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

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BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AND ATLANTIC LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* [1]

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amici curiae* and their counsel made a monetary contribution intended to fund preparation or submission of this brief.

business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

Amici are directly interested in the question presented. Are workers who incidentally drive a truck to deliver goods as part of broader job responsibilities akin to statutorily enumerated "seamen" and "railroad employees" who may bar enforcement of written arbitration promises that would otherwise be broadly enforced by the Federal Arbitration Act in all other contracts involving interstate commerce? *Amici* and their members and supporters, and the businesses that they represent, are committed to enforcing the strong and good policies favoring arbitration which underlie the Federal Arbitration Act.

SUMMARY OF ARGUMENT

This case asks what it means to be a "transportation worker" whose employment contracts are exempt from the Federal Arbitration Act (FAA). The FAA validates and enforces written arbitration agreements *except* those binding on "seamen," "railroad employees," and equivalent "transportation workers." 9 U.S.C. §§ 1-2; *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (FAA-exempted workers, taken together, are called "transportation workers[;]" "the class of workers engaged in ...

commerce" is "controlled and defined by" "seamen" and "railroad employees").

A written "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Excepted from this rule are employment contracts involving "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; *see Circuit City,* 532 U.S. at 115.

But workers who drive trucks to move interstate goods are *not* in total a "class of workers" akin to seamen and railroad employees. To be so, for FAA purposes, a trucker must work for a transportation industry *common carrier.* A common carrier is a term of art in the law: "[A] regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character."[2]

Petitioners here own sole proprietorship businesses. They make money by reselling baked

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[2] *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 444 (1889).

goods made in a different State by a national bakery conglomerate. They operate and sell in assigned areas. They are independent distributors contracted to do many things. The most important task is selling bread. As part of bread-selling, they deliver bread, by truck, to stores. *See* JA32 ¶ 16.1, 47, 52, 115, 120.

Petitioners *truck* bread to *sell* bread. Selling the bread is the real "bread and butter." That's their business. Truck driving is incidental. They are not "transportation workers" analogous to "seamen" or "railroad employees" who are exempt under FAA § 1.

In 1925, when the FAA became law, only employees of common carriers were in the same league as railroad workers and merchant seamen.[3] Congress specified two kinds of carriers (seamen and railroad employees) and used a general catch-all to encompass the other kinds of common carriers already actively operating in the U.S.—the so-called "express service" carriers which emerged in the 1830s to help Americans ship and receive small, single-item packages. In 1906, the Hepburn Act first regulated express companies the same way as railroads. At that

[3] Federal Arbitration Act, ch. 213, 43 Stat. 883 (January 1, 1926).

time, express freight charges represented around 75% of all transportation fees charged in the U.S.[4]

So the historical record from around this time shows that express companies in 1925 were already well-established common carriers doing business in interstate commerce through existing channels, essentially the same as ships and railroads. They had droves of workers directly engaged in their transportation work. What the historical record does *not* support is the simplistic argument that "truck driving = transportation = FAA exempt = the end."

This is not a question of semantics, because cases from other contexts don't get at the core issue just by using the same words. This case is about interpreting plain language from the perspective of people who lived when the law came about, were affected by it, and who contemporaneously knew about the policy concerns the law was designed to address. This inquires of the contemporaneous social, political, and technological developments, reframing to imagine life in a different era, from 1925's perspective. *See New Prime Inc. v. Oiveira*, 139 S.Ct. 532, 535 (2019) (like all statutes, FAA gave the "ordinary ... meaning ... at

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[4] Arthur S. Field, *The Rates and Practices of Express Companies*, 3 AM. ECON. REV. 314, 325 (1913); *see also*, Arthur S. Field, *The Express Charges Prescribed by the Interstate Commerce Commission*, 3 AM. ECON. REV. 831 (1913).

the time Congress enacted the statute.") (quoting *Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2070 (2018)).

This Court has repeatedly underscored the words "engaged in commerce" in FAA § 1. Those words require workers to be personally "engaged in" transportation work. *Circuit City*, 532 U.S. at 121; *Saxon*, 142 S.Ct at 1789 ("[T]o be 'engaged' in something means to be 'occupied,' 'employed,' or 'involved' in it[;]" exemption applies only to "workers directly involved in transporting goods"). Such engagement is what makes the worker one of "the employees of a carrier [who] is so closely related to interstate transportation as to be practically a part of it . . . ." *Sw.R. Co. v. Burtch*, 263 U.S. 540, 544, (1924).

