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 OF *AMICUS CURIAE* NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENT


LISE GELERNTER
Arbitrator/Visiting Scholar
UNIVERSITY OF BUFFALO
SCHOOL OF LAW
5500 North Bailey Avenue,
Box 589
Amherst, NY 14226

JOSHUA M. JAVITS
Arbitrator & Mediator
PRESIDENT, NATIONAL ACADEMY OF
ARBITRATORS
700 New Hampshire Avenue, NW,
Suite 416
Washington, DC 20037

BARRY WINOGRAD
*Counsel of Record*
Arbitrator & Mediator
875-A Island Drive,
No. 144
Alameda, CA 94502
(510) 393-7283
winmedarb@aol.com



120809

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Are workers who deliver locally goods that travel in interstate commerce—but who do not transport the goods across borders nor interact with vehicles that cross borders—"transportation workers" "engaged in foreign or interstate commerce" for purposes of the Federal Arbitration Act's § 1 exemption?

## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Cited Authorities*

*Page*

*Cited Authorities*

*Page*

*Cited Authorities*

*Cited Authorities*

*Page*

*Page*



**Statutes**

*Cited Authorities*

**Rules and Regulations**

*Page*

**Other Authorities**

*Cited Authorities*

## INTEREST AND CONCERN OF AMICUS[1]

Amicus National Academy of Arbitrators (Academy or NAA) was founded in 1947 to ensure standards of integrity and competence for professional arbitrators of workplace disputes, including establishing canons of professional ethics,[2] and offering programs promoting the understanding and practice of arbitration.[3] As historians of the Academy observe, it has been "a primary force in shaping American labor arbitration."[4]

Arbitrators elected to Academy membership are only those with widely accepted practices and scholars who have made significant contributions to labor and employment relations. Currently, the Academy has more than 500 members in the United States and Canada. Members are prohibited from serving as advocates, consultants or

---

1. Rule 37.6 statement: Counsel of record is the author of this brief on behalf of amicus. Other members of the organization assisted. No person or entity other than amicus made any monetary contribution to the preparation or submission of this brief.

2. Gladys Gruenberg, Joyce Najita & Dennis Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* (1997). A special contribution developed with the Federal Mediation and Conciliation Service and the American Arbitration Association has been The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, at: https://naarb.org/code-of-professional-responsibility/.

3. For the variety of topics discussed by arbitrators and advocates at the Academy's annual meetings, see https://naarb.org/proceedings-database/.

4. Gruenberg, et al., *Fifty Years in the World of Work, supra*, at 26.

associates for parties in the field, and from appearing as expert witnesses on behalf of labor or management.

The traditional function of labor arbitration has been to resolve disputes over the interpretation and application of collective bargaining agreements. More recently, arbitration has been used to resolve disputes over the statutory rights of employees in the non-union workplace. Academy members serve parties in both fields. For the non-union workplace, as in this case, the NAA has been a leader in developing professional standards and due process protections.[5]

On several occasions, the NAA as amicus has contributed briefs to the Court in labor-management arbitration cases as well as disputes regarding the Federal Arbitration Act (FAA).[6] In particular, the Academy has offered its views in *Circuit City*, *Saxon*, and *Bissonnette*, three cases in which, as in this proceeding, the coverage of transportation workers under the residual clause of Section 1 of the FAA was at issue. As relevant here,

---

5. See, e.g., https://naarb.org/due-process-protocol/; https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/.

6. 9 U.S.C. §1. See, e.g., *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Sw. Airlines Co. v. Saxon*, 596 U.S. 450 (2022); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018); *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986).

NAA members have decades of experience with trucking, shipping and other transportation disputes in cases involving private sector employees subject to the National Labor Relations Act (NLRA)[7] and to the Railway Labor Act (RLA)[8] for the heavily unionized railroad and airline industries. In providing the Academy's perspective, amicus emphasizes that the organization supports arbitration as an institution because it is capable, when properly structured, of providing workplace justice in accord with legislative intent, judicial precedent, and historic practice.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus NAA supports Respondent Brock and the Tenth Circuit's decision in *Brock v. Flowers Foods, Inc.*[9] The Academy maintains that a straightforward answer to the question before the Court can be found in its previous Section 1 decisions. In those cases, the Court applied the residual clause of Section 1 of the FAA, which exempts from the statute "seamen and railroad employees, or any other class of workers engaged in foreign or interstate commerce."[10] In doing so, the Court determined that transportation workers are excluded from the FAA, including those who are engaged in commerce without crossing a state border or who work in a non-transportation industry.

---

7. 29 U.S.C. §151, et seq.

8. 45 U.S.C §151, et seq., and §181, et seq.

9. 121 F.4th 753 (10th Cir. 2024).

10. 9 U.S.C. §1.

