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 FOR AMAZON.COM, INC. AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae owns subsidiary companies that, among other activities, offer products for sale through websites, applications, and physical retail locations. One of amicus's subsidiaries, Amazon Logistics, Inc., contracts with independent providers of transportation services, including local delivery services that characteristically take place wholly within a state. In making these local deliveries, drivers generally pick up goods from a nearby warehouse or grocery or retail store. If the goods had a prior interstate journey before arriving at the pickup location, they were transported in, and unloaded from, their interstate vehicles by separate classes of workers, not the local delivery drivers.

These local delivery drivers' contracts often include arbitration agreements. Some drivers have contended, however, that their arbitration agreements are exempt from the Federal Arbitration Act (FAA) because the packages they deliver within a single state often have been shipped from other states. Numerous courts have addressed that question, with differing conclusions.

In one recent case, the Ninth Circuit agreed that Amazon Flex delivery drivers' agreements were exempt from the FAA, and Amazon has asked this Court to grant certiorari to review that determination. See

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[1] In accordance with this Court's Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel made a monetary contribution intended to fund its preparation or submission.

Amazon.com, Inc. v. *Miller*, petition for cert. pending, No. 23-424 (filed Oct. 19, 2023).

Amicus thus has a strong interest in, and significant experience litigating, the potential application of the FAA's exemption to workers who, much like petitioners, make local deliveries of goods already located at warehouses or retail or grocery locations within their states.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court granted certiorari to decide whether "a class of workers that is actively engaged in interstate transportation [must] also be employed by a company in the transportation industry" to be exempt from the FAA. Petitioners thus assume that they belong to "a class of workers that is actively engaged in interstate transportation."

That assumption is untrue. Under the text of the FAA, and Supreme Court precedent construing that statutory text, picking up goods located in-state and delivering them locally within that same state does not constitute interstate transportation in the relevant sense. As the Court has explained, the FAA's exemption requires active engagement in transporting goods across state lines. See *Sw. Airlines Co.* v. *Saxon*, 596 U.S. 450, 457-458 (2022). And the analysis depends on "the actual work that the members of the class, as a whole, typically carry out," rather than the activities of the business that contracts with those workers. *Id.* at 456. Viewed through this lens, a class of workers that transports in-state goods within that

single state does not meet *Saxon*'s test of being "directly involved in transporting goods across state or international borders." *Id.* at 457. Because the analysis focuses on the class of workers' own activities, this conclusion must remain true even if other classes of workers were actively engaged in transporting the same goods across borders for the same business.

There is, however, a recognized circuit split on this question. The Fifth and Ninth Circuits openly reject each other's position on whether picking up and delivering in-state goods within that single state satisfies the exemption's test if the goods were previously shipped across state lines for the same business. Compare *Lopez* v. *Cintas Corp.*, 47 F.4th 428, 432 (5th Cir. 2022), with *Carmona* v. *Domino's Pizza, LLC*, 73 F.4th 1135, 1137 (9th Cir. 2023), petition for cert. pending, No. 23-427 (filed Oct. 19, 2023), and *Miller* v. *Amazon.com, Inc.*, No. 21-36048, 2023 WL 5665771, at *1 (9th Cir. Sept. 1, 2023), petition for cert. pending, No. 23-424 (filed Oct. 19, 2023). See also *Rittmann* v. *Amazon.com, Inc.*, No. 16-cv-1554, 2023 WL 8544145, at *1 (W.D. Wash. Dec. 11, 2023) ("[T]he Fifth and Ninth Circuit are split on this issue."). Other circuits also hold diverging views. See, *e.g.*, *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.); *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337, 1350 (11th Cir. 2021); *Fraga* v. *Premium Retail Servs., Inc.*, 61 F.4th 228, 238 (1st Cir. 2023).