In 1925, truck drivers were not yet a class of "workers over whom the commerce power was most apparent"—far from it. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995). They did not, as of 1925, yet "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). "Motor-trucks" of the era were barely getting started, not yet in widespread interstate use, as major design innovations were still emerging. There were few improved roads in 1925 America. Most were muddy, rutted-out trails, vestiges of the wagon era not at all usable for cargo or long-haul transport yet, especially out west. There was no viable way to use roads to drive freight across state lines to meaningfully engage in commerce. That is why, after World War I,

Congress prioritized highway construction—to ensure the rapid mobilization and deployment of military, commerce activities, and citizens. That could not be done on unimproved roads. In 1925, after wartime delays and road funding disputes, improvement projects on some of the critical routes broke ground.

When Congress enacted FAA § 1 with its "other workers" language, it had existing transportation common carriers in mind—not the emerging trucking industry with its nonexistent or insufficient infrastructure and new technology that was still developing. Any such "class of workers" did not yet "engage in" interstate commerce. A common carrier employer is what links ships, railroads, and express companies. That link did not yet extend to the fledgling trucking industry pioneers who were there, at the beginning of a long road-commerce journey.

Petitioners make money from re-selling bread at a markup. Driving a truck is an ancillary bread-selling process. They sell no transportation. They will not make money by *driving* bread unless they *sell* it too. They do not work for a common carrier. They are not equivalent to seamen or railroad workers. Moving cargo is their work. Seamen and railroad workers do not have to sell their cargo to earn their keep. These workers are not the same. They are very different. Petitioners are not FAA-exempt. They must arbitrate.

The lower court got it right: the lynchpin of the FAA-exemption is directly engaging in transportation industry work as a producer, not consumer, of

transportation. Otherwise, no FAA-exemption, no lawsuits. Arbitration only. This Court should affirm.

ARGUMENT

The Federal Arbitration Act mandates judicial enforcement of all written agreements to arbitrate—except those involving workers of common carriers who were already, in 1925, directly engaged in interstate transportation

It would have been an unfounded notion in 1925 to suggest that the railroads would be displaced by trucks. Improved, structurally sufficient roads are needed for trucks to haul heavy cargo long distances. Such roads, in a usable condition, were not built yet. The trucks that were used commercially at this time were local operations with short intrastate runs.

It would have been nonsensical for Congress to carve out different treatment for truck drivers as a "class of workers" when they did not yet exist as a class. There was not yet enough infrastructure for them to affect national commerce by "engaging in" their work. There was not yet a federal interest or reason to enact unique protections for truck drivers.

But Congress had several reasons to craft legislation carving out the personnel of common carriers. Their services were already solidified as essential to national security and prosperity. Decades of tense labor relations among railroad and express company owners and their workers were at the forefront of national news and conversation. Those workers and their organized labor unions wielded

major power. Acting collectively through strikes and boycotts, they could easily halt the entire industry as leverage to force their demands. This labor dispute had been ongoing for years before the FAA—and Congress—knew about it, having enacted significant legislation aiming to quell these workers' unrest.

The future is always untold—but Congress in 1925 knew one thing for sure: the exception *never* swallows the rule. Here, the *rule* is broad (written arbitration agreements involving commerce are enforceable) but the *exception* is narrow (employment contracts involving seamen, railroad employees, and any equivalent "class of workers" are exempt. *See* 9 U.S.C. §§ 1-2. The powerful, collective worker agents of well-established common carriers are who Congress had in mind. Congress was not considering a fledgling industry still lacking required infrastructure. The narrow exemption does not subsume the broad rule.

A. Section 2 of the FAA broadly enforces all written arbitration agreements

Section 2 of the FAA enforces "[a] written [arbitration] provision in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The FAA aims "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It embodies a "liberal federal policy favoring arbitration agreements" in both state and federal

courts. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, (1983).

B. Section 1 of the FAA narrowly exempts only workers of common carriers, and from that set of persons, it carves out workers whose jobs are "too remote from interstate transportation to be practically a part of it"

In *Circuit City Stores, Inc. v. Adams*, this Court examined the language and historical context of Section 1 to determine whether a worker was FAA-exempt. The employee in *Circuit City* was a retail worker who sold electronics—no driving involved. The Ninth Circuit held that employment contracts in total are exempt from the FAA, thus siding with the worker and refusing to compel arbitration. This Court granted certiorari. *Circuit City*, 532 U.S. at 111.

This Court reversed. Employment contracts are not exempt from the FAA. That argument was rejected as wrong in a single sentence: "If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce' would be pointless." *Id.* at 114.

Having concluded the claim fell within the scope of FAA § 2, the Court next asked whether the § 1 exemption applied to the plaintiff, a retail worker. Section 1 names seamen and railroad workers. Those classes of workers "control" and "define" who the FAA-exemption carves out. *Id.* at 115. The Court, seeking

a fair characterization encompassing the quite different kinds of work done by these commonly situated workers, described the whole group as "transportation workers." *Id.* at 121. The Court explained why the plain statutory language, both the words and phrasing, compel the conclusion that only exactly analogous workers are exempt:

> The wording of § 1 calls for the application of the maxim ejusdem generis, the statutory canon that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Under this rule of construction the residual clause 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; the interpretation of the clause pressed by respondent fails to produce these results.