In this proceeding, Petitioner Flowers Foods and related companies (or, Flowers) urge the Court to construe the residual clause in Section 1 as applying *only* if the worker at issue is personally involved with a vehicle crossing a border, or by loading or unloading goods on such vehicles. In Flowers' brief, it states that the Section 1 exemption is limited to workers who "move goods across state lines" or "interact with the vehicles that do. . . ."[11] For Flowers, those who do neither fail to qualify as transportation workers. Flowers describes Brock's work as confined to "moving goods from one local spot to another," and argues that "whether the goods Brock transports were part of an interstate transaction is irrelevant to the actual work Brock performs."[12] Neither proposition is accurate. Adding the conditions proposed by Flowers to the text of Section 1 would disregard decades of Court decisions recognizing that the channels of interstate commerce cannot be confined in this way.

If the FAA is revised as Flowers prefers, it would disrupt administration of the U.S. transportation system by creating conflicts with existing substantive laws affecting hundreds of thousands of workers who drive for a living.[13] Drivers not only work for freight-hauling companies such as the United Parcel Service and Federal Express, but also for national companies such as Amazon, Wal-Mart, Target, and others. Brock is such a driver.

---

11. Petitioners' Brief at 12.

12. *Id.* at p. 22.

13. https://www.census.gov/library/stories/2019/06/america-keeps-on-trucking.html.

After the Court broke new ground in *Circuit City*, perhaps it is not surprising that there are jurisprudential differences among parties and courts considering Section 1's residual clause. While *Saxon* and *Bissonnette* helped resolve some of the differences, Flowers' view of a "transportation worker" is too limited because it fails to consider how the work being performed is engaged with interstate commerce, the question before the Court. Instead, Flowers distorts the Court's reasoning in *Saxon* and *Bissonnette* by arguing that the last portion of a journey made by its bakery products is irrelevant to the Section 1 inquiry. In reality, the performance of work cannot be divorced from determining whether the goods being transported are in interstate commerce; that is, part of continuing movement through the channels of commerce by crossing state lines to an ultimate destination. To separate the movement of goods from this inquiry is to ignore the words "engaged in foreign or interstate commerce" in Section 1's residual clause. These are two sides of the same coin and must be considered together.

If Flowers' position is adopted, drivers delivering its bakery products from a warehouse in the same state in which its products are made, to a depot or warehouse in an adjacent state, *will* be exempt from Section 1. However, for Flowers, drivers picking up the same product from a depot or warehouse in the adjacent state for delivery in that same state will *not* be exempt. As a result, if Flowers' "transportation worker" test is approved, drivers in one state will be exempt, but drivers in the adjacent state will not be exempt—*even though both drivers are doing precisely the same work of delivering the company's product.*

The happenstance of a state line and the location of a warehouse should not yield different readings of the FAA when the work being performed entails the interstate delivery of a product to its destination. Indeed, Flowers concedes this factual premise as being essential for its own business. In a declaration offered by Flowers in the District Court, it explains how its nationwide "direct-store-delivery" (DSD) distribution model relies on drivers to transport products to the end user.[14] For Flowers, the DSD system is one in which,

> . . . orders for its customers are produced by out-of-state bakeries in response to Brock's specific orders. They are then shipped from the various out-of-state bakeries to Brock's warehouse in Colorado for ultimate sale and delivery of the products to the end customers for whom he ordered them with the intent that such products will be delivered to those end customers. . . ."[15]

Flowers also operates a data tracking system that carefully monitors every step of the product to its final location.[16]

---

14. Joint Appendix (Jt. App.) at 92-97.

15. *Id.* at 95.

16. *Id.* at 96. Flowers' DSD distribution model also is described on the company's website: https://flowersfoodservice.com/why-flowers/. Additional insight into the integrated nature of a driver's work within Flowers' nationwide distribution system can be found in *In Re Flowers Foods, Inc. Sec. Litig.*, 2018 WL 1558558 (M.D. Ga. 2018) at 2-3.

To assist the Court, the Academy offers a workable approach to clarify who is a "transportation worker" engaged in interstate commerce. This approach draws upon examples of substantive laws governing the American workplace that have long covered transportation workers. Applying this perspective will bring greater consistency and predictability to the administration of the FAA's residual clause, and will limit conflict between the FAA, a procedural statute, and substantive employment laws that govern the American workplace. As a result, employers, workers, courts and arbitrators will benefit. In accord with *Saxon*'s command, the Academy's approach applies both to identify the "class of workers" in Section 1's residual clause as one step in the decision-making process, and also, as the second step of the process, to use existing sources of positive law that offer guidance as to when workers are "engaged in interstate commerce."

Reference to existing law also provides an important guardrail for the judiciary. When, as is often the case, courts must decide who is an exempt transportation worker under the Court's Section 1 precedent, there is a risk of judges becoming *de facto* personnel officials. Parties ask courts to review job descriptions, assignment schedules, freight manifests, location tracking data, and other transportation evidence, to decide whether workers are subject to the FAA. Courts utilizing a time-consuming and hyper-technical method of decision-making can find themselves straying from the text of the FAA's Section 1 residual clause. Instead, the Academy offers a realistic means of clearing up uncertainty when applying that provision.

## ARGUMENT

### 1. As Confirmed by Decisions of This Court, Section 1's Residual Clause Exempts Transportation Workers Engaged In Interstate Commerce.

