No. 24-935

IN THE

Supreme Court of the United States

FLOWER FOODS, INC., *et al.*,

Petitioners,

v.

ANGELO BROCK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* COALITION FOR WORKFORCE INNOVATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The Coalition for Workforce Innovation (CWI) is a collection of diverse stakeholders representing worker advocates, small-business start-ups, entrepreneurs, technology companies, and traditional businesses and associations representing companies in the media, transportation, distribution, retail, and service industries. Its members support efforts to modernize workforce policy to enhance choice, flexibility, and economic opportunity for all workers. It works to educate policymakers on the benefits of independent work and supports policy proposals that protect and empower individuals to choose nontraditional work arrangements.

Through its policy and advocacy work, CWI has become aware of the importance of clear, objective standards for interpreting and applying contracts within the industries in which its members operate—especially arbitration contracts. Clear, ex ante rules of interpretation promote stability, choice, and therefore independence. CWI offers this brief to help the Court understand the importance of those principles to emerging and innovative industries, and to understand how the lower court's decision could jeopardize those interests.[1]

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1. In accordance with Supreme Court Rule 37.6, Amicus certifies that no party or counsel for a party to this case authored this brief in whole or in part. Amicus also certifies that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel made a monetary contribution.

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA) rests on three core principles. First, the statute expresses a broad policy favoring arbitration: when the parties want arbitration, they should generally get it. Second, arbitration is a matter of contract: courts decide what the parties wanted by looking to the agreement itself. And third, arbitration contracts must be enforced according to their terms: the terms, and not exogenous policy considerations, control what issues are arbitrable. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 351 (2011) ("Arbitration is a matter of contract, and the FAA requires courts to honor the parties' expectations."); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505–06 (2018) (recognizing that the FAA adopts a "liberal federal policy favoring arbitration agreements" (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).

All three principles were contradicted below. In *Flowers Foods v. Brock*, the Tenth Circuit held that the FAA did not apply to an agreement between a bakery company and a local distributor. 121 F. 4th 753, 757 (10th Cir. 2024). The agreement described the distributor as an independent business enterprise: it had agreed to sell and transport the bakery company's goods in a single state. *Id.* at 757. But later, the distributor said that it had been misclassified: rather than being an independent contractor, as the agreement said, it was the company's employee. *See id.* That argument ultimately convinced the Tenth Circuit, which found that the distributor was closely controlled by the bakery company. *See id.* at 767. And because the distributor was closely controlled, it was not providing purely local transportation: it was in fact the

final link in an unbroken chain of interstate commerce. *See id.* at 767–69. It therefore fell within an exception to the FAA for interstate-transportation workers, and the FAA did not apply. *See id.*

That analysis was backwards. Rather than first determining whether the exclusion applied, the Tenth Circuit stepped beyond the exclusion and addressed the merits of the dispute. *See id.* at 767–69. It first decided whether the parties were independent—the merits issue—and only then decided whether the FAA exception applied. *See id.* In the process, the court read the exception broadly, to sweep in even facially independent businesses offering local transportation. *See id.* And worst, the court disregarded the terms of the agreement itself, which clearly and explicitly created an independent-contracting relationship. *See id.* at 757, 767. *Cf. New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (explaining that the section 1 exclusion is logically prior to other questions under the FAA).

That approach was wrong, to be sure. It put the merits cart before the exception horse. But more important, it is also likely to be repeated. In recent years, litigation over the transportation-worker exception has centered on classification disputes. *See* Tamar Meshel, *If Apps Be the Food of the Future, Arbitrate on!: Mobile-Based Ride-Sharing, Transportation Workers, and Interstate Commerce*, 15 Va. L. & Bus. Rev. 1, 27 (2020) (describing recent litigation involving local food delivery and transportation); Emina Sadic Herzberger, *The Gig Economy's Short Reach: An Analysis of the Scope of the Federal Arbitration Act's "Transportation Worker" Exemption*, 56 Ga. L. Rev. 299, 319–23 (2021) (same).