Id. at 115 (citations omitted).

This Court emphasized that the factual context and policy-related purpose which prompted Congress to enact the FAA helps understand the meaning of it:

> In rejecting the contention that the meaning of the phrase "engaged in commerce" in § 1 of the FAA should be given a broader construction than justified by its evident language simply

> because it was enacted in 1925 rather than 1938, we do not mean to suggest that statutory jurisdictional formulations "necessarily have a uniform meaning whenever used by Congress." As the Court has noted: "The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula." We must, of course, construe the "engaged in commerce" language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose.

Id. at 118 (citation omitted).

In *New Prime Inc. v. Oiveira*, 139 S.Ct. at 543-44, this Court once again interpreted Section 1, holding that it exempts contracts of employees and independent contractor workers. *Id.* at 121. In so doing, the Court reaffirmed its "transportation worker" characterization as the defining common trait among exempt workers, and again said courts must view the law through the lens of 1925. New Prime was a common carrier; the plaintiff was its truck driver. Both were engaged in actual interstate commerce as common carriers—precisely within the FAA § 1 exemption. *Oiveira* did not raise the issue of a common carrier requirement in FAA § 1.

This Court got a little closer last year, in *Southwest Airlines Co. v. Saxon*, where the Court narrowed Section 1 significantly, even for employees of common carriers, who everyone agrees are

analogous to railroads and ships. 142 S.Ct. 1783 (2022). The employee argued that her day-to-day job tasks were irrelevant. She claimed that *all* employees of common carriers are per se exempt no matter their actual jobs. This Court disagreed. The limited scope of the exemption is "subset of workers" who are themselves actually "engaged in the [] shipping industry." *Id.* Not everyone who works for a common carrier is also "engaged in" shipping—and on this point, job tasks of the worker are dispositive.

The Court relied on the meaning of "seamen," a word connoting a subset of marine transportation personnel, and another subset of all transportation workers who as a unit together are exempted. "In 1925, seamen did not include all those employed by companies engaged in maritime shipping. Rather, seamen were only those 'whose occupation [was] to assist in the management of ships at sea; a mariner; a sailor; ... any person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." 142 S.Ct. at 1791. "Because 'seamen' includes only those who work on board a vessel, they constitute a subset of workers engaged in the maritime shipping industry." *Id.* In other words, not everyone.

So, the employee's argument failed, but next up the employer's argument did too. The Court held that FAA-exemption reaches beyond the physical limits of the airplane itself. The exemption goes beyond those airline employees who actually "ride aboard an airplane." *Id.* "[U]nlike those who sell asphalt for

intrastate construction or those who clean up after corporate employees, our case law makes clear that airplane cargo loaders plainly do perform 'activities within the flow of interstate commerce' when they handle goods traveling in interstate and foreign commerce, either to load them for air travel or to unload them when they arrive." *Id*. at 1792 (quoting *United States v. Am. Bldg. Maint. Indus*., 422 U.S. 271, 276 (1975) (janitors not "engaged in commerce").[5]

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[5] Citing *Baltimore & Ohio Sw. R. Co. v. Burtch,* 263 U.S. 540, 544 (1924) ("It is too plain to require discussion that the loading or unloading of an interstate shipment *by the employees of a carrier* is so closely related to interstate transportation as to be practically a part of it . . . .") (emphasis added); *see also Shanks v. Delaware, Lackawanna & Western R.R. Co*., 239 U.S. 556, 558 (1916) (railroad machinist injured while moving heavy shop fixture "was not employed in interstate transportation" or using an "instrument then in use in such transportation" because "[t]he connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, . . . was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce . . . .").

Saxon correctly narrowed the scope of the exemption—but in so doing, it decided a different issue: are all workers of common carriers exempt? This case is different. It asks the flip side of the same question. Is common carrier status a requirement? Can workers who *consume*—not produce—transportation ever be exempt under FAA § 1 workers to begin with? The answer is a resounding "no."

Congress in 1925 did not legislate based on any desire to single out interstate truck drivers not working for common carriers. It did not consider them to be the same as railroad and seamen workers with equivalent attributes underlying FAA-exemption. The carve out is for transportation workers of common carriers with a *primary* business *directly* involving moving people or stuff, like airlines, railroads, taxis, buses, trucking companies, freight brokers, private parcel post services, cruise ships, etc.

