No. 24-935

IN THE

Supreme Court of the United States

FLOWERS 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 FOR *AMICI CURIAE* INDEPENDENT BAKERS ASSOCIATION AND AMERICAN BAKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statute

STATEMENT OF INTEREST [1]

The Independent Bakers Association ("IBA") is a national trade association of more than 200 family-owned bakeries and related companies and trade groups in the baking industry. The association was founded in 1968 to protect the interests of independent manufacturers of baked goods.

The American Bakers Association ("ABA") is the largest trade association for the commercial baking industry in the United States. Established in 1897, the ABA's community includes more than 350 member companies representing commercial baking facilities and the industry supply chain.

Manufacturers of baked goods, including IBA and ABA members, often contract with independent wholesale distributors who purchase the manufacturers' products and sell them to local retailers for a profit. The distributor agreements that govern these relationships often include arbitration provisions that allow the parties to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation.

Amici and their members therefore have a significant interest in the proper interpretation of the Federal Arbitration Act ("FAA"). *Amici* respectfully submit this brief to offer their unique perspective into the business operations of wholesale distributors of baked

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part; that no counsel for any party or any party made a monetary contribution intended to fund the preparation or submission of the brief; and that no person, other than *amici*, their members, or their counsel, made such a monetary contribution.

goods and the unpredictability and unworkability of the Tenth Circuit's misguided analysis.

SUMMARY OF ARGUMENT

Wholesale distributors of baked goods are local businesses engaged in local commerce. They earn income by buying the goods from manufacturers and reselling them to in-state, local retailers at a higher price. While delivering products from a local warehouse to retail customers is part of what wholesale distributors do, they spend much of their time engaged in significant in-store activities—including product merchandising (*e.g.*, arranging the display of products on shelves and positioning them to maximize consumer appeal), removing stale products, setting up promotional displays, and cultivating retailer relationships. And importantly, most distributors do business within defined geographic territories that exist entirely within a single State—as respondent's company, Brock, Inc. ("Brock"), did—never transporting their products across state lines.

Those industry realities should have made this case straightforward. The FAA's narrow exemption for transportation workers applies only to workers who "actively" play a "direct and necessary role" in transporting goods across state lines. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 256 (2024) (quotation marks omitted). The analysis focuses on the "actual work that members of the class, as a whole, typically carry out." *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 456 (2022). As the owner and operator of a wholesale distributorship of Flowers products, respondent does not transport baked goods across state lines and does not otherwise perform interstate-transportation work. It is Flowers—not

Brock—that arranges to transport the goods across state lines via a shipping company, and it is Flowers that unloads the goods at a local warehouse. After the goods arrive and are unloaded, respondent goes to the warehouse in his own sales vehicle to obtain the goods. Respondent then distributes the goods to local customers and engages in the in-store activities that are important and time-consuming aspects of his business. Respondent's work thus did not involve him in the interstate transportation of baked goods at all.

The decision below reached the opposite conclusion only by employing a misguided, fact-intensive analysis that departs from the FAA and this Court's precedents and is inherently unpredictable and unworkable. Rather than assessing whether respondent is actively, directly, and necessarily engaged in the work of transporting goods across state lines, as this Court's precedents require, the panel's test focused primarily on the extent to which Flowers exerted control over Brock's local operations, improperly wading into the merits of the case. Among other factors, the court considered Flowers's financial relationship with Brock and various provisions of the distributor agreement, including provisions governing Brock's ability to sell competing products, the appearance of Brock personnel, the termination of unprofitable accounts, and the timely removal of stale products. The court also scrutinized the mechanics of the product-distribution process, including the amount of time the goods sat at the warehouse and which entity owned the warehouse. Based on this analysis, the court concluded that the baked goods had not "come to rest" at the warehouse and instead remained in a continuous interstate journey, for which respondent served as the last-mile delivery driver on behalf of Flowers. The

complexity of the court's analysis even led it to prepare a diagram of the relationships between Flowers, Brock, and the retailers to which Brock sold.