Across the country, plaintiffs have tried to slip past their arbitration agreements by smuggling in questions about the classification merits. In many of these cases, courts have properly rejected those maneuvers, enforcing the arbitration agreements as written. *See, e.g.*, *Singh v. Uber Techs., Inc.*, 67 F.4th 550, 560 (3d Cir. 2023); *Immediato v. Postmates, Inc.*, 54 F.4th 67, 78 (1st Cir. 2022); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 863–64, 866–67 (9th Cir. 2021); *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802–03 (7th Cir. 2020). But that result has been by no means been uniform. Some courts have rewarded plaintiffs' gambits by conflating the exception with the merits—as the Tenth Circuit did here. *See, e.g.*, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 919 (9th Cir. 2020); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 23 (1st Cir. 2020). And if courts continue down that path, they will blow a hole in the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts.").

In the past, this Court has called for vigilance against "new devices and formulas" to undermine the FAA. *See Epic Sys.*, 584 U.S. at 509. This case presents one. The Tenth Circuit's approach allowed the distributor to litigate the merits of his claim under the guise of applying the exception. *See* Resp't Br. in Opp'n 15–16 (acknowledging that the nature of the parties' relationship is a "factual dispute" and that the "Tenth Circuit agreed with Brock"). That tactic was no less problematic because it was clever, and it should not be allowed to persist. *See Epic Sys.*, 584 U.S. at 509 (warning against a "great variety of devices and formulas" devised to undermine the FAA's pro-arbitration policy (quoting Concepcion, 563 U.S. at 342)).

This Court should make clear that even in classification disputes, a court may not step over the parties' agreement to reach the merits of the dispute. Instead, a court should take the parties at their word—as they described themselves in their agreement. And unless the agreement itself shows that the exception applies, the court should send the merits to an arbitrator. *See id.* at 506 (explaining that when the parties sign an enforceable agreement to arbitrate, the FAA protects their agreement "pretty absolutely"). *See also Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (rejecting an interpretation of section 1 that would lead to more litigation and higher costs as a precondition to compelling arbitration).

ARGUMENT

1. The transportation-worker exception is a threshold question—distinct and logically prior to the merits of the dispute.

Enacted in 1925, the FAA adopted a broad federal policy in favor of arbitration. It combatted judicial hostility to arbitration by placing arbitration agreements on equal terms with other contracts. As a general matter, it requires courts to give equal respect to arbitration agreements. It also reflects that arbitration is a matter of contract—enforceable to the extent and to the letter of the parties' agreement. *See, e.g.*, *Epic Sys.*, 584 U.S. at 505–06; *Concepcion*, 563 U.S. at 339; *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24.

This pro-arbitration policy is not, however, unlimited. In section 1 of the FAA, Congress carved out an exception for "contracts of employment of seamen, railroad

employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As this Court has explained, the exception applies to workers who are actually engaged in interstate transportation. *See Cir. City Stores*, 532 U.S. at 123. For these workers, arbitration agreements are enforceable, if at all, only under state law. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595 (3d Cir. 2004) (holding that arbitration could be compelled under state law when arbitration agreement was exempt under section 1 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989))).

Even so, the exception is narrow. It does not apply to workers tangentially connected to interstate transportation. Workers do not qualify merely because they work in the transportation industry. *See Bissonnette v. Flowers Foods*, 601 U.S. 246, 252–54 (2024) (rejecting industry-wide analysis). Nor do they apply merely because their jobs affect interstate commerce. *See Cir. City Stores*, 532 U.S. at 115–16. Rather, a worker must have a direct, necessary connection to interstate transportation. *See, e.g.*, *Wallace*, 970 F.3d at 801 ("[T]he inquiry is always focused on the worker's active engagement in the enterprise of moving goods across interstate lines."); *Singh*, 67 F.4th at 558 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)); *Immediato*, 54 F.4th at 79 (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943))). Otherwise, the exception would swallow the rule. *See Cir. City Stores*, 532 U.S. at 119, 121 (rejecting broad interpretation that would have vacuumed in all employment contracts and rendered references to "seamen" and "railroad employees" superfluous).