In this case, the Second Circuit noted some of these conflicting decisions. But it refrained from addressing the issue, instead deciding the case on other grounds. Pet. App. 51a-52a. This Court may have granted certiorari with an apparent intention of doing

likewise, to resolve the question presented alone. In doing so, however, the Court should recognize lower courts' disagreement over this lurking issue and avoid prejudging the issue in this case, where it is not properly presented.

Caution is especially appropriate given some of the claims in the briefing on petitioners' side. In particular, the Court should not accept petitioners' erroneous suggestion that for purposes of the FAA's exemption, "anyone engaged in transporting interstate goods [is] engaged in interstate commerce." Pet. Br. 21. Nor should the Court accept the similar assertion by amicus Public Justice that the exemption extends to anyone transporting goods at any point on an "interstate journey." Public Justice Amicus Br. 3.

Contrary to their misleading discussions, the relevant case law—both today and before the FAA's enactment—supports the conclusion that a class of workers who pick up goods that have been unloaded by other workers at in-state warehouses (or other in-state locations), and who then deliver them within the state, are not themselves actively engaged in transporting goods across borders. The Court should either sidestep this question, which is not encompassed by the question presented, or it should reject the mistaken views of petitioners and their amici.

ARGUMENT

I. The statutory language and applicable precedent establish that the exemption analysis turns on the activities of the class of workers themselves, rather than the activities of the company with which they contract.

This Court's prior precedent on the reach of the FAA provides important background for these issues. The Court has repeatedly highlighted that Congress used broad language in Section 2 of the FAA—"transaction involving commerce"—to generally extend the FAA throughout the full range of Congress's power over foreign and interstate commerce. 9 U.S.C. 2; see, *e.g.*, *Cir. City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001). That broad reach is subject, of course, to the exemption in Section 1. 9 U.S.C. 1. Yet in carving out certain agreements in Section 1, Congress deliberately used a much narrower formulation. See, *e.g.*, *Cir. City*, 532 U.S. at 115. To fall within Section 1's exemption, an agreement must be a "contract[] of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1.

The Court carefully analyzed these words in *Saxon* and other cases. In particular, this language "speaks of 'workers,' not 'employees' or 'servants,'" and considers the activities in which those workers are personally "engaged" rather than their relationship with a business. *Saxon*, 596 U.S. at 456 (citation omitted). The analysis focuses on their "performance of work"—that is, "the actual work that the members of the class, as a whole, typically carry out." *Ibid.* (citation and emphasis omitted). The analysis does *not*

turn on the activities of the company for which the worker works. See *ibid.* ("Saxon is therefore a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally.").

This conclusion finds further support in the structure of the sentence as a whole. "[T]he words 'any other class of workers engaged in * * * commerce' constitute a residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.'" *Cir. City*, 532 U.S. at 114. Some courts have misunderstood the enumerated categories (seamen and railroad employees) to justify considering the business that contracts with the workers. For example, in *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10, 22-23 (1st Cir. 2020), the First Circuit reasoned that "[t]he nature of the business for which a class of workers perform their activities must inform th[is] assessment" because seamen and railroad employees are supposedly groups "defined by the nature of the business for which they work." But *Saxon* exposed the flaw in that reasoning. Contrary to the First Circuit's view, the category of "seamen" is defined in terms of the work performed by the workers themselves, not the work performed by the companies with which they contracted. See *Saxon*, 596 U.S. at 460 ("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[.]'" (citation omitted)).

Petitioners' own argument against a transportation-industry requirement highlights *Saxon*'s emphasis on the work of the class of workers themselves. See Pet. Br. 17, 33-34. But petitioners fail to recognize

that the same reasoning, as discussed next, forecloses extending the exemption to intrastate transportation of in-state goods—like their work delivering goods located in Connecticut warehouses within that state—just because the company with which they contract has engaged *other* classes of workers to transport those goods across state lines.

II. Picking up and delivering in-state goods within a state does not constitute engagement in interstate commerce within the meaning of the FAA.