Section 1 of the FAA states that the statute does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[17] The plain text of the residual clause in Section 1 exempts *classes of workers* who are *engaged in interstate commerce*. The statutory choice of words is meaningful, as demonstrated by the FAA's legislative history and the exemption's context, which focused on protecting labor interests and existing means of dispute resolution from arbitration under the FAA.[18]

The Court first construed Section 1's residual clause in *Circuit City*. Rather than read the text to cover all classes of workers, the Court applied the doctrine of *ejusdem generis* to conclude that mention of seamen and railroad employees in Section 1 meant that "any other class of workers" in the residual clause should only apply to "transportation workers."[19] A related factor in *Circuit City*'s understanding was a distinction between the narrow scope of the Section 1 exclusion for those "engaged

17. 9 U.S.C. §1.

18. Matthew W. Finkin, "*Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 286-288 (1996).

19. *Circuit City, supra*, 532 U.S. 105, 114-115 (2001).

in commerce," and the broader reach of "affecting commerce" and "involving commerce" for enforcement under Section 2 of the FAA. In applying this distinction, the Court cited antitrust cases which viewed the "engaged in commerce" language as precluding coverage of local economic activity within the outer limits of the commerce power.[20] Another feature of the Court's reasoning was that Congress likely crafted the residual clause because "it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers,"[21] citing in particular the Shipping Commissioners Act of 1872, the Transportation Act of 1920 and the Railway Labor Act enacted in 1926 and amended in 1936.[22]

The *Circuit City* decision meant that the FAA's Section 1 exemption did not cover either the retail store employee in that case or employees generally. By adopting a narrow reading of the *breadth* of the residual clause to confine the exemption to transportation workers, the Court left Section 1 issues about the *content* of the exclusion for subsequent consideration.

Since *Circuit City*, the Court has ruled on Section 1's residual clause in three cases. In 2019, the Court found that truck drivers deemed to be independent contractors were excluded from coverage as "workers" even though

---

20. *Id.* at 115-117, citing *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271 (1975) (janitorial services for others engaged in commerce); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) (local asphalt production).

21. *Circuit City, supra*, 532 U.S. at 120-121.

22. *Id.* at 121.

they were not classified as employees.[23] In *Saxon* in 2022, the Court ruled that ramp agent supervisors who load and unload cargo on planes, but who do not cross state borders, were excluded from the FAA.[24] In *Saxon*, the Court prescribed a two-step analysis to assess the work performed by the "class of workers" at issue, and whether, by doing such work, the employees were "engaged in interstate commerce." The Court found that the plaintiff, a baggage handler and supervisor, was exempt based on her work, "not what Southwest does generally."[25] For the Court, the intrastate handling of cargo on planes headed out of state showed that the workers were "engaged in interstate commerce," distinguishing this work from the business dealings in antitrust cases which the Court viewed as purely local activity.[26] A key lesson from *Saxon* is that it is *what workers do* that exempts them from FAA coverage.

Most recently, in *Bissonnette* in 2024, a case involving another Flowers subsidiary, the Court confirmed that the Section 1 exemption is not industry-dependent, but is tied to what a worker is doing; in that case, delivering company products to market.[27] *Bissonnette* adhered to *Saxon*'s lesson, reasoning that a transportation industry test "would often turn on arcane riddles about the nature

23. *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019).

24. *Saxon, supra*, 596 U.S. 450 (2022).

25. *Id.* at 456.

26. *Id.* at 462-463.

27. *Bissonnette, supra*, 601 U.S. at 246.

of a company's services," rather than on what the workers actually did.[28]

As *Saxon* and *Bissonnette* confirm, the FAA's use of the term "workers" in the residual clause directs attention to the performance of work, while the statute's use of "engaged . . . emphasizes the actual work that members of the class, as a whole, typically carry out."[29] Accordingly, for the Tenth Circuit in this case, the facts showed that Flowers' drivers are members of a class of workers transporting goods in the company's interstate distribution channels for deliveries to customer locations.

In contrast, Flowers' reading of the Section 1 exemption would mean that delivery drivers who transport goods for companies with broad distribution networks would *not* be exempt if, after out-of-state shipments are sent to an in-state depot or warehouse, they are delivered by another driver to an ultimate destination. This cramped interpretation of what interstate commerce means—deeming the last driver to be irrelevant—is at odds not only with this Court's recent decisions, but also with those of the Court for more than 100 years, before and after passage of the FAA.

A sampling of several decisions demonstrates a variety of intrastate transportation activities that the Court has considered part of interstate commerce. In one, the Court found invalid a license rule for an in-state shipping agent.[30]

---

28. *Id.* at 254.

29. *Saxon, supra*, 596 U.S. at 456.

30. *Rearick v. Com. of Pennsylvania*, 203 U.S. 507 (1906).