This Court should not endorse the court of appeals' atextual and inherently ambiguous totality-of-the-circumstances test. That test improperly requires a fact-heavy, merits-like inquiry into the relationship between the manufacturer and distributor and into the details of the distribution process, rather than focusing on the actual work performed by the class of workers. The test is also unpredictable. Even within the baked-goods industry, the details of distributor agreements and practices can vary significantly. Many aspects of Brock's distributorship agreement that the court of appeals cited here—including provisions about selling competitors' products, obtaining approval from Flowers for certain decisions, and using administrative tools provided by Flowers—are often not present in distributor agreements with other baked-goods manufacturers. Similarly, respondent's practice of picking up warehouse items less than a day after they arrive is not necessarily the practice of other owners of wholesale distributorships, especially those that provide their own warehouses or distribute products with relatively long shelf lives. Yet the court of appeals' amorphous, multifactor test makes it impossible to predict how the analysis would come out on even slightly different facts.

The court of appeals' test is also unworkable, and would dramatically complicate threshold determinations about FAA applicability. It necessitates a detailed analysis of such imponderables as whether goods sufficiently "came to rest" at a warehouse, who a manufacturer's "true" customers are, and whether a

manufacturer exercised too much control over a distributor. The FAA does not supply standards for this type of metaphysical line-drawing exercise, and courts are bound to misapply the test and reach divergent results.

This case illustrates the point. The court of appeals' multifactor test led it to treat standard, appropriate provisions of baked-goods distributor agreements—such as the distributor's agreement to use best efforts to develop the market and remove stale products from shelves—as evidence that Flowers exerted control over Brock. But these and other provisions are fully consistent with the distributors' status as independent entities. Both Flowers and Brock have a shared financial interest in Brock's success. It is thus entirely unremarkable that Flowers and Brock agreed to terms designed to promote Brock's successful sale of Flowers products to retailers and consumers. This Court should not endorse a test that can be so easily misapplied to find control over distributors and that overlaps so significantly with the merits of worker-classification questions.

The Court should instead adopt the straightforward rule that is compelled by the text of the FAA and precedent: Workers who do not typically transport goods across state lines or load or unload goods from vehicles that transport goods across state lines do not fall within the FAA's transportation-worker exemption. 9 U.S.C. § 1. Under that test, respondent and similar wholesale distributors fall outside the exemption. This straightforward test will bring clarity and consistency, which are critical for businesses in the modern economy.

ARGUMENT

I. Most Baked-Goods Distributors Operate Entirely Intrastate, Despite Variations In The Details Of Business Arrangements.

Before baked goods reach the pantries of consumers, they typically pass through three transactions involving three distinct businesses. First, baked-goods manufacturers—like Flowers or members of *amici*—make the goods and sell them to wholesale distributors. Second, the distributors resell the goods at a markup to local grocery stores and other retailers, typically engaging in significant in-store activities as well. Third, the retailers sell the products to consumers. While the details of these business arrangements differ from company to company, this three-part framework is the chassis on which the supply chain for baked goods is built. Many other industries—especially those involving products with a limited shelf-life—utilize a similar supply-chain structure.

Wholesale distributors of baked goods, such as Brock, are engaged in a quintessentially local business enterprise. These distributors are not subsidiaries of baked-goods manufacturers; most are small to medium-size independent businesses that contract for the right to sell and distribute baked goods to retailers within a local region. As middlemen in the supply chain, wholesale distributors take title to the baked goods they purchase after those goods have been delivered to a local warehouse. *Canales v. CK Sales Co.*, 67 F.4th 38, 41 (1st Cir. 2023); JA14 (Distributor Agreement ¶ 4.1). And they earn profits (or suffer losses) based on the difference between the prices at which they buy products from manufacturers and the prices at which they sell them to retailers, less operating expenses. Pet. App. 5a. Owners of wholesale

distributorships, like respondent, therefore aim to maximize sales and control expenses—and they risk losing money if sales slump or expenses rise.