Saxon not only directs the inquiry to the class of workers' own activities. It also explains what it means for a class of workers to be engaged in interstate commerce for purposes of the FAA exemption. The class of workers must be "directly involved in transporting goods across state or international borders" or, in other words, "actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Saxon*, 596 U.S. at 457-458.

Saxon recognized that workers who personally load and unload vehicles moving goods across borders—such as airplanes—satisfy that description. *Saxon*, 596 U.S. at 457. Physically loading and unloading "planes traveling in interstate commerce" is, for all intents and purposes, "part of the interstate transportation" itself. *Ibid.*

At the same time, however, the Court distinguished local delivery work. *Saxon*, 596 U.S. at 457 n.2. The Court recognized that local delivery work is "further removed from the channels of interstate commerce or the actual crossing of border." *Ibid.* But the

Court had no occasion to resolve that question in *Saxon*. *Ibid.* Properly applied, *Saxon*'s test shows that drivers who deliver in-state goods to local destinations within the same state do not qualify as engaged in interstate commerce under Section 1 of the FAA.

The Fifth Circuit recently drew that very conclusion in *Lopez* v. *Cintas Corp.*, 47 F.4th 428, 433 (5th Cir. 2022). Local delivery drivers who pick up and deliver goods within a state are not "actively engaged in transportation of those goods across borders," as *Saxon* requires, merely because other classes of workers have previously taken those goods across borders for the same company using other vehicles. *Ibid.* (citation omitted). Rather, "[o]nce the goods arrived at the [in-state] warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce." *Ibid.*

That conclusion comports with the best-reasoned pre-*Saxon* cases. Several circuits correctly anticipated *Saxon*'s reading of the exemption as being focused on the activities of the class of workers themselves, rather than the activities of the company with which they contract.

For example, then-Judge Barrett explained for the Seventh Circuit that the exemption does not apply just because plaintiffs "carry goods that have moved across state and even national lines." *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020). In *Wallace*, local delivery drivers who opposed arbitration argued that "the residual exemption is not so much about what the worker does as about where the goods have been." *Ibid.* But the Seventh Circuit

determined that "to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Ibid.* Those local delivery drivers were simply making local deliveries and therefore were not exempt.

The Eleventh Circuit endorsed the same worker-focused reading of the exemption in *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337, 1350 (11th Cir. 2021). Once again, local delivery drivers argued that "it's enough that the *goods* that are being transported have crossed state lines." The Eleventh Circuit disagreed. It explained that "Section one is directed at what the class of workers is engaged in, and not what it is carrying." *Ibid.*

Any effort to focus on the goods' prior travels—rather than what the class of workers do themselves—would violate *Saxon*. As explained above, the analysis cannot subordinate the nature of the workers' actual work to the nature of the broader business of the company with which they contract. Petitioners therefore err in framing the question as whether workers are "engaged in transporting interstate goods." Pet. Br. 21. Public Justice likewise errs in asking whether the transported goods are on an "interstate journey." Public Justice Amicus Br. 3. These arguments necessarily depend on what the broader business enterprise does with the goods, not what the local delivery drivers do themselves. These arguments thus contradict *Saxon*.

Unless workers belong to a class that is "actively 'engaged in transportation' of those goods across bor-

ders via the channels of foreign or interstate commerce," they do not qualify as exempt from the FAA under the statutory language and this Court's precedent. *Saxon*, 596 U.S. at 458 (citation omitted). As long as the cross-border transportation remains in progress—from the loading of the border-crossing vehicle to its unloading—workers who contribute to that transportation fit within the exemption. See *id.* at 458-459. But once the border-crossing vehicles are unloaded, workers who interact with the goods that previously crossed state lines are not themselves actively engaged in cross-border transportation within *Saxon*'s framework.

III. The pre-FAA precedent also supports the view that a local delivery service, considered in its own right, is distinct from transportation across borders.

Petitioners and Public Justice cite a hodgepodge of cases decided before the FAA's enactment in 1925 in an effort to suggest that, at the time, in-state deliveries invariably qualified as interstate commerce whenever the goods were previously shipped from other states. According to them, this pre-FAA precedent supposedly shows that the exemption's residual clause extends to local delivery drivers like petitioners.