In another, coal cars were changed within a state for subsequent interstate shipment.[31] In a third case, multiple steps in the intrastate movement of cattle to and from stockyards was interstate commerce.[32] The same was true for railway rates within a state[33] and for intrastate train transfers[34] where goods were on a continuous interstate journey. In a case the Tenth Circuit found instructive for this dispute, the Court concluded that a special contract for taxi service for rail passengers between two stations was interstate commerce, although independent local taxi service was not.[35]

The NAA believes that the principles the Court has applied in diverse commercial and regulatory settings to determine when intrastate activity qualifies as interstate commerce, before and after enactment of the FAA, are consistent with the Academy's proposal in this brief; a proposal that relies on statutory text, history and precedent under our nation's employment and labor laws.

### 2. Lower Court Disputes Over Section 1's Residual Clause Reflect Continued Differences About its Application.

Since *Circuit City*, lower court variation when applying the Section 1 exemption is evident as courts have

---

31. *Philadelphia & R.R. Co. v. Hancock*, 253 U.S. 284 (1920).

32. *Stafford v. Wallace*, 258 U.S. 495 (1922).

33. *Baltimore & O.S.W.R. Co. v. Settle*, 260 U.S. 166 (1922).

34. *United States v. Cap. Transit Co.*, 325 U.S. 357 (1945).

35. *United States v. Yellow Cab Co.*, 332 US 218 (1947), cited in *Brock, supra*, 121 F.4th at 765-766.

grappled with determining who counts as a transportation worker.[36] Some decisions have considered the frequency or amount of time a worker travels across state lines,[37] and others have focused on a worker's position in a supply chain,[38] including warehouse or franchise operations.[39] While work that involves local pickups and deliveries far removed from interstate activity has not been deemed exempt,[40] other decisions have dealt with whether a worker

---

36. Recent reviews of Section 1 cases include: Ella Klahr Bunnell, *How the Federal Arbitration Act's "Transportation Workers Exemption" Protects Last-Mile Delivery Drivers*, 2024 U.Ill.R.Online 37; John David Dufort, *Navigating the Arbitration Speedway: Gig Economy Drivers Blindly Swerve Through Obstacles Created by the Uneven Application of the Federal Arbitration Act*, 69 Vill. L. Rev. 439 (2024); Tamar Meshel, *Employment Arbitration: Recent Developments and Future Prospects*, 39 Ohio State J. Dis. Res. 279 (2024).

37. Compare *Singh v. Uber Technologies, Inc.*, 67 F.4th 550 (3d Cir. 2023); *Cunningham v. Lyft, Inc.*, 17 F.4th 244 (1st Cir. 2021); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854 (9th Cir. 2021) and *Osvatics v. Lyft, Inc.*, 535 F.Supp.3d 1 (D.D.C. 2021) with *Islam v. Lyft, Inc.*, 524 F.Supp.3d 338 (S.D.N.Y. 2021).

38. Compare *Waithaka v. Amazon.com, Inc.*, 966 F.3 10 (1st Cir. 2020); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020); and *Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228 (1st Cir. 2023) with *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021).

39. Compare *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023) and *Ortiz v. Randstad Inhouse Services*, 95 F.4th 1152 (9th Cir. 2024) with *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022).

40. *Wallace v. Gubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020).

closely supports interstate transportation functions,[41] and yet others consider if there is a significant difference, for Section 1, between transporting people and transporting goods.[42] An emerging issue is whether arrangements requiring drivers to form corporate entities to deliver products are "contracts of employment" in interstate commerce under Section 1.[43]

Some terms that have been used to describe a worker's engagement in interstate commerce, such as "direct," "necessary," "actively engaged," and "intimately involved," among others, have been misapplied to limit what the residual clause excludes from statutory coverage.[44] As shown by the litigation history for Section 1, these terms, subjective by nature, can confuse rather than illuminate the assessment of workplace policies and

41. *Lopez v. Aircraft Serv. Int'l, Inc.*, 107 F.4th 1096 (9th Cir. 2024); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004); *Perez v. Global Airport Sec. Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001).

42. *Singh v. Uber Techs., Inc.*, 939 F.3d 210 (3d Cir. 2019).

43. Compare *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, 97 F.4th 1190 (9th Cir. 2024) with *Adler v. Gruma Corp.*, 135 F.4th 55 (3d Cir. 2025) and *Silva v. Schmidt Baking Distribution, LLC*, 2025 WL 3703088 (2d Cir. Dec. 22, 2025)

44. The descriptive terms used in the Section 1 decisions recall the analysis of the residual clause in a collective bargaining dispute involving a manufacturing company in *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Loc. 437*, 207 F.2d 450, 452 (3d Cir. 1953)(residual clause applies only to classes of workers " . . . engaged directly in commerce, that is, only those . . . actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it").

practice. Flowers' proposed test is a good example of this trend with its tunnel vision of what workers do. This is especially so for a truck driver who is "[i]ndisputably . . . a transportation worker" under the FAA.[45]

The Academy urges the Court to clarify the test for determining when a transportation worker is "engaged in . . . interstate commerce" and is thus exempt from the FAA. In doing so, the NAA is not proposing that the Court "reinvent the wheel." Rather, the Court can rely on substantive laws and its own substantial precedent applying interstate commerce in a variety of contexts, thereby limiting the prospect of piecemeal litigation requiring discovery and trials to decide if the exemption applies, or not.[46]

### 3. A Workable Approach is Available Based on Substantive Employment and Labor Laws.

A workable approach faithful to the text of the FAA is available to assist with consistent application of the

---

45. *Lenz v. Yellow Transp.*, 431 F.3d 348, 351 (8th Cir. 2005). *See also Canales v. CK Sales Co., LLC*, 67 F.4th 38, 45-46 (1st Cir. 2023); *Int'l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012).