Of course, to distinguish between covered and uncovered workers, courts must decide where interstate

transport stops and where intrastate transport begins. Sometimes, they have drawn the line where goods "come to rest." *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–44 (1935). For example, an apple shipped from Washington to North Carolina may be trucked to a local grocery store. When the apple arrives on store shelves, its interstate journey has ended. If a customer then orders it to be delivered to her home, this second trip is not part of the interstate journey. It is transportation that is purely intrastate. *See, e.g.*, *Wallace*, 970 F.3d at 802 (applying similar analysis to local goods delivery); *Immediato*, 54 F.4th at 78 (same).

Given that approach, courts often look to see whether the interstate chain has been broken by an independent transaction. For example, if an interstate shipper sells goods to an independent local retailer, the chain has been broken by the sale. *See Wallace*, 970 F.3d at 802; *Immediato*, 54 F.4th at 78–79. But if the shipper merely hands the goods off to a last-mile courier, and the courier delivers it to the shipper's customer, the local trip may just be the last leg in an interstate journey. So the exception often depends on whether goods are passed to an independent local entity to make an independent local sale. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 231–32 (1947) (explaining that taxi cabs providing independent local service were not engaged in interstate commerce even when they carried passengers to and from train stations).

This focus on independence, however, sometimes pushes up against substantive disputes between the parties. For example, in many cases, the underlying dispute involves worker misclassification. An interstate shipper may contract for local distribution with a local

dealer. The contract may say that the shipper and dealer are independent businesses. But later, the dealer may say that it is in fact the shipper's employee. The distinction between employees and contractors often turns on how much control one party has over the other—i.e., whether the parties are really independent. And on its face, that issue raises the same kinds of questions raised by the traditional approach to the section 1 exception. *Compare Lopez v. Cintas Corp.*, 47 F.4th 428, 432 (5th Cir. 2022) (concluding that independent local distributor was not engaged in interstate transportation), *with Rittmann*, 971 F.3d at 919 (reaching opposite conclusion), *and Waithaka*, 966 F.3d at 23 (same).

But the superficial resemblance between these issues is only that—superficial. In practice, the analysis is qualitatively different. The section 1 question is a threshold issue; it asks merely whether the FAA applies to the contract at all. *See New Prime Inc.*, 586 U.S. at 111. It should be decided first, before delving into the parties' competing claims on the merits. And unlike the merits, it can be answered facially—by looking at the agreement itself. *See id.* (assuming for purposes of applying exemption that parties were independent as described in contract).

To be sure, the contract itself may reveal facts that call the parties' independence into question. The contract may provide for so much control by one party that their nominal independence cannot withstand scrutiny. Those contractual features are proper for a court to consider. The court can also consider extrinsic facts about the nature of the work itself—as this Court has often done. *See Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022). But again,

the section 1 analysis is a threshold step; it is not a full-blown examination of the parties' claims, and it should not be inflated into a fact-bound mini-trial on the merits. *See Bissonnette*, 601 U.S. at 254 (rejecting "transportation industry" requirement that would have complicated the § 1 exception analysis and turned the analysis into its own "mini-trial").

By contrast, the classification issue cannot be addressed without digging into the relationship. Classification involves not what the parties wrote in the contract, but how they behaved in real life. *See, e.g.*, *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (explaining that in classification analysis under National Labor Relations Act and common law of agency, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive"); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (emphasizing context-heavy analysis under Fair Labor Standards Act (FLSA)). Labels are secondary; facts are primary. *See Rutherford Food*, 331 U.S. at 729 ("[P]uting on an independent contractor label does not take the worker from the protection of the [FLSA]."). So it requires a different kind of engagement from the decisionmaker. It requires the decisionmaker to parse through evidence about the parties' course of dealings, industry conditions, and economic interdependence. And of course, if the parties have agreed to arbitration, those questions should be decided by an arbitrator. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.").

2. The Tenth Circuit reversed the analysis, stepping over the exception to address the merits.

Here, the Tenth Circuit reversed these two steps. Ostensibly addressing the section 1 exception, it looked past the parties' agreement and substantively characterized their relationship. It first determined that the distributor was not independent, and then reversed course to find that the exception applied. That approach was not only backwards, but dangerous, as it could pry open a new hole in the FAA.

