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 NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The National Employment Law Project ("NELP") is a non-profit organization with over 55 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has studied and written about the working conditions and employment relationships of truck drivers, publishing two comprehensive reports on the subject, The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports, in 2010, and The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement, in 2014. NELP has litigated and participated as amicus curiae in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws, and in a number of cases involving the scope of the Federal Arbitration Act. NELP seeks to ensure that all workers receive the full protection of labor and employment laws and that employers are not rewarded for skirting their obligations.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Employment Law Project hereby submits this Brief as *Amicus Curiae* to address the actual work performed by Respondent Angelo Brock and similar delivery drivers.

Mr. Brock is a commercial truck driver tasked with transporting Petitioners' baked goods that arrive from out-of-state at a centralized warehouse. Once the goods arrive at the warehouse, Brock immediately loads the products onto his DOT-registered truck and delivers them to retail stores across Colorado.

Petitioners Flowers Foods and its affiliates ("Petitioners" or "Flowers") have tried throughout this litigation to obscure the substance and nature of the drivers' actual work. Flowers points to language of form contracts (the "Distributor Agreements") and relies upon its requirement that many drivers like Brock must incorporate or form an LLC in order to work for Petitioners. Petitioners attempt to use these formalities to invoke the Federal Arbitration Act ("FAA") and force Brock to individually arbitrate his disputes. Although the FAA does not apply to contracts of employment of a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, Flowers contends that Brock is not exempt. Specifically, according to Flowers, its "independent contractor" relationship with Brock somehow severs the continuous interstate journey of its bread

products and supports a finding that Brock is engaged in separate, "local" transactions when he delivers Flowers' goods to its retail customers. *See* Petrs. Br. at 2, 9. However, under the FAA — like other labor and employment statutes — mere labels and formalities concealing the true nature of the work do not override the facts on the ground nor allow employers to escape the applicable statutory framework.

Flowers' purported business model does not transform the interstate transportation work of its drivers into separate, local transactions, nor does it render their arbitration agreements enforceable. In fact, its business model is nothing more than a common form of independent contractor misclassification used by other distributors of food and retail products, as well as by companies like FedEx. The illegality and sham nature of these arrangements has been the subject of countless wage-and-hour lawsuits across the country and form the basis of Brock's claims in this case.[2] Brock brought this action alleging that he was misclassified as an "independent contractor," that he was in fact Flowers' employee, and that Flowers unlawfully withheld his wages. This Court should not permit Flowers to hide behind its worker misclassification scheme to compel its drivers' claims to arbitration.

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[2] For example, Flowers Foods was held to be the employer of similar "distributors" under California law. *Goro v. Flowers Foods, Inc.*, No. 17-CV-2580 TWR (JLB), 2021 WL 4295294, at *14 (S.D. Cal. Sept. 21, 2021).

As discussed herein, Flowers' portrayal of Brock and other Flowers drivers as separate businesses engaged in local transactions is a fiction, and Flowers has repeatedly emphasized the fact that its bread products proceed in a continuous interstate journey from its bakeries to its retail customers. At the same time, many of Flowers' "last-mile" drivers performing the same work as Brock routinely deliver bread over state lines, and Brock performs the same job and has the same effect on interstate commerce as these individuals, underscoring that Flowers' proposed line-crossing rule is erroneous.

When the façade of Flowers' misclassification scheme is cast aside, then under nearly any definition of "interstate commerce," the work of Brock and other commercial truck drivers places them squarely within the ambit of the FAA's Section 1 exemption.

ARGUMENT

I. THE FAA EMPHASIZES THE ACTUAL WORK OF THE CLASS OF WORKERS, RATHER THAN FORMALITIES

Section 1 of the Federal Arbitration Act exempts from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In *Circuit City Stores, Inc. v. Adams*, this Court interpreted the residual clause to extend only as far as the contracts of employment of "transportation workers." 532 U.S. 105, 119 (2001). In *Sw. Airlines*

Co. v. Saxon, this Court made clear that application of the Section 1 exemption is based on "the actual work that the members of the class, as a whole, typically carry out." 596 U.S. 450, 456 (2022). Where the class of workers is "actively engaged" in the transportation of goods in interstate commerce, they are exempt. *See id.* at 458.

One hallmark of the Court's FAA jurisprudence is that the scope of the statute and its Section 1 exemption are not contingent upon arbitrary issues such as how a business defines itself, *see, e.g.*, *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 254 (2024), nor on how the business defines its workers, *see New Prime Inc. v. Oliveira*, 586 U.S. 105, 108–21 (2019). The Court has held that the application of Section 1 does not "turn on arcane riddles about the nature of a company's services," like whether "it 'pegs its charges chiefly to the movement of goods or passengers'" or other technicalities such as how the company describes its "internal structure and revenue models." *Bissonnette*, 601 U.S. at 254 (quoting *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655, 661 (2d Cir. 2022)).