Most distributors (including Brock) serve geographic markets located entirely within one State and do not cross state lines when delivering goods. *E.g.*, Pet. App. 2a; *Canales*, 67 F.4th at 41 (distribution territories were "entirely within Massachusetts"); *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655, 658 (2d Cir. 2022) (Connecticut), *vacated and remanded*, 601 U.S. 246 (2024); *Carpenter v. Pepperidge Farm, Inc.*, No. 20-cv-3881 (E.D. Pa. Feb. 28, 2023), ECF No. 80-3 at 9 (Pennsylvania). It is the *manufacturers* who arrange for transporting the goods to local warehouses. *See* Pet. App. 5a; *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 249 (2024); *Canales*, 67 F.4th at 41. And once the goods arrive at the warehouse, it is ordinarily employees or agents of the manufacturer who unload them. Only after the goods have been delivered to the warehouse does title transfer to the wholesale distributor. *Canales*, 67 F.4th at 41; JA14 (Distributor Agreement ¶ 4.1). Wholesale distributors thus operate entirely *within* state lines. They typically have no involvement in the interstate movement of baked goods.

The basic, day-to-day activities of wholesale distributors confirm the fundamentally intrastate nature of their work. Wholesale distributors "purchase the baked goods from [manufacturers] and then market, sell, and deliver them to retailers," *Bissonnette*, 601 U.S. at 249—all activities the distributor performs within a single State. These tasks are central to a distributor's success and require business judgment regarding, *e.g.*, how much of each product to order, given the shelf life and demand for each perishable product.

Ordering too much of a product at once could result in the baked goods going stale (resulting in monetary loss for the distributor); ordering too little could result in empty retail shelves and loss of sales opportunities. Given these realities, the quantity of a product ordered by a wholesale distributor requires careful consideration. *See Carpenter v. Pepperidge Farm, Inc.*, 2023 WL 4552291, at *10 (E.D. Pa. July 14, 2023) (explaining that wholesale distributors are "responsible for . . . order[ing] based on consumer habits and other external factors"), *aff'd*, 2024 WL 2103257 (3d Cir. May 10, 2024).

Wholesale distributors also perform significant work within retailers' stores. Typical activities include "stock[ing] shelves, maintain[ing] special displays, and develop[ing] and preserv[ing] positive customer relations" with the retailers. Pet. App. 4a. Distributors also monitor and rotate products in the stores to maximize product freshness, JA11 (Distributor Agreement ¶2.6); JA14-15 (Distributor Agreement ¶ 5.1); remove stale products from shelves, JA25-26 (Distributor Agreement ¶ 12.1); set up promotional displays, JA14-15 (Distributor Agreement ¶ 5.1); JA26-27 (Distributor Agreement ¶¶ 13.1–2); and make decisions about how best to position the products on the shelves to catch the consumer's eye, *Carpenter*, 2023 WL 4552291, at *5. They may even negotiate with local store personnel to "deviate from" default shelving schematics, based on the distributor's insights into customer preferences. *Id.* at *6. Wholesale distributors are also responsible for finding and developing relationships with un-serviced retailers. *See Bissonnette*, 601 U.S. at 250 (explaining that distributors were responsible for "f[i]nd[ing] new retail

outlets"). All of these activities take place within a distributor's territory—typically within a single State.

These key business activities of wholesale distributors are prevalent throughout the baked-goods industry. The details of the manufacturer-distributor relationship, by contrast, differ from company to company. For example, whereas Flowers owned the warehouse at which the baked goods were delivered, Pet. App. 5a n.3, 26a, many manufacturers rely on the distributor to maintain its own warehouse (either owned by the distributor or leased from a third party). Brock also agreed to other terms specific to the relationship with Flowers, including that: (i) a Flowers-affiliated entity would finance Brock's purchase of distribution rights; (ii) Brock would not sell baked goods that compete with Flowers products, (iii) Brock would obtain Flowers's approval before terminating an unprofitable account, (iv) Brock employees would maintain a clean and professional appearance, (v) Brock would not receive credit for sales made through alternate distribution arrangements, (vi) Flowers could service Brock's territory if Brock failed to do so, (vii) Flowers would have a security interest in Brock's distribution route, (viii) Flowers could act on Brock's behalf to negotiate certain terms with chain stores; (ix) Brock would use Flowers's administrative services, and (x) Brock would adhere to Flowers's promotions and feature pricing for major accounts. Pet. App. 6a-7a, 22a-26a. Other distributor agreements do not necessarily include these terms. Lastly, while Brock picked up his goods from the warehouse "less than a day after the drop-off," Pet. App. 26a, other wholesale distributors—especially those that sell other products with different shelf lives—may pick them up at different times.