46. *Fraga v. Premium Retail Services, Inc., supra*, 61 F.4th at 237. Section 4 of the FAA provides for summary disposition or jury trials when "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue. . . ." (9 U.S.C. §4.) Discovery findings also may play a role beyond FAA proceedings, as evident in securities litigation alleging petitioner's strategic business decision to treat its drivers as independent contractors rather than as employees. (See *In Re Flowers Foods, Inc. Sec. Litig., supra*, 2018 WL 1558558 at 2 (citing accounting officer deposition).

Court's Section 1 precedent. To this end, the Academy urges reliance on employment and labor laws that have long dealt with the movement of goods and passengers in interstate commerce, and that have resolved disputes affecting classes of workers engaged in interstate commerce. Sharpening the focus to laws with settled principles governing interstate commerce will preserve the distinction between substantive legal doctrine and the FAA, a procedural statute that is not an independent basis for federal jurisdiction.[47] It also reduces the risk of the FAA becoming a type of super-employment statute superceding substantive laws in the field.

To apply this perspective, the Academy offers a road map for Section 1 disputes. *Circuit City*'s construction of the residual clause was tied to the *breadth* of the clause by limiting its reach to transportation workers, rather than all workers. Subsequent decisions in *New Prime*, *Saxon* and *Bissonnette* directed statutory attention to the *content* of work. The road map proposed by the Academy builds upon this approach. As demonstrated by the record in the District Court, Flowers' drivers are a key link in the distribution of products that are ordered for customers from out-of-state bakeries. The work they did was an extension of, and indistinguishable from, the work of delivery drivers in the originating state. For this case, like work should be treated alike for FAA Section 1 purposes.

With this understanding, a further refinement of the *content* of work excluded under Section 1 is appropriate, one that emphasizes the importance of substantive law derived from workplace experience. The Court already

47. *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009).

has begun this project, relying in particular on the Federal Employers Liability Act,[48] an important precedent in previous Section 1 decisions by the Court.[49] The Court can continue developing this perspective and avoid unsettling other statutory settings by referring to U.S. employment and labor laws developed when the FAA was enacted, or soon after, as *Circuit City* instructs and as we are reminded by *Bissonnette*.[50] Within this framework, the Academy offers three additional guideposts as examples of statutes that shed light on the *content* of "any other class of workers engaged in foreign or interstate commerce" to be excluded from the FAA.

A key source to assist in resolving Section 1 disputes is the Fair Labor Standards Act (FLSA),[51] the statutory basis for the wage claims in this proceeding based on drivers being employees, not independent contractors. As required by the overtime provision of the FLSA, in words that echo the residual clause in Section 1,

> . . . no employer shall employ any of his employees who in any workweek is *engaged in commerce* or in the production of goods for commerce . . . for a workweek longer than forty hours. . . .[52]

---

48. 45 U.S.C. §51, et seq.

49. See, e.g., *Circuit City, supra*, 532 U.S. at 116, citing *The Employers' Liability Cases*, 207 U.S. 463 (1908) and *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Saxon, supra*, 596 U.S. at 457, citing *Baltimore & O. S. W. R. Co. v. Burtch*, 263 U.S. 540 (1924).

50. 601 U.S. at 253, citing *Circuit City, supra*, 532 U.S. at 121.

51. 29 U.S.C. §203, et seq.

52. 29 U.S.C. §207(a)(emphasis added). See also 29 U.S.C. §206(a) (minimum wage). The FLSA, in 29 U.S.C. §203(b), defines

The longstanding FLSA test for determining if the intrastate segment of a shipment is "engaged in commerce" was set forth in *Walling v. Jacksonville Paper Co.*[53] At issue in *Jacksonville Paper* was the in-state distribution of paper products from a branch operation after they were ordered for delivery from an out-of-state location. The Court held that this intrastate work was covered by the FLSA, stating:

> If there is a *practical continuity of movement* from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse.[54]

Soon after *Jacksonville Paper*, the Court issued another important FLSA decision, *McLeod v. Threlkeld*.[55] In that case, the Court declined to extend the FLSA to

---

"commerce" as: "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

53. 317 U.S. 564 (1943).

54. *Id.* at 569 (emphasis added).

55. 319 U.S. 491 (1943).

contract workers furnishing meals to maintenance-of-way railroad employees, concluding that this local work was unrelated to interstate commerce. *Jacksonville Paper* and *McLeod* represent two points along a continuum in determining when intrastate work is deemed part of interstate commerce.