A worker driving goods across state lines employed by a business that is *not* a carrier, is *not* analogous to a "'seaman" or "railroad employee." If their master is no carrier, even servants who drive trucks still operate outside the transportation sector. They therefore never come within the gambit of Section 1. A sole proprietorship which sub-contracts to a bakery conglomerate for end-of-line distribution and delivery tasks (of which driving is only one) lacks the critical unifying, essential trait among seamen and railroad employees—working for a common

carrier.[6] Truck drivers who transport goods to achieve broader objectives of their non-carrier employers are not exempt. As a class of workers in 1925, they were entirely unrelated to seamen and railroad employees.

C. Historical context confirms that Section 1 exempts only workers of common carriers

Extraneous cases about other laws and different facts do not help. The law is man made. Judicial opinions only reveal so much about reality. A soundbite from any case that uses the words "railroad employee" tells us nothing about what to do in Petitioner's case. More is needed than words. Words derive meaning beyond their legislative and judicial usage. It derives from a broader context.

Here, taken in total, what did it mean to be working for a railroad, or for a merchant ship, in 1925? How did that compare to the local short-run delivery drivers who were already schlepping bread, milk, and beer across American cities in the first fleets of trucks? Did they too have the capacity to affect the U.S. economy by simply striking, or boycotting, or doing work maliciously? Were they instrumentalities of change whose work could leverage pressure the same

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[6] Airlines are common carriers. Some of them make money off credit card loyalty programs with lucrative profit margins. It is cheaper to deal in points than it is to operate aircraft. Even so, selling loyalty points does not diminish common carrier status.

way as railroad employees who were the backbone of the American economy with the power to destroy it?

As explained below, by 1925, this delicate balance and tension between the labor demands of railroad workers and the needs of the American economy and public, was very real. Congress had every reason to act quickly and completely, to avoid more violent railroad labor disputes, strikes, and boycotts. But there was no such concern about truck drivers. It was too soon for that. The first "highways" were still being planned. Trucking companies were only just beginning to enter into the transportation industry.

1. Railroad workers wielded and exercised the power to collectively stop commerce

In 1862, Congress passed the Pacific Railway Act authorizing construction of the transcontinental railroad.[7] It was completed in 1869, in Promontory, Utah.[8] The railroad sector quickly exploded in size and significance, as did the economy's reliance on it. This codependency came to bear in early 1886 when thousands of railroad workers in five states went on

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[7] Pacific Railway Act of 1862, 12 Stat. 489, as amended in 13 Stat. 356 (1864).

[8] JOHN HOYT WILLIAMS, A GREAT AND SHINING ROAD: THE EPIC STORY OF THE TRANSCONTINENTAL RAILROAD (1996).

strike, shuttering the Union Pacific and Missouri Pacific railroads and seriously disrupting commerce.[9]

The 1886 strike resolved but railroad strikes continued. The Pullman Strikes of 1894 involved the American Railway Union.[10] The union called for a boycott of all train cars made by Pullman Company. Its members obliged, with fervor. Pullman train cars were prolific—and practically over night, they were all adrift, dead weight. The entire rail industry ground to a halt, stalling delivery of everything from raw materials to mail. Federal regulators went to court. An injunction was issued to stop the boycott, resume work, and protect the flow of interstate commerce.[11]

Worsening relations among regulators, employers, workers, and the public created an uncertain time for America, especially as it recovered from the Civil War. Private industry outpaced regulation.[12] At the time, the idea of government regulation was itself novel. The railroad became the first federally regulated

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[9] THERESA A. CASE, THE GREAT SOUTHWEST RAILROAD STRIKE AND FREE LABOR (2010).

[10] WILLIAM HORACE CARWARDINE, THE PULLMAN STRIKE (1973); *see also* HARVEY WISH, *THE PULLMAN STRIKE: A STUDY IN INDUSTRIAL WARFARE* (1939).

[11] *Id.*

[12] John P. Davis, *The Union Pacific Railway*, 8 ANNALS OF THE AM. ACADEMY OF POL. AND SOCIAL SCIENCE 47 (1896).

industry in 1887 when Congress passed the Interstate Commerce Act.[13] It was just in time. By 1900 there were five transcontinental railroads.[14]

It takes a lot of workers to launch and sustain such exploding growth in a brand-new industry. Never before had there been a class of workers with such a prominent role in securing America's future. But securing national prosperity is hard when enduring dismal working conditions. Fed up, in August 1916, nearly 400,000 railway workers threatened to strike if 8-hour days were not immediately instituted. The railroads refused, but Congress and President Woodrow Wilson gave in. They knew the economy could not withstand ongoing railroad strike crises. The Adamson Act passed on September 2, 1916 and was the first federal law regulating private-sector work hours, guaranteeing 8-hour workdays for railway workers.[15] This Court upheld the statute and its breadth. *See Wilson v. New*, 243 U.S. 332 (1917).