Again, the dispute before the Tenth Circuit involved a baked-goods company and a local distributor. The distributor bought the goods from the company, picked up the goods from a warehouse owned by the company, and delivered them to the distributor's own customers. *See Flowers Foods*, 121 F.4th at 757–58. Under the traditional analysis, that arrangement broke the interstate chain: when baked goods arrived at a local warehouse and were sold to an independent party, the interstate journey came to an end. And the distributor itself was not, properly understood, engaged in interstate transportation. *See, e.g.*, *Lopez v. Cintas Corp.*, 47 F.4th at 432 (local distributors who picked up goods "at rest" in warehouse and delivered them to local customers not engaged in interstate commerce); *Wallace*, 970 F.3d at 802 (independent couriers who picked up meals prepared in restaurants and delivered them to local consumers not engaged in interstate commerce); *Immediato*, 54 F.4th at 78 (independent couriers who delivered goods from retailers to local consumers not engaged in interstate commerce).

But the Tenth Circuit declined to follow that line of reasoning. Instead, it discarded the parties' description of their own relationship—which they had laid out in the contract—and made its own judgment on the merits. It found that in fact, the distributor was closely controlled by the baked-goods company. *See* 121 F.4th at 766. For example, it said, the distributor was required to use "commercially reasonable means" to sell the company's goods within a prescribed territory. *Id.* at 767–68. If this territory proved unprofitable, the arrangement could be canceled. *Id.* The distributor was also required to use the baked-goods company's administrative services, keep up certain service standards, and offer standard discounts. *Id.* For those reasons, in the court's eyes, the distributor was not really running an independent enterprise. *Id.* It was instead the baked-goods company's agent, carrying the company's goods through the last step in an unbroken interstate journey:

> Though Brock, Inc. and Flowers are different companies, they form an integrated distribution chain, in which Flowers exercises a significant degree of control over Brock's operations. This control makes it evident to us that Brock serves as Flower's last-mile driver, because Flower's real interest lies in delivering the baked goods to its true customer—the various retail stores on Brock's route, not Brock Inc.

Id. at 766. This analysis was questionable on its own terms. It failed to consider numerous important factors, such as whether the distributor provided its own equipment (it did), whether the distributor was compensated by the job

(it was), and whether the distributor could offer the same services to other clients (it could).

But ultimately, whether the analysis was right on the merits is beside the point. The point is that the court collapsed analytical steps. Again, the distributor was claiming that it had been misclassified: it argued that regardless of what the agreement said, he was in fact the baked-goods company's employee. *See id.* at 757–58. That argument turned on whether the distributor was under the company's control. *See Rutherford Food*, 331 U.S. at 724 – 25 (citing control as a consideration in FLSA classification analysis); U.S. Dep't of Lab. Wage & Hour Div., Fact Sheet 13: Employee of Independent Contractor Classification Under the Fair Labor Standards Act (FLSA) (March 2024)[2] (same). In effect, it required the distributor to show that the parties' contract was wrong, and in fact, the distributor worked under the company's direction. *See* Resp't Br. in Opp'n 15–16 (acknowledging that Tenth Circuit weighed in on the factual dispute over nature of parties' relationship).

So by leaping to the control analysis, the Tenth Circuit effectively decided the merits. Control was the substance of the dispute; and the substance should have been the second step. The first step should have been simply to decide whether the exception applied to the agreement as written. If the exception did apply, the court could have moved to the merits. But if the exception didn't apply, the merits should have been left for the arbitrator. The arbitrator's decision, after all, is what the parties

2. Available online: https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.

contracted for in the first place. *See Moses H. Cone Mem. Hosp.*, 460 U.S. at 24–25 (explaining that doubts about arbitrability should be resolved in favor of arbitration, even when they involve competing interpretations of the agreement or defenses to arbitrability). *Cf. Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022) (explaining that arbitration should be compelled when there is a "contractual basis" for doing so).