Drawing upon FLSA case law, federal regulations provide criteria determining when intrastate work is considered part of interstate commerce.[56] As stated in 29 C.F.R. §776.9,

> . . . the courts have made it clear that coverage of the Act based on engaging in commerce extends to every employee employed "in the channels of" such commerce or in activities so closely related to such commerce, as a practical matter, that they should be considered a part of it.[57]

Another regulation, 29 C.F.R. §776.10, extends FLSA coverage to,

> [E]mployees whose work is an essential part of the stream of interstate or foreign commerce, in whatever type of business they are employed. . . . This would include, for example, employees of a warehouse whose activities are connected

56. 29 C.F.R. §§ 776.9-776.11.

57. 29 C.F.R. §776.9, citing, *inter alia, Walling v. Jacksonville Paper Co., supra*, 317 U.S. 564.

> with the receipt or distribution of goods across State lines.[58]

Also demonstrating the relevance of the FLSA to FAA Section 1 disputes is litigation Flowers has pursued relying on the Motor Carrier Act (MCA),[59] enacted in 1935, and later reorganized and renumbered.[60] As enacted, the MCA applied to motor carriers "engaged in interstate or foreign commerce,"[61] the same condition required by the FAA's residual clause and by the FLSA.

In *Ash v. Flowers Foods, Inc.*,[62] a recent Fifth Circuit decision concerning the relationship between the MCA and the FLSA, the court affirmed summary judgment for Flowers. In that case, Flowers invoked the MCA to seek an exemption from the overtime mandate under Section 13(b)(1) of the FLSA.[63] In order to claim the MCA exemption, Flowers made an argument that directly contradicts its position in this case. It argued that its drivers were engaged in interstate commerce even though they picked up and delivered products in only one state. The Fifth Circuit panel agreed with Flowers and upheld the District Court decision, finding that Flowers' in-state delivery drivers were exempt from overtime under the

---

58. 29 C.F.R. §776.10, citing *A.H. Phillips, Inc. v. Walling*, 340 U.S. 490 (1945).

59. Ch. 498, 49 Stat. 543.

60. 49 U.S.C. §§13501, 31502.

61. 49 Stat. 543, §202(b).

62. 2024 WL 1329970 (5th Cir. 2024).

63. 29 U.S.C. §213(b)(1); also see 29 C.F.R. §782.2(a)(2).

FLSA. Flowers has advanced the same position in other FLSA cases.[64]

The federal regulation that assists in determining when intrastate activity is part of interstate commerce under *both* the MCA and the FLSA adds weight to this analysis. Statutory coverage for transportation of goods in interstate commerce is premised on the "practical continuity of movement . . . from the point of origin to the point of destination."[65] This standard governs both statutes, "except in those situations where the Commission has held or the Secretary of Transportation or the courts hold otherwise."[66]

A Policy Statement issued by the Surface Transportation Board[67] reinforces this approach to the intrastate movement of goods from warehouses.[68] The Policy Statement provides in relevant part:

---

64. See, e.g., *Aguiluz v. Flowers Foods, Inc.*, 2024 WL 5251179 (C.D. Ca. 2024); *Noll v. Flowers Foods, Inc.*, 442 F.Supp.3d 345 (D. Me. 2020).

65. 29 C.F.R. §782.7(b)(1), citing, *inter alia, Walling v. Jacksonville Paper Co., supra*, 317 U.S. 564.

66. 29 C.F.R. §782.7(b)(1).

67. The Surface Transportation Board was the successor to the Interstate Commerce Commission. (See I.C.C. Termination Act of 1995, Pub. L. No. 104–88, 109 Stat. 803; also see 9 U.S.C. §1301, et seq.)

68. *Policy Statement—Motor Carrier Interstate Transportation—From Out-of-State Through Warehouses to Points in Same State*, 8 I.C.C. 470 (1992 WL 122949).

> The essential and controlling element in determining whether the traffic is properly characterized as interstate is whether the shipper has a "fixed and persisting" intent to have the shipment continue in interstate commerce to its ultimate destination. Where a distribution center or warehouse serves only as temporary storage to permit orderly and convenient transfer of goods in the course of what the shipper intends to be continuous movement to a destination, the continuity of the movement is not broken at the warehouse.[69]

Viewed together, the federal regulation and the Policy Statement define when drivers for the intrastate portion of delivery work are engaged in interstate commerce. Since the FAA shares the same statutory premise of engagement in interstate commerce that is present for the FLSA and the MCA, the jurisprudence, interpretive regulations and policy statements applicable to the FLSA and MCA are relevant to interpreting the text of the FAA. Within that context, it is telling that the evidence Flowers submitted to the District Court in this case describing what its drivers do when ordering and delivering products parallels the description of interstate commerce in the federal regulations and Policy Statement discussed above.[70]

A second area of substantive law to assist in determining the *content* of the Section 1 exclusion is

---

69. *Policy Statement, supra*, 8 I.C.C. 470.

70. Jt. App. at 94-96.

the Railway Labor Act,[71] one of the statutes shaping the majority's reading of the FAA in *Circuit City*. The RLA specifically applies to those employees working for railroads and air carriers. Notably, the RLA's jurisdictional test is nearly identical to the text of the FAA in extending coverage to workers "engaged in interstate or foreign commerce."[72] The relevance of the RLA to Section 1 disputes is amplified because the RLA reflects a broad understanding of the *content* of transportation, which includes many workers who are not obviously on trains or planes, or loading them.[73]

---

71. 45 U.S.C. §151 et seq.