That portrayal is inaccurate. Before the FAA's enactment, cases that focused on the specific activity of performing local, in-state transportation—after or before interstate transportation—concluded that such in-state transportation was a distinct intrastate activity. In some other legal contexts, however, courts focused not on the local activity considered in its own

right, but on its relationship to a broader interstate transaction. Indeed, some pre-FAA statutes required courts to consider the activities of the employer—not just the activities of the workers themselves. But elsewhere, courts recognized that local delivery drivers like petitioners perform a distinct, intrastate service.

In one important example, this Court reached this exact conclusion about local drivers of horse-drawn cabs who transported passengers within New York City after they had arrived by rail from another state. See *New York ex rel. Pa. R.R. Co.* v. *Knight*, 192 U.S. 21, 28 (1904). The railroad company offered this local cab service to take its passengers from the train station to their homes or hotels, and the Court had to decide whether the cab service qualified as interstate commerce immune to state taxation. The railroad argued that the "cab service [was] a part of the interstate transportation" because the railroad, by providing the cab service, was "completing the [passengers'] transportation to their places of destination," such as their "residences or hotels." *Id.* at 25. This Court agreed that a passenger arriving in New York state from some other state did not "fully complete his journey * * * [until] delivered at his temporary or permanent stopping place in the city." *Id.* at 26. But the railroad's role in the passengers' overarching journey was not dispositive. Instead, the Court focused on the "separation in fact" between the "transportation service wholly within the State and that between the States." *Id.* at 27. Given its separateness, the cab service counted as "an independent local service," which was "subsequent to any interstate transportation" and not a part of it, despite the transported passengers' broader interstate journey. *Id.* at 28.

The Court's 1904 holding in *Knight* was not limited to local transportation of *passengers*. A few years earlier, this Court had drawn the same basic distinction between the interstate railroad transportation of goods and the local, over-land "cartage" of those same goods within a city on the railroad line. See *ICC* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U.S. 633, 643-644 (1897). In this setting, the law recognized that "the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service." *Id.* at 643. Many English cases, for instance, treated "delivery of goods [as] a separate and distinct business from that of railway carriage," even "when railroad companies undertake to do [the local delivery] for themselves." *Id.* at 644.

Ignoring these cases, petitioners and Public Justice focus on pre-FAA cases that adopted the business-oriented mode of analysis that this Court rejected for the FAA in *Saxon*. Such cases focus not on what the relevant class of workers are doing themselves, but on what their employer does. While that approach may honor the text and purposes of other statutes, it does not work for the FAA exemption, for the reasons already discussed.

For example, Public Justice relies heavily on cases addressing the Federal Employers' Liability Act (FELA). See Public Justice Amicus Br. 4-7. FELA is a broadly interpreted remedial statute that provides compensation for certain injured railroad employees. *E.g.*, *Jamison* v. *Encarnacion*, 281 U.S. 635, 640 (1930). FELA, unlike the FAA exemption, does not

focus exclusively on the work of the individual railroad employee. Rather, it "is oriented more around the work of the 'common carrier.'" *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 931 (9th Cir. 2020) (Bress, J., dissenting) (citing 45 U.S.C. 51 (1908)). Indeed, this Court ruled that FELA does not separate the activities of a railroad "into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole." *Pedersen* v. *Del., Lackawanna & W. R.R. Co.*, 229 U.S. 146, 152 (1913). Instead, FELA's test asked, "Is the work in question a part of the interstate commerce in which the carrier is engaged?" *Ibid.* This analysis stands in sharp contrast to *Saxon*, where the Court rejected looking at Southwest's business as a whole.

