 2007); *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at *4 (N.D. Cal. Apr. 5, 2004); *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 393 (5th Cir. 2003); *Buckley v. Nabors Drilling USA Inc.*, 190 F. Supp. 2d 958, 964 n.2 (S.D. Tex. 2002).

when Congress passed the Jones Act in 1920 (five years before enacting the FAA). *Wilander*, 498 U.S. at 346.

The understanding of the term "railroad employees" at the time the FAA was passed was equally broad. Although the FAA does not define the term "railroad employees," other statutes of that era do. For example, in 1898 Congress defined "railroad employees" in the Erdman Act as "all persons actually engaged in any capacity in train operation or train service of any description," *See also United Bhd. of Maint. of Way Emps. & Ry. Shop Laborers v. St. Louis Sw. Ry. Co.*, Decision No. 120, 2 R.L.B. 96, 101–02 (1921). Indeed, in *New Prime*, this Court discussed the Railroad Labor Board's broad construction of the term "employee" in the Transportation Act of 1920 and concluded that the Erdman Act "evince[s] an equally broad understanding of 'railroad employees.'" 139 S. Ct. at 543.

The breadth of *Circuit City*'s worker coverage was thus reaffirmed by this Court in *New Prime*. Reacting to Petitioner New Prime's attempt to graft a 21st-century meaning onto the 1925 statute, the Court unanimously refused the company's request to limit the scope of covered transportation workers and rejected its definition of "contract of employment." As Justice Gorsuch wrote: "[T]his modern intuition isn't easily squared with evidence of the term's meaning at the time of the Act's adoption in 1925. At that time,

[it] usually meant nothing more than an agreement to perform work."[27] *Id.* at 539.

This was followed by the Court's unanimous decision in *Southwest*, in which Justice Thomas pointedly rejected an industry-specific approach to the statutory exemption that Respondents now seek. *Southwest Airlines Co. v. Saxon*, 496 U.S. 450 (2022). The Court held that what is important is "the actual work" being performed by the worker. *Id.* at 456. Justice Thomas's examples of occupations he believes would not be entitled to the exemption even though Southwest is a transportation company are instructive: "shift schedulers," "those who design Southwest's website," and "those who run the Southwest credit-card points program." *Id.* at 460. Justice Thomas's reasoning is clear: regardless of whether or not a worker is employed by a transportation company, only employees doing transportation work are entitled to the exemption. For the same reason, the converse is true—workers for Flowers who are doing transportation work are covered by the exemption.

The transportation of goods and passengers by motor carrier was far from an insignificant part of

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[27] *New Prime* also rejected the suggestion that the exception's text should be viewed through the lens of a "liberal federal policy favoring arbitration agreements." *Id.* at 543 (citation omitted). In their Brief in Opposition at 5, Flowers ignored *New Prime* and quoted to this Court the 1983 case of *Moses H. Cone Mem'l Hosp v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). Curiously, Flowers also ignored this Court's recent reference to that case in *Morgan v. Sundance, Inc.*, where the Court explained how this *Moses* quote had been misused by advocates like Flowers. 596 U.S. 411, 412 (2022) ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.").

commerce in the 1920s. In 1926, over 25,000 trucks engaged in motor commerce.[28] Obviously, over the years, this number has dramatically expanded. There are now many trucking companies that service the business of the American economy. A very significant portion of this transportation network is comprised of fleets of trucks or tractor-trailers that are controlled, managed, and employed by America's corporations. It would be the drivers for these fleets that the Second Circuit and Respondents would in one fell swoop remove from the FAA's exemption. Of these, eight of the largest fleets employing drivers are owned by companies in the food business like Flowers.[29] Yet, as a result of their self-described "unique business model,"[30]

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[28] *Organization and Membership of American Trade Unions*, *supra* note 15, at 13.

[29] *See Top 100 Private: 2022 Essential Management and Operating Information for the 100 Largest Private Carriers in North America*, TRANSP. TOPICS, https://www.ttnews.com/private-carriers/rankings/2022 (last visited Nov. 20, 2023). By the end of 2022: PepsiCo Inc. had 11,079 tractors, 16,138 trucks, 6,682 pickups/cargo vans and 20,105 trailers; US Foods had 5,969 tractors, 433 trucks, and 7,748 trailers; Tyson Foods had 2,594 tractors, 46 trucks and 5,024 trailers; Gordon Food Service had 2,064 tractors, 34 trucks and 2,851 trailers; Dot Foods had 1,788 tractors, 12 trucks, 42 pickups/cargo vans, and 2,900 trailers United Natural Foods Inc had 1,611 tractors, 12 trucks, and 4,620 trailers, Coca-Cola Bottling Co. United had 1,595 trailers, 554 trucks, and 1,854 trailers; and The Kroger Co. had 1,404 tractors, 10 trucks, and 18,500 trailers. *Id.*

[30] *See* Brief in Opposition at 1. Just a few months ago, on August 29, 2023, Flowers settled the Ludlow and Maciel cases for $55,000,000, covering 475 distributors. The settlement also required Flowers to pay $50,000,000 to buy 350 distributor territories and convert them to an employment model. Form 8-K Flow-

Flowers is not listed in the top 100 fleets despite revenue of more than five billion dollars.[31]

The bottom line is the Court has consistently held that the FAA's exemption extends to all those who perform "activities within the flow of interstate commerce"[32] until they reach their final destination.[33] This includes "*any* class of workers directly involved in" the interstate transportation of goods, including those employed by Flowers. *Saxon*, 496 U.S. at at 457 (emphasis added).

Therefore, even accepting the *Circuit City* Court's definition of those entitled to the exemption (i.e. workers employed in the transportation sector), all such workers in the flow of commerce are exempt from the FAA, including Petitioners.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to reverse the judgment of the U.S. Court of Appeals for the Second Circuit.

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ers Foods Inc. (Form 8-K) (Sept. 1, 2023), https://www.streetinsider.com/SEC+Filings/Form+8K+FLOWERS+FOODS+INC+For%3A+Aug+29/22117681.html.

[31] *Flowers Foods, Inc. (FLO)*, STOCK ANALYSIS, https://stockanalysis.com/stocks/flo/revenue/ (last visited Nov. 20, 2023).

[32] *Saxon*, 496 U.S. at 462.

[33] *See, e.g.*, *Caldwell v. North Carolina*, 187 U.S. 622, 632 (1903); *The Daniel Ball*, 77 U.S. 557, 565 (1870) ("[F]or whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.").

Respectfully submitted,

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