72. Section 181 states that air carriers and their employees are "engaged in interstate or foreign commerce," text which parallels the FAA exemption. (45 U.S.C. §181.) And who are those employees? Section 181 states they are, "every air pilot or other person who performs any work as an employee or subordinate official of such carrier." (*Id.*) Similarly, for railroad workers, Section 151 of the RLA defines an "employee" as "every person . . . who performs any work" for a carrier covered by the statute. (45 U.S.C. §151, Fifth.)

73. The breadth of the RLA's application to workers tracks the Esch-Cummins Transportation Act of 1920, also cited favorably by the Court in *Circuit City, supra*, 532 U.S. at 120. That legislation in Section 400(3) defined "transportation" as including,

> . . . *all services* in connection with the receipt, delivery, elevation, and *transfer in transit*, ventilation, refrigeration or icing, storage, and *handling of property transported*. (41 Stat. 456, 475; emphasis added.)

The RLA in 45 U.S.C. §153(h) covers personnel working for railroads. After amendment of the RLA in 1936, the statute also covers those working for air carriers, as detailed by the treatise, *The Railway Labor Act*, § 4.II.E.2, Douglas W. Hall & Marcus Migliore eds., 2023 (ebook ABA/Bloomberg Law).

Although the Court in *Saxon* rejected a blanket airline industry exclusion under Section 1, the decision did not preclude reliance on the RLA's statutory framework to assist in deciding if a worker is exempt.[74] Justice Thomas, writing for the Court, reasoned that the distinction between "seamen" and "railroad employees" in Section 1 weighed against an industry-based test, "[r]egardless of whether 'railroad employees' include all rail-transportation workers."[75] For the NAA, the RLA remains an important source of congressional direction in identifying transportation workers engaged in interstate commerce. Under the RLA, the statute has covered workers who may never cross state lines but who are nonetheless "engaged in interstate commerce" if they are integral parts of the interstate transportation of people or goods.

For example, in *Virginian Ry.Co. v. System Federation No. 40,*[76] the Court held that the work activities of "back shop" employees who repaired train cars and locomotives at a railroad's facility in West Virginia, "have such a relation to the other confessedly interstate activities of the petitioner that they are regarded as part of them," and therefore within the RLA's jurisdiction.[77] By focusing solely on Brock's intrastate work, Flowers disregards whether this work is, "as a practical matter, part of

74. *Saxon, supra*, 596 U.S. at 460-461.

75. *Id.*

76. 300 U.S. 515 (1937).

77. *Id.*, 300 U.S. at 554-556.

the interstate transportation of goods."[78] The RLA's jurisdiction extends to work that does not cross state borders.[79] RLA coverage of intrastate work also may extend to third party contractors servicing aircraft and railroads, although this depends on the nature and scope of work performed, and the degree of employer control.[80]

A third relevant source for a Section 1 road map is precedent under the NLRA. The NLRA states that "affecting commerce," " . . . means *in commerce*, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[81] Although *Circuit City* rejected the argument that Section 1's residual clause should be construed to encompass the full extent of the commerce power, Justice Kennedy, writing for the majority, gave equivalent weight to the terms "in commerce" and "engaged in commerce":

> The Court's reluctance to accept contentions that Congress used the words "in commerce" or "engaged in commerce" to regulate to the full extent of its commerce power rests on

78. *Saxon, supra*, 596 U.S. at 457.

79. See *The Railway Labor Act*, *supra*, §§ 3.I.A.2.B (rail functions), 3.I.B.2.b (air functions).

80. See, e.g., *Delpro Co. v. Broth. Ry. Carmen of U.S. & Canada, AFL-CIO*, 676 F.2d 960 (3d Cir. 1982); *Dist. 6 Int'l Union of Indus. v. National Mediation Board of U.S.*, 139 F.Supp.2d 557 (S.D.N.Y. 2001).

81. 29 U.S.C. §152(7) (emphasis added).

> sound foundation, as it affords objective and consistent significance to the meaning of the words Congress uses when it defines the reach of a statute.[82]

Recognizing the relevance of the NLRA to the issue in this case is consistent with the way in which labor strife in transportation was a significant factor for passage of the NLRA. The NLRA was enacted in a period of widespread labor unrest in 1934 and 1935. At the time, strikes involving truck drivers in Minneapolis and dockworkers in San Francisco increased concerns over industrial peace and spurred statutory means of resolving labor disputes.[83] As one example of the impact of these actions, Rep. William Connery, a sponsor with Sen. Robert Wagner of the NLRA, expressly referred to truck driver and dockworker strikes in May 1934 in urging passage of the new labor legislation.[84]

From the earliest days of the statute, bakery drivers were among the many transportation workers covered by the law.[85] Indeed, the National Labor Relations

---

82. *Circuit City, supra*, 532 U.S. at 117. Under the NLRA, the term "commerce" means, "trade, traffic, commerce, transportation, or communication among the several States . . . or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country." (29 U.S.C. §152(6).)