Ultimately, despite differences in the details of the business relationship, a successful baked-goods distributor will be one who engages with local retailers to "increase sales, build customer relationships, and effectively identify the popularity of different products, hire and train employees, and manage profits and losses." *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74, 78 (2d Cir. 2020). This is an essentially local business endeavor, removed from the transportation of goods across state lines.

II. The Court Of Appeals Adopted A Misguided Multifactor Test That Is Unpredictable And Unworkable.

Given the intrastate nature of Brock's work as a wholesale distributor, the Tenth Circuit should have readily concluded that respondent does not fall within any "class of workers engaged in foreign or interstate commerce" under the FAA. 9 U.S.C. § 1. As this Court has made clear, the transportation-worker exemption applies only to classes of workers—such as seamen and railroad employees—that "actively" play a "direct and necessary role" in moving goods across state or international lines. *Bissonnette*, 601 U.S. at 256 (quoting *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022)). Respondent is not part of any such class of workers; he is not involved in the transportation of baked goods across state lines.

The Tenth Circuit nevertheless held that respondent fell within the transportation-worker exemption, because it asked the wrong questions. The court focused on facts supposedly showing that Flowers exercised *control* over Brock and that *the goods* Brock sold and distributed were thus moving in a supposedly continuous interstate journey. This misguided analysis

confuses the threshold question of the FAA's applicability with a fact-intensive, merits-like inquiry into a distributor's business relationship with the manufacturer. It is bound to yield divergent results in different cases even within the baked-goods industry, where business arrangements vary from company to company. And the court's analysis was wrong on its own terms, confirming its unworkable and unpredictable nature.

This Court should reaffirm that the transportation-worker exemption applies only to classes of workers that are actively, directly, and necessarily involved in transporting goods across state lines. That rule is rooted in statutory text and precedent and will promote the clarity and certainty needed for businesses (and workers) to plan their business relationships.

A. The Court Of Appeals' Test Conflicts With This Court's Precedents.

In holding that respondent falls within the FAA's transportation-worker exemption, the decision below inquired at length into various ways that Brock's distribution agreement purportedly gave Flowers "control" over its "intrastate deliveries." Pet. App. 22a. The court noted, for example, that a Flowers-affiliated entity financed Brock's initial purchase of distribution rights and owned the local warehouse, and that Brock agreed to not sell competing products, to seek Flowers approval for certain decisions, to ensure employees maintain a professional appearance, to use Flowers's administrative services, and to grant Flowers certain rights. Pet. App. 5a-7a & n.3, 22a-26a; *see supra*, at 9. The court also inquired into whether the baked goods had "come to rest" at the warehouse before respondent picked them up, Pet. App. 24a; *see* Pet. App.

26a. According to the court, this analysis showed that "Flowers's true customers [are] the various retail stores" that Brock sold to, that respondent is "Flowers's last-mile delivery driver," and that respondent is thus "engaged in interstate commerce." Pet. App. 28a-29a.

This fact-intensive, merits-like inquiry into Brock's relationship with Flowers strays from the FAA and this Court's precedents in at least three ways.

First, the Tenth Circuit incorrectly focused on the manufacturer (Flowers) rather than the worker (respondent). The decision below turned on whether "Flowers exercises a significant degree of control over Brock's operations" or has "substantial involvement in" them. Pet. App. 22a-23a. But a manufacturer's level of involvement with a wholesale distributor's operations is a merits inquiry that is irrelevant to whether the distributor is actively, directly, and necessarily engaged in transporting goods across state lines. *Bissonnette*, 601 U.S. at 256; *Saxon*, 596 U.S. at 456-57; 9 U.S.C. § 1. Regardless of whether a worker is an independent contractor or an employee, the transportation-worker exemption is inapplicable if the worker is not part of a class engaged in transporting goods across state lines. Indeed, if the transportation-worker exemption turned on a totality-of-the-circumstances inquiry into a manufacturer's control over a distributor, it would require threshold mini-trials into the merits of plaintiffs' misclassification claims and make it virtually impossible for contracting parties to determine in advance when the exemption applies. Here, for example, the court drew *five diagrams* about the relationships between various entities to analyze whether the connection between

Flowers and Brock triggered the exemption. None of this follows from the text of the statute.