It is no surprise, then, that this Court applied FELA expansively to reach employees whose own activities were far removed from being "directly involved in transporting goods across state or international borders." *Saxon*, 596 U.S. at 457. As Public Justice admits, FELA's expansive test extended as far as cooks who prepared meals for carpenters who repaired the railroad's bridges, merely because "the work of the bridge carpenters * * * was so closely related to [the railroad's] interstate commerce as to be in effect a part of it." *Phila., Balt. & Wash. R.R. Co.* v. *Smith*, 250 U.S. 101, 103 (1919).

Besides inapposite FELA cases, petitioners and Public Justice also cite cases addressing the Constitution's balance between federal and state authority over activities related to interstate commerce. Yet in these cases, too, the focus was not on the specific activities of the individual workers (as *Saxon* instructs),

but on the broader business enterprise for which they worked. After all, the relevant question in the cited cases was whether states were unlawfully burdening interstate business operations.

Falling within this category is *Caldwell* v. *North Carolina*, 187 U.S. 622 (1903), which petitioners prominently highlight. See Pet. Br. 18-19. In *Caldwell*, the Court found an unconstitutional attempt to burden interstate commerce because the Court focused on the effect of a state law on "[t]ransactions between manufacturing companies in one state * * * with citizens of another." 187 U.S. at 632. Similarly, in *Rearick* v. *Pennsylvania*, 203 U.S. 507, 511-512 (1906), the Court concluded that the Commerce Clause "protected" interstate transactions because "the company offered the goods" from another state. Likewise, Public Justice highlights (at 5-6) *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U.S. 114, 120 (1890), which invalidated a state tax on an office that a railroad "maintained because of the necessities of [its] interstate business."

And the legal treatise that Public Justice quotes (at 4) was simply summarizing a case that had confronted a similar issue. See *Bouvier's Law Dictionary & Concise Encyclopedia* 532 (8th ed. 1914). The issue was whether a city could require a license "as a condition precedent to conducting the interstate business of an express company." *Barrett* v. *City of New York*, 232 U.S. 14, 30-31 (1914). This Court held that the Constitution did not permit the municipality to impose such "a direct burden upon interstate commerce." *Id.* at 31. But again, the focus was on the law's applica-

tion "to the company's business of interstate transportation," not the specific activities of individual workers. *Id.* at 33. And, in any event, many of the express company's workers were actually crossing the border between New Jersey and New York. *Id.* at 28.

In short, in 1925, the activity of delivering goods or passengers locally, wholly within a state, did not qualify as interstate transportation when considered in its own right. It is only when such transportation was considered as a component of a broader interstate business that it was brought within the protections of certain statutes or the Constitution's Interstate Commerce Clause.

But this case is not about taxation or injured railroad workers. It is about the FAA. The Court should not be led astray by selective discussions of inapposite cases that do not address the FAA's unique language and structure. Such cases cannot establish that local delivery drivers, who perform exclusively in-state transportation, are somehow actively and directly engaged in transportation across state lines.[2]

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[2] Public Justice also discusses cases under the Fair Labor Standards Act of 1938, a statute that postdated the FAA by more than a decade. See Public Justice Amicus Br. 15-18. These cases shed no light on the meaning of the FAA when it was enacted in 1925. And they too are off point because they focus on the activities of the *business* rather than the *workers*. See, *e.g.*, *Foxworthy* v. *Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir. 1993) (identifying, as the "[c]rucial" factor, "the shipper's fixed and persisting intent at the time of shipment" (citation omitted)). Given the statutes' differences, such cases do not clarify the scope of the FAA. See *Hamrick*, 1 F.4th at 1347-1349.

Under *Saxon* and the most relevant pre-FAA authority, local delivery drivers do not meet that description. They are therefore not exempt from the FAA, despite petitioners' and Public Justice's arguments and a few misguided rulings from certain circuit courts. In *Lopez*, the Fifth Circuit properly analyzed this issue as *Saxon* and the FAA demand by focusing on "the work that [the local delivery drivers] actually did." 47 F.4th at 431. In an appropriate case, the Court should affirm that approach as the correct interpretation of the FAA and this Court's precedent.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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