83. Irving Bernstein, *The Turbulent Years*, at 217-351 (1969).

84. 78 Cong.Rec. 9888-89 (May 29, 1934).

85. See, e.g., *Bakery & Pastry Drivers & Helpers Loc. 802 of Int'l Bhd. of Teamsters v. Wohl*, 315 U.S. 769 (1942); *Nat'l Lab. Rels. Bd. v. Cont'l Baking Co.*, 221 F.2d 427 (8th Cir. 1955). This

Board (NLRB) determined that route drivers for the company in *Bissonnette*, a Flowers subsidiary, would be an appropriate unit for union representation.[86] In other cases, the NLRB has affirmed jurisdictional findings that Flowers is "in commerce" under the statute in finding that it committed unfair labor practices affecting bargaining units of production and maintenance employees.[87]

Transportation workers covered by the NLRA are not parsed into discrete occupational categories to determine if they are covered by the statute. Instead, the NLRA's jurisdictional reach is limited by statutory definitions for "employee," "employer," and "supervisor,"[88] and by the business volume thresholds established by the NLRB.[89] Relevant here, workers providing interstate transportation services for passengers or goods, or essential links in such services, are subject to the NLRA,

---

application of the NLRA is consistent with the seminal decision of *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In that case, the Court applied the NLRA to a steel company that, with its subsidiaries, employed thousands of workers in a "completely integrated enterprise" with its own transportation facilities in several states and Canada. (*Id.* at 26-27.)

86. See *LePage Bakeries*, NLRB Case No. 1-RC-21501 (2002); *LePage Bakeries*, NLRB Case No. 1-RC-21877 (2005).

87. See, e.g., *Flowers Baking Co., Inc.*, 240 NLRB 870 (1979); *Flowers Baking Co.*, 169 NLRB 738 (1968); *Flowers Baking Co.*, 161 NLRB 1429 (1966).

88. 9 U.S.C. § 151(2), (3), (11).

89. *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*, Ch. 27.II.A, Jayme L. Sophir, ed., 2025 (ebook ABA/Bloomberg Law),

except that coverage is limited to businesses exceeding $50,000 in gross annual volume.[90]

The examples offered by the Academy are not the only potential sources for analyzing the *content* of the Section 1 transportation worker exclusion. Guidance also may be drawn from statutes addressing workplace discrimination, health and safety, workers' compensation, and other substantive fields of law. Amicus knows from the experience of its members that American law is rich in the detail it provides about who is engaged in transportation work in interstate commerce in a variety of workplace settings. This well-established detail offers a solid foundation to determine the *content* of the Section 1 exemption, without turning the FAA into a substitute employment law, something the statute was never intended to be. For amicus, these traditional sources of law can provide *prima facie* support for a presumption that an exemption is warranted, or not, under Section 1's residual clause.

## CONCLUSION

*Circuit City* delineated the *breadth* of Section 1's residual clause by excluding transportation workers, and not all workers. *New Prime, Saxon* and *Bissonnette* assisted in determining the *content* of Section 1's exclusion by placing the focus on actual work performed and on engagement in commerce. Flowers seeks a significant limitation on the application of Section 1's residual clause by proposing to redefine "interstate" in the text of the statute. However, as Judge Learned Hand wisely

90. *Id.*, §27.IV.B.

wrote, the Court should not "make a fortress out of the dictionary."[91]

In the aftermath of the Court's Section 1 decisions, lower courts and litigants have attempted to refine the *content* of the exclusion. The Academy proposes that a workable approach for Section 1 disputes can be found in already-existing substantive laws that apply to transportation workers engaged in interstate commerce. If the Academy's perspective is adopted, courts and parties will have substantive law and practice to guide decision-making, and they will be spared the seemingly never-ending task of construing the *content* of work covered by the residual clause. They also will be spared potential conflicts that can arise between the procedural reach of the FAA and well-developed substantive legal doctrine in the American workplace.

The Court's cautionary reminder in *New Prime* applies here. Respondent seeks refuge in FAA policy because it is "[u]nable to squeeze more from the statute's

---

91. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945). As expressed by Judge Hand,

> [O]f course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

text."[92] As in *New Prime*, the Court should refrain from exercising its authority to "pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal."[93]

Respectfully submitted,

LISE GELERNTER
Arbitrator/Visiting Scholar
UNIVERSITY OF BUFFALO
SCHOOL OF LAW
5500 North Bailey Avenue,
Box 589
Amherst, NY 14226

JOSHUA M. JAVITS
Arbitrator & Mediator
PRESIDENT, NATIONAL ACADEMY
OF ARBITRATORS
700 New Hampshire Avenue, NW,
Suite 416
Washington, DC 20037

BARRY WINOGRAD
*Counsel of Record*
Arbitrator & Mediator
875-A Island Drive,
No. 144
Alameda, CA 94502
(510) 393-7283
winmedarb@aol.com

Dated: January 22, 2026

92. *New Prime, supra*, 586 U.S. at 120.

93. *Id*.