Second, the Tenth Circuit improperly based its decision on irrelevant aspects of the "mechanics of the delivery." Pet. App. 26a. The court observed, for example, that the baked goods mostly originate from out of State, that respondent places orders for the goods, that Flowers owns the warehouse at which the goods are delivered, and that respondent loads the goods onto his vehicle less than a day after they arrive. Pet. App. 26a. Yet this analysis misses the central point: Respondent's *own* duties as the owner and operator of a wholesale distributorship all take place within the State of Colorado and are entirely distinct from the transportation of goods across state lines. Pet. App. 22a. This Court has made clear that courts should focus on the "actual work that the members of the class, as a whole, typically carry out," *Saxon*, 596 U.S. at 456, and on whether they "actively" play a "direct and necessary role" in transporting goods across state lines, *Bissonnette*, 601 U.S. at 256 (quotation marks omitted). The Tenth Circuit erred by focusing on the prior interstate movement of goods rather than on respondent's own lack of involvement in that interstate transportation. The transportation-worker exemption does not ask merely whether respondent's actions *affect* or *involve* products that traveled in interstate commerce. It requires that respondent be actively *engaged in* interstate commerce. 9 U.S.C. § 1; *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) ("The plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' or 'involving commerce.'"); *accord Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 800-02 (7th Cir. 2020) (Barrett, J.).

Third, because the Tenth Circuit was focused on determining the degree of Flowers's control over Brock, Pet. App. 24a, the court relied on an indeterminate, non-exhaustive list of factors to conduct its analysis. Pet. App. 19a n.5 ("we do not foreclose the consideration of other factors in this analysis"). Wading through the intricate and variegated details of countless unique business relationships in this way departs from this Court's teaching that the "central feature of a transportation worker" is that the worker is involved in the movement of goods "across borders," *Saxon*, 596 U.S. at 458, and that the transportation-worker exemption "focuses on the *performance* of work" and should be "limit[ed]" to its "appropriately narrow scope," *Bissonnette*, 601 U.S. at 253, 256 (quotation marks omitted). The multifactor, totality-of-the-circumstances approach adopted by the decision below risks transforming a straightforward threshold question about a narrow FAA exemption into a burdensome, fact-intensive, merits-like decision on a worker's employment status.

B. The Court Of Appeals' Test Is Unpredictable And Unworkable.

The multifactor, indeterminate nature of the test adopted by the decision below would also render the FAA's transportation-worker exemption unpredictable and unworkable, yielding divergent results in similar cases. Indeed, the Tenth Circuit misapplied its own test on the facts of *this* case.

Many distribution agreements are structured differently from the relationship between Brock and Flowers, even within the baked-goods industry. Adopting a totality-of-the-circumstances test like the Tenth Circuit's would make it impossible for businesses to know in advance whether an agreement to

arbitrate will be enforced. For example, many baked-goods manufacturers rely on wholesale distributors to provide their own warehouses. Pet. App. 5a, 26a. Many baked-goods distribution agreements likewise do not prevent distributors from selling competing products, Pet. App. 6a, 23a; *e.g.*, *Urena v. Earthgrains Distrib., LLC*, 2017 WL 4786106, at *6 (C.D. Cal. July 19, 2017) (Earthgrains distributor also distributed cookies manufactured by another company), and do not require manufacturer approval to terminate an unprofitable account, Pet. App. 7a, 23a. Further, many manufacturers do not finance wholesale distributors' purchase of distribution areas, as a Flowers affiliate did here. Pet. App. 4a-5a n.2, 23a. And many other provisions of Flowers's agreement with Brock likewise vary from agreement to agreement. The multifactor nature of the Tenth Circuit's analysis makes it impossible for businesses to know how much weight to assign to each provision and which of them (if any) would be dispositive.

The "mechanics of the delivery" will also differ from company to company. Pet. App. 26a. For example, the decision below emphasized that respondent picked up the baked goods less than a day after they were delivered to the warehouse. Pet. App. 26a. That practice makes sense, given the limited shelf life of baked goods and the economic incentive to pick them up and resell them promptly. But the court cited the short turnaround to argue that the goods did not "'come to rest' at the warehouse" and were merely being transferred "to a different vehicle for the last mile of the [goods'] interstate journeys." Pet. App. 26a-27a. The court did not indicate how long goods need to sit in a warehouse before the interstate journey will be deemed complete. Would two days suffice? A week?