Government regulation proved too much for those burdened by it. Rising taxes and operational costs, laws capping service charges, and the 8-hour workday

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[13] Interstate Commerce Act, 24 Stat. 379 (February 4, 1887).

[14] ALBRO MARTIN, RAILROADS TRIUMPHANT: THE GROWTH, REJECTION, AND REBIRTH OF A VITAL AMERICAN FORCE (1992).

[15] Adamson Act, ch. 436, 39 Stat. 721 (September 3-5, 1916); *see also*, 45 U.S.C. § 65 *et seq.*

itself, pushed many railroad companies into receivership by 1915. Meanwhile, trouble was brewing globally—war in Europe. Congress took note. The Army Appropriations Act of 1916 vested the president with unilateral power to nationalize transportation during war.[16] America joined WWI in April 1917. All U.S. railways were soon nationalized.

The Railroad Control Act of 1918 guaranteed re-privatization of railroads within 21 months of a peace treaty signed by the U.S.[17] The railways were nationalized for longer than WWI, continuing until 1920. (Congress had to change the conditions for reverting control to the private sector, as the Senate never ratified a peace treaty after WWI). The Transportation Act of 1920 re-privatized railroads and expanded the powers of the ICC, along with establishing worker collective bargaining systems.

Labor conditions of railroad employees improved only slightly. Another strike ensued in 1922 after the Railway Labor Board, established to mediate disputes between railroads and unions, cut wages of railway shopmen. The strike collapsed after two months, but so did the Railway Labor Board. Congress thus passed

[16] Army Appropriation Act, 39 Stat. 45 (August 29, 1916).

[17] Railroad Control Act, 40 Stat. 451 (March 1, 1918).

the Railway Labor Act of 1926, strengthening railroad worker arbitration rights.[18]

The federal government walked a tense tightrope between effectively regulating railroads and avoiding strikes, boycotts, and the other economic backlash inflicted by the same desperate railroad workers who were responsible for the actual transporting of goods. Congressional acts were crafted to assuage these workers from holding American railways hostage.

2. Seamen's labor conditions were protected by existing labor laws and seamen lobbyists sought FAA exemption

Like railroad workers, sea-faring workers in this era were already protected by substantial labor laws. The law has always recognized the inhospitable conditions at sea, thus specially protecting mariners. The First Congress gave "seamen the right to written

[18] Railway Labor Act, ch. 347, § 1, 44 Stat. 577 (May 20, 1926).

employment contracts . . . [and] protection from onboard debt collection."[19] It also regulated mutiny.[20]

Punishment for mutiny was death—but that did not quell maritime labor protests which were common "in the nineteenth and early twentieth centuries."[21] Seamen were backed by highly organized unions and lobbyists which worked to procure substantive protections in federal labor laws.[22] The complexity of

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[19] Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 292 (2004) (discussing Act of July 20, 1790, 1 Stat. 131, 131-35); *see also Southern S.S. Co. v. NLRB*, 316 U.S. 31, 38-39 (1942) ("Workers at sea have been the beneficiaries of extraordinary legislative solicitude[.] … The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages, and return transportation to this country if destitute abroad.").

[20] U.S. Const. art. I § 8, cl. 10 (power "to define and punish . . . Felonies committed on the high Seas."); *see also*, 1 Stat. 112, 114 (any "seaman" who "shall … make a revolt in the ship," is "a pirate and a felon, and … shall suffer death.").

[21] *White*, "Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law," at 299-301.

[22] *See id.* at 305.

admiralty law made seamen more vulnerable to hidden arbitration clauses.[23] Then-Secretary of Commerce Herbert Hoover supported the FAA but asked Congress to exempt "workers' contracts".[24]

Federal regulation of water transport began with the Panama Canal Act of 1912.[25] "The U.S. merchant fleet had shrunk after the Civil War, and by 1910 carried only 10% of the U.S. trade."[26] "In order to restore the health of the U.S.-flag fleet, Congress passed the Shipping Act of 1916."[27] "The Merchant Marine Act of 1926 replaced the Shipping Board with

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[23] Matthew W. Finkin, *Workers' Contracts under the United States Arbitration Act: An Essay in Historical Clarificatio*n, 17 BERKELEY J. EMP. & LAB. L. 282, 286 (1996).

[24] Joint Hearings on S. 1005 and H. R. 646 ("If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but 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.'").

[25] Panama Canal Act of 1912, c. 390, 37 Stat. 560, 566 (August 24, 1912).

[26] Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L. J. 235, 270 (2002).