If the Tenth Circuit's approach were right, it would transform section 1 into a font of litigation. If a party could litigate its independence by raising the exception, courts would be drawn into broad classification fights at the initial stages of a case. They would have to navigate extensive evidence and discovery about nearly every facet of the parties' relationship, including every protocol, policy, or arrangement that could limit the parties' independence or discretion. *See Flowers Foods*, 121 F.4th at 767–68 (examining more than a dozen ways in which the company allegedly controlled Brock). The exception analysis would become a miniature trial—an odd result for a statute designed to minimize litigation in the first place. *See Circuit City*, 532 U.S. at 123 (rejecting an approach that would have complicated what was supposed to be a straightforward facial analysis under § 1).

3. This Court should make clear that the exception cannot be collapsed into the merits.

Wrong as it was, the Tenth Circuit's error is likely to be repeated. In recent years, cases involving the exception have also increasingly alleged misclassification. *See, e.g.*, *Capriole*, 7 F.4th at 863–64 (app-based rideshare drivers); *Singh*, 67 F.4th at 560 (same); *Wallace*, 970 F.3d at 802–03

(app-based delivery couriers); *Immediato*, 54 F.4th at 78 (same). The merits of these cases have centered on whether the workers involved were controlled by another business. Those cases will doubtless continue to be filed. And if future courts follow the Tenth Circuit's approach, the analysis will be scrambled. Rather than deciding first whether the exception applies, courts will leap directly to the control issue. They will look past the contract and decide whether the parties are truly independent. And even if they determine that the exception does apply, they will have already effectively decided the merits, leaving nothing for the arbitrator to do. *See Brock*, 121 F. 4th at 766–69 (concluding that exception did not apply because drivers were not independent).

That cannot be right. It cannot be that the FAA applies to misclassification disputes only in name. Nothing in the statute's text implies that classification disputes are a special class of case. Nor would such special treatment match the FAA's purposes. The FAA adopts a broad, pro-arbitration policy, one that requires courts to enforce arbitration agreements according to their terms. *Concepcion*, 563 U.S. at 339. The statute ensures that when the parties bargain for arbitration, they will get arbitration—even when they disagree about the basic details of their relationship. *See Concepcion*, 563 U.S. at 351 ("Arbitration is a matter of contract, and the FAA requires courts to honor the parties' expectations."). *See also Viking River*, 596 U.S. at 653 ("The FAA's mandate is to enforce '*arbitration agreements*.'" (emphasis in original) (quoting *Concepcion*, 563 U.S. at 344)),

The Tenth Circuit's approach also contradicts this Court's longstanding approach to the section 1 exception.

This Court has repeatedly explained that the exception is to be "afforded a narrow construction." *Circuit City*, 532 U.S. at 118. It has likewise explained that the exception is a threshold issue under a statute designed to minimize litigation. *See id.* at 123 (noting that the exception should not be interpreted to add "considerable complexity and uncertainty" or to "breed[] litigation" (quoting *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 275 (1995))) It should therefore be interpreted to avoid excessive complexity and unnecessary litigation at the front end. The test should be simple, straightforward, and objective. *See Preston v.* Ferrer, 552 U.S. 346, 357 (2008) (explaining that Congress designed the statute "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22)).

Conclusion

But as the Tenth Circuit's decision shows, lower courts have not always applied the exception that way. So it falls to this Court to clarify the issue. The Court should make clear that the analysis has two steps: first, the exception; second, the merits. The first step must come first, because if the exception does not apply, the FAA commands that the merits be addressed by an arbitrator. Courts should not usurp the arbitrator's role by conflating the two steps. They should decide first whether the contract itself describes a "contract of employment" covering a worker "engaged in interstate or foreign commerce." If it does not, the exception does not apply, and the court should respect the parties' agreement. The court should not reach past the agreement to decide the merits when the parties have bargained for a decision by an arbitrator. *See AT&T Techs.*,

Inc. v. Comm'cns Workers of Am., 475 U.S. 643, 649 (1986) ("The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claim.").

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Respectfully submitted,

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