A month? Even if an answer could be determined for respondent and the Flowers products he sold, it would need to be adjusted for other workers based on the type of product at issue (*e.g.*, loaves of bread versus individually wrapped snack cakes, cookies, or granola bars) and the type of retailer being served.[2]

The Tenth Circuit's amorphous multifactor test is also unworkable—as demonstrated by its misapplication of the test to the facts of this case. The factors that the court cited as evidence of Flowers's purported "control" over Brock are fully consistent with their status as separate, independent entities that share common interests. For example, the court highlighted that Brock agreed to remove stale products from the shelves to "protect the business reputation of *both*" Flowers and Brock, Pet. App. 23a, and that Brock agreed to use "commercially reasonable best efforts to develop and maximize the sale" of the baked goods, Pet. App. 24a. The court also noted that Brock made other commitments to Flowers, and that Flowers agreed to support Brock in certain ways. Pet. App. 22a-26a. But it is unremarkable that Flowers has an interest—even an "intense interest"—in reaching agreements with wholesale distributors to effectively promote the sale of baked goods to retailers and consumers. Pet. App. 26a. Manufacturers, distributors, and retailers alike have a strong interest in selling

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[2] To the extent the Court finds Flowers's business relationship with Brock relevant to the FAA inquiry, these differences in the terms of the parties' distribution agreements and the mechanics of the delivery would foreclose a broad, industrywide ruling that *all* wholesale distributors of *all* baked goods fall within the transportation-worker exemption.

products; such aligned interests do not equate to "control." Companies regularly enter into agreements with independent contractors describing the results that the company expects the independent contractor to achieve. And baked-goods manufacturers and distributors *both* have a financial interest in achieving those results by promoting sales of baked goods and positive business reputations; a rising tide lifts all boats. The terms of the parties' agreement do not cast doubt on Brock's independence from Flowers or on Brock's bona fide ownership of the baked goods it distributes—even if such questions were relevant to the FAA inquiry.

Outside the baked-goods context, the unworkability of tests like the Tenth Circuit's has been discussed at length. *E.g.*, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 936-38 (9th Cir. 2020) (Bress, J., dissenting). "The difficulty lies in the fact that determining whether an interstate transaction is 'continuous,' or where an item in transit 'came to rest,' is more a matter of metaphysics than legal reasoning"—a "line-drawing" exercise as to which the FAA provides no guidance. *Id.* at 930, 937. For example, it is unclear how courts would approach situations where an out-of-state good (such as a bag of chips) is sold alongside a local one (such as a sandwich); the analysis may "depend[] on [the court's] selection of the relevant 'unit' for commerce purposes." *Id.* at 930. These and other "confounding inquiries" are a direct result of departing from the FAA's focus on the work actually performed. *Id.* at 937*; see Saxon*, 596 U.S. at 456; *see also Wallace*, 970 F.3d at 802 ("[T]o 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."). A multifactor test like the

Tenth Circuit's also "produces the inequitable result that workers performing the same work are subject to different legal regimes," depending on which products they deliver and whom they work with. *Rittmann*, 971 F.3d at 937. Contracting parties should not need to reference diagrams like the ones in the decision below (Pet. App. 20a-22a) to attempt to determine whether intrastate work is covered by the FAA's exemption for workers engaged in interstate commerce.

Ultimately, wholesale distributors of baked goods—such as Brock—ought to fall outside the FAA's limited transportation-worker exception regardless of which test is used. But the Court should not endorse an unworkable, unpredictable test that departs from the statutory text and this Court's precedents.

III. The Transportation-Worker Exemption Does Not Apply Because Respondent Is Not Actively, Directly, And Necessarily Engaged In Moving Goods Across Borders.