[27] *Id.* (citing Shipping Act of 1916, ch. 451, 39 Stat. 728, 46 U.S.C. app. § 801).

the U.S. Maritime Commission," a move designed to foster American commerce and national defense."[28]

3. Infrastructure for interstate road-based common carriage was just emerging, so trucks did not (yet) engage in or substantially affect interstate commerce

In 1751, the first federal road, Braddock Road, spanned Fort Cumberland Maryland and Fort Duquesne (Pittsburgh).[29] In 1806, Congress authorized the Cumberland Road to replace and expand Braddock Road, becoming the "first national highway"—itself a misnomer. It was a stone-laden path between the Potomac and Ohio Rivers. It was abandoned in the early 1800s after an impasse surrounding where to cross the Mississippi.[30]

To call it a "road system" is perhaps an overstatement. Roads sprung up piecemeal in the wagon age; they were not yet suited for the new reality. In 1904, the federal government conducted its first nationwide road census. Pathways and trails spanned some 2.1 million patch-worked miles, and more than 90% was unimproved dirt and mud. Travel

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[28] *Id.* at 271 (citing Merchant Marine Act, 46 U.S.C. § 1101 (1926)).

[29] Richard F. Weingroff, *Clearly Vicious as a Matter of Policy: The Fight Against Federal-Aid,* U.S. Dept. of Transportation, Federal Highway Administration, Office of Infrastructure, 2017.

[30] *Id.*

was done for exploration, adventure, and trailblazing, not for commerce. As late as 1916, the Lincoln Highway Association's *Official Road Guide* advised travelers stuck near Fish Springs, Utah: "If trouble is experienced, build a sagebrush fire. Mr. Thomas will come with a team. He can see you 20 miles off."[31]

In 1916, Congress passed the Federal Aid Road Act which earmarked $75 million in matching funds towards a 5-year state-administered road improvement effort. Road building stalled during WWI, resuming post-war. Roads had to be viable for national security. In July 1919, more than 80 Army vehicles embarked on the First Transcontinental Motor Convoy, suffering more than 230 accidents and countless breakdowns.[32] Trucks collapsed culverts and bridges hung them up. It was slow going at around 6 mph. They encountered treacherous conditions on more than half of the route which was unimproved "dirt roads, wheel paths, mountain trails, desert sands, and alkali flats." Conditions were nearly

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[31] LINCOLN HIGHWAY ASSN. OFFICIAL ROAD GUIDE (1916), available at https://tinyurl.com/mu8rrk55

[32] Richard F. Weingroff, U.S. Dept. of Transportation, Federal Highway Administration, Office of Infrastructure, *The Lincoln Highway*, available at https://tinyurl.com/yr8rwhzy; *see also*, Lt. Col. Dwight D. Eisenhower, *Report on Transcontinental Trip* (November 3, 1919) available at https://tinyurl.com/4nb9t8ff

impassable in western states, but the convoy persevered and arrived in California in September.[33]

Public opinion on trucks changed when the public was forced to use them. WWI "produced shortages in transport capacity at home that forced the acceptance and widespread use of motor vehicles long before this would otherwise have been the case."[34]

Autos began their long rise to prominence as America reached a tipping point in the urban-rural divide. In the 1920s, for the first time in history, the urban population surpassed the rural one, with 51.2 percent of Americans now living in "urban" areas with more than 500 people. The other half lived in the boondocks, with limited transportation access. And all of them were enthusiastic about the prospects of a nation united by an interconnected road network.

The public zeal is exemplified by the nationwide celebrations and parades in May 1920 during "National Ship By Truck – Good Roads" week, "designed to bring to the attention of the general public the economic advantages of the Ship by Truck plan, and the contingency of the success of the

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[33] Michael Auslin, *Commemorating the Centennial of the First Transcontinental Motor Convoy,* THE NATIONAL REVIEW (July 7, 2019), available at https://tinyurl.com/m3c87eew

[34] *Id.*

movement upon concerted action which will bring about the passing of a national highways bill[.]"[35]

The public marketing effort worked. The Federal Highways Act took effect in 1921.[36] In 1922, the Bureau of Public Roads commissioned Gen. John J. Pershing to map out the most important U.S. roads for use in wartime. The Pershing Map was the first official topographic nationwide road map; almost all were muddy, rocky, rutted, dust-consumed roads perfect for an exhilarating four-wheeling adventure.

"By the mid-1920's, the Nation was crisscrossed by a network of approximately 250 named trails."[37] "Some were major routes, such as the Jefferson Highway, the Lincoln Highway, the National Old Trails Road, the Old Spanish Trail, and the Yellowstone Trail, but most were shorter." They were "a confusing tangle, often on routes selected more because of the willingness of local groups to pay 'dues' to a trail association than … transportation value."[38]

And although around 3 million trucks were registered in America in 1925, trucks still faced major

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[35] Richard F. Weingroff, *A Moment in Time: The Week America Loved Trucks*, FHWA NEWS 2022, available at https://tinyurl.com/322576mz

[36] Federal Highways Act, ch. 119, 42 Stat. 212 (November 9, 1921).