In stark contrast to the test endorsed by the decision below, the text of the FAA and this Court's precedents dictate that the focus of the transportation-worker inquiry should be on the *work* performed by the worker, not on the goods they carry. As this Court explained in *Bissonnette*, the transportation-worker exemption covers only those workers who are "actively engaged in transportation of goods across borders" and who play a "direct and necessary role" in such interstate transportation. *Bissonnette*, 601 U.S. at 256 (quotation marks omitted). The Court emphasized that the language of Section 1 "focuses on the *performance* of work" rather than other factors, such as the industry of the employer. *Id.* at 253-54 (quotation marks omitted); *see also Saxon*, 596 U.S. at 456 (FAA's test "emphasizes the actual work that the members of

the class, as a whole, typically carry out"). When the focus is properly on "what [the worker] does," *Saxon*, 596 U.S. at 456, rather than on the relationship between business entities or on the interstate journey of the goods, respondent and other owners and operators of wholesale distributorships who operate wholly intrastate do not fall within the Section 1 exemption.

As explained above, most wholesale distributors of baked goods have territories located entirely within a single State. Respondent and others who perform work for such distributorships therefore perform work entirely within a single State. The local, intrastate nature of this work is demonstrated by the activities distributors typically perform. Distributors typically order baked goods, pick them up from local warehouses, deliver them to local retail stores, and perform in-store merchandising work, such as stocking shelves, monitoring inventory, setting up promotional displays, removing stale products, and meeting with store owners. *Supra*, at 8. They typically do not unload cargo from trucks that have crossed state lines. *Supra*, at 7. While specifics may differ among particular distributors, the central point remains the same: The work that wholesale distributors typically perform does not require them to cross state lines and is not "so closely related to interstate transportation as to be practically a part of it." *Saxon*, 596 U.S. at 457 (quoting *Baltimore & Ohio Sw. R. Co. v. Burtch*, 263 U.S. 540, 544 (1924)). They therefore are not covered by the FAA's narrow exception for transportation workers.

The decision below viewed Brock not as a distinct business operating in intrastate commerce, but as a mere last-mile delivery company completing an interstate transaction on behalf of Flowers. Pet. App. 28a.

But wholesale distributors obtain and take title to the baked goods they purchase only *after* those goods have been delivered to a local warehouse. And they undeniably exercise significant business judgment in operating their businesses, including by ordering products and performing the in-store functions discussed above. The decision below failed to account for distributors' many non-transportation-related activities—in large part because its analysis is divorced from the FAA and this Court's precedents.

This Court should hold that the transportation-worker exemption is inapplicable to respondent because he does not typically transport goods across cross state lines, load goods on vehicles that cross state lines, or unload goods from vehicles that cross state lines. Thus respondent is not actively, directly, and necessarily engaged in the interstate transportation of goods. That rule aligns with the statutory text and this Court's precedents, and it provides the certainty needed for businesses to plan, budget, and operate in a modern global economy.

This Court has cautioned against introducing "complexity and uncertainty [into] the construction of § 1" because it "undermin[es] the FAA's proarbitration purposes," "'breeding litigation from a statute that seeks to avoid it.'" *Circuit City*, 532 U.S. at 123 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995)). Congress enacted the FAA to protect arbitration agreements and ensure their enforcement, and a clear rule will enable businesses and workers alike to benefit from the advantages of arbitration. Avoiding an amorphous, unpredictable, multifactor test is especially important in today's modern, global economy, where many products have traveled interstate at some point in their journey from the

manufacturer to the consumer. The Tenth Circuit's test "unnecessarily complicat[es] the law" and threatens to deprive businesses and workers of their agreed-upon contractual arrangements. *Allied-Bruce*, 513 U.S. at 275.

As this case demonstrates, adopting the Tenth Circuit's test will also impose unnecessary litigation costs. A straightforward and administrable approach rooted in the statutory text would obviate the need for threshold mini-trials regarding the details of a distributorship agreement. The Tenth Circuit's approach, in contrast, would impose substantial costs and litigation burdens while frustrating the purpose of arbitration and denying both parties the benefits of an efficient resolution to their dispute. While larger companies may be able to withstand these expenses (by passing on the costs to consumers), small businesses will suffer disproportionately.

The Court need not break new ground to reject the decision below. It need only reiterate that where, as here, a worker is not actively, directly, and necessarily involved in transporting goods across borders, the worker is not a transportation worker engaged in interstate commerce within the meaning of Section 1 of the FAA.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted.

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