[37] *Id.*

[38] *Id.*

obstacles to widespread implementation for interstate transportation use. The trucks of this era were not semi-tractor trailers as seen on highways today.[39] Semi-trailers and fifth wheels were invented in 1914 and 1915 but they took time to proliferate. Air-filled tires showed up in 1920, enabling smoother, less-damaging cargo rides. The modern shipping pallet emerged in 1925 and quickly became a shipping staple. Long haul commercial cargo trucks entered the scene later, only *after* these technologies were widespread.[40]

Had the FAA been enacted a mere 10 years later, the calculus would be different. And that's not to say there were *no* interstate trucks around 1925 when the FAA became law. There were a few.[41] But in 1925, the trucking industry "still bore the marks of infantilism."[42] Truckers as a "class of workers" did not "engage in" interstate commerce and were not a class of "workers over whom the commerce power was most apparent." *Allied-Bruce*, 513 U.S. at 273.

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[39] *See* Federal Highway Administration, Statistics of Nationwide Automobile Registrations (1900-1995), available at https://tinyurl.com/mvf4ct89.

[40] Dempsey, *Transportation: A Legal History*, at 274.

[41] *See e.g. Clark v. Poor*, 274 U.S. 554 (1927); *Michigan Pub. Util. Comm. v. Duke*, 266 U.S. 570 (1925).

[42] Merrill J. Roberts, *The Motor Transportation Revolution*, 30 BUS. HISTORY REV. 74 (1956).

4. Employees of "express companies" were "engaged in interstate commerce" in 1925 like seamen and railroad employees

In 1896, domestic rural mail delivery began but there was no parcel service for anyone, rural or urban. Other arrangements had to be made to ship goods. American "express companies" served that need.

With no government parcel post, and lacking regulation of express companies, express companies were the only game in town. Prices reflected such. People complained and Congress approved domestic parcel service. It began on January 1, 1913. In less than a week, Americans shipped millions of parcels.[43]

But domestic parcel post left a lot to be desired and railroads had no obligation for the last-leg of shipment. Their job was only to offload at the train station. The express company carrier bridged the gap. Its footprint was well established long before 1925.

"[E]xpress companies of the United States are unique organisms, and have no counterparts in any country outside of North America."[44] "Express service typically involved the last leg of delivery of goods earlier moved by railway, done by express companies acting in concert with steamships, railroads, and stage

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[43] R.B. Kielbowicz, *Rural Ambivalence Toward Mass Society: Evidence from the U.S. Parcel Post Debates, 1900–1913*, 5 RURAL HISTORY 81, 86 (1994).

[44] Benedict, *The Express Companies of the United States: A Study of a Public Utility*, at 3.

lines to deliver goods."[45] "The express company in the United States collects from the shipper the matter to be sent by express and delivers it to the consignee."[46]

Railroad companies and their principals owned controlling stakes in most of the express companies.[47] Those industry players sought out such investments starting in 1887 after the ICC began regulating railroads. Express companies were still unchecked to operate in the "wild west" free from any rules.[48]

The Hepburn Act of 1906 broadened federal regulatory authority to include all express companies (as well as jurisdiction over sleeping car and steamship companies, and fuel pipelines).[49] Suddenly, express carriers faced intensive (and profit-killing) regulatory scrutiny, hefty tariffs, and rate rules.[50] The Mann-Elkins Act of 1910 empowered the ICC to adjudicate service rates of express companies and

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See e.g.* Field, *The Rates and Practices of Express Companies*, at 320; Benedict, *The Express Companies of the United States: A Study of a Public Utility*, at 4.

[49] Hepburn Act, sess. 1, ch. 3591, 34 Stat. 584 (June 29, 1906).

[50] *Id.*

such rulings were reviewable only by this Court.[51] The ICC tested out this new power over express companies via a scorched-earth investigation of the express service industry, slashing rates on February 1, 1914.[52]

As time went on, the law surrounding express companies developed too. For example, in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) this Court compared railroad carriers and express carriers, holding that they are common carriers but entirely distinct kinds of carriers.[53] That meant a messenger employee of the express company lacked any rights under the Employers Liability Act to sue a negligent railroad which derailed a train he was working on, injuring him. Because he was not a railroad employee, but an employee of the express company, his ELA suit was legally baseless. This Court strictly applied the employer-employee rule, reversing the judgment.

Yes, Taylor worked for a common carrier, Wells Fargo, and yes, he and his express company employer were engaged in interstate commerce.[54] But "the words 'common carrier by railroad,' as used in the act,

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[51] Mann-Elkins Act, sess. 2, ch. 309, 36 Stat. 539 (1910); *see also*, Frank Haigh Dixon, *The Mann-Elkins Act, Amending the Act to Regulate Commerce*, 24 QUARTERLY JOURNAL OF ECONOMICS 593 (1910).

[52] *Id.*

[53] *Id.* at 186.

[54] *Id.* at 187.

mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company *acting as a* common carrier."[55] A "common carrier by express" is not the same thing. "[A] common carrier by express neither owns nor operates a railroad, but uses and pays for railroad transportation," thus it is not a "common carrier by railroad" and its employees have no ELA rights.[56]

Per *Circuit City*, the two classes seamen and railroad employees "define and control" the broader catch-all category which includes all other workers like them—the narrow class of workers Congress intended to exempt when it enacted the broad FAA. The catch-all encapsulates workers of common carriers whose jobs directly entailed transporting goods through existing interstate commerce channels.

Just as railroads and boats are similar but different vehicles of commerce, so too are railroads and express companies. But all of them are subsets of one: common carriers whose work impacts commerce.[57]

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[55] *Id.*

[56] *Id.*

[57] *Id.* at 189; *see also, Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84 (1915) (distinguishing between employees of railroad and employees of express company operating on a railroad, when applying Employer's Liability Act authorizing suits by railroad employees, and holding that express company's

Apples, bananas, and oranges are all fruit. Seamen, railroad employees, express company workers, and other laborers who were actually engaged in interstate commerce in 1925, are all agents of common carriers.

D. The Second Circuit should be affirmed

Petitioners argue for an unwieldy, complicated legal standard focusing on semantics, not real world meaning. It is not enough to simply ask whether a worker drives a truck to haul interstate goods, no matter because that skips the far more important threshold dispositive question: why does he drive?

Driving a truck is not the measure of being commonly paired with a seaman or a railroad employee. Section 1 controls "a class of workers in the transportation industry," not "workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated." *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005). That is why even workers of common carriers are FAA-exempt only if their job is close enough to "interstate transportation to be practically a part of it." *Burtch,* 263 U.S. at 544. If it is too attenuated, the worker is *not* exempt, per *Saxon*.

Under this framework, FAA-exempt employees may work only for transportation industry common carriers. Otherwise, they never come within exemption to begin with because they are not

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messenger was barred from suing the railroad who never employed him).

equivalent to seamen or railroad employees. No further analysis is required. Their job tasks are irrelevant if they do not work for a transportation industry common carrier. Macro questions come first.

The Second Circuit says it like this: "The specification of workers in a transportation industry is a reliable principle for construing the clause here." Pet.App.9a. With respect, yes, but that puts it far too mildly. It is not merely a reliable principle for construing the clause—it is the *required* way to do so.

To say otherwise will drive district courts into a morass of fact-intensive scrutiny over microcosmic case-by-case one-offs, rather than giving them a rule that asks the broader, society-wide questions implicating the transportation sector and interstate commerce as a whole. District courts already know what it means to be a common carrier—and can identify one as quickly as this Court did in *Liverpool & Great Western Steam Co. v. Phenix Ins.* Co., when it "shortly disposed of" the issue. 129 U.S. at 437.

Like courts who spot carrier status with ease, industry players and regulators know full well what the transportation industry is: the economic sector where businesses get paid to move tangibles as their highest business purpose, not pay others for it as a cost of doing something else.[58] Baking bread is not it.

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[58] *See* North American Industry Classification System, 2022 Definitions (Sector 48-49, Transportation and

Any other rule invites district courts and litigants to perform wasteful intellectual exercises on case-by-case grounds, pointlessly asking the same question anew for every plaintiff with a slightly different job description. That is too fuzzy. There are millions of jobs in America. This case, with all its effort, exemplifies the abyss of fact-intensive litigation about never-again issues. This has grave potential to bog down courts and drown out the policy of the law.

On the other hand, the sector-focused rule, hinging on whether the employer is a common carrier and then carving out from there, has clearly ascertainable contours. It is far easier to apply as it is analytically straightforward. Courts won't reach fact-intensive job-task questions unless they have to, after answering yes to the first question.

Bright-line rules enable courts to decide cases on macro issues which apply across the board. That promotes the development of the law and in turn imparts notice about what the law requires, so affected people know their rights. Such standards are better than flimsy, open-ended, and unreliable balancing tests where the outcome is susceptible to variation depending on the decider. The law needs certainty. The Second Circuit gave this law certainty

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Warehousing) ("industries providing transportation of passengers and cargo"); *see also* Global Industry Classification Standard (Transportation Industry Standard, 203010 through 203040), available at https://tinyurl.com/ya5af6m8.

by correctly applying FAA § 1 to only workers of transportation carriers, not bakeries. This is the right answer. This Court should affirm.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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