Instead, time and again, both this Court and lower courts "[f]ollowing the clear instruction of" this Court have reaffirmed that the exemption requires looking to what workers are actually doing — *i.e.*, "the substance" of the work arrangement, and "not its formalities." *Silva v. Schmidt Baking Distrib., LLC*, 162 F.4th 354, 362 (2d Cir. 2025) (holding that although agreements were technically between the

baking company and the plaintiffs' LLCs, they were nevertheless "contracts of employment" and that "to hold otherwise would allow employers to render the exception a nullity, which would vitiate the role played by § 1 in ensuring judicial (rather than arbitral) resolution of disputes involving a vital sector of the nation's workforce"). Thus, the substance of the work rather than the employer's formalistic descriptions should guide the Court's analysis.

II. FLOWERS' CHARACTERIZATION OF BROCK AND OTHERS AS LOCAL DELIVERY DRIVERS IS A FICTION

The crux of Flowers argument is that Brock and other Flowers drivers perform "exclusively" local work. Petrs. Br. at 2. This entire argument is based on the illusion that Flowers has attempted to create through its "Distributor Agreement," and it does not align with the actual facts.

Flowers is one of the largest manufacturers of bread and other packaged baked goods in the United States. *Bissonnette*, 601 U.S. at 248-49. Flowers' brands, such as Wonder Bread, can be found on grocery store shelves across the country. *Id.* Flowers relies on drivers like Brock to deliver its bread products to the grocery stores.

At one time, Flowers used employees to deliver its products to retailers, but then "[a]round 1983, Flowers began re-classifying the employee delivery drivers of its then-approximately 40 bakery

subsidiaries as independent contractor 'distributors.'" *In re Flowers Foods, Inc. Sec. Litig.*, No. 7:16-CV-222 (WLS), 2018 WL 1558558, at *2 (M.D. Ga. Mar. 23, 2018). Evidence produced in litigation demonstrated that "the point of the distributor program and pride of Flowers was that it could avoid paying employee benefits, such as overtime, to the distributors." *Id.* at *2.

Despite reclassifying many of its drivers as "independent contractors," to this day, Flowers still has more than 500 "company operated territories," which are staffed by a driver Flowers itself considers an employee.[3] Many distributors began their delivery work for Flowers in these employee positions. For example, Neal Bissonnette, who has asserted wage claims against Flowers Foods arising from his work in Connecticut, initially worked for Flowers as an employee before he was told that if he wished to continue working, he was required to form a business, "purchase" a territory, and be reclassified as an independent contractor. *See Bissonnette v. LePage Bakeries Park St., LLC, et al.*, No. 19-965 (D. Conn.), ECF No. 79-3 at ¶¶ 6-10.

Unsurprisingly, the employees performing this delivery work do the exact same job as the alleged "contractors" like Brock. They enter the stores' product orders on Flowers' handheld device, load

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[3] Flowers Foods, Inc., Annual Report (Form 10-K), 8 (Feb. 18, 2025), accessible at https://www.sec.gov/Archives/edgar/data/1128928/000095017025022243/flo-20241228.htm.

products onto commercial trucks, and deliver the products to retail stores that contract with Flowers. *See id.* at ¶14.[4]

In this case, Flowers is relying upon its illusory "distributor" model to obscure the interstate nature of the drivers' work. For example, Flowers argues vociferously that the grocery stores and retailers are Brock's customers. *See* Petrs. Br. at 2, 10, 11. However, in their internal company documents, Flowers "recognize[s] the reseller [i.e., the grocery store] as their customer[.]" *Goro*, 2021 WL 4295294, at *5; *see also* CAJA[5] at 15, 17-18, 187 (Flowers' SEC statement explaining that Flowers is "the principal," the retailer is Flowers' "customer," and the driver is Flowers' "agent").

Relatedly, Flowers points to language in its Distributor Agreement to argue that Brock purchases and "takes title" to the products that he picks up at

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[4] Courts have long held that when work performed by alleged "independent contractors" is also customarily performed by the company's own employees, it is strong evidence that the worker is actually an "employee" of the company. *See generally, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."); *Forno v. Gulf Oil Corp.*, 699 F.2d 795, 796 (5th Cir. 1983) (holding that where "contractor" performed duties customarily assigned to employees, they may be considered "statutory employees" of the principal for purposes of Worker's Compensation statute).

[5] Citations to CAJA are to the joint appendix in the Court of Appeals below.

Flowers' centralized warehouse. Petrs. Br. at 21. Flowers relies on this fiction to create the impression of a second, "local" sale from Brock to the retail stores.[6] *Id.* But Flowers' internal documents tell a different story. The company describes its model as a "consignment" system, under which the drivers are merely "intermediar[ies]," because Flowers does not transfer control of the products to its drivers. *See Goro*, 2021 WL 4295294, at *5. Thus, even according to Flowers, there is no actual sale of products from Flowers to Brock that precedes his delivery. This makes sense because Brock and other drivers do not actually pay Flowers for the products. The vast majority of the time, Flowers is paid directly from the retail store (such as Walmart), and Flowers "realizes" the revenue when the product arrives at the retail store or when the product is scanned in the checkout line.[7] *Id.* at *4.

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[6] Distributors like Brock do not actually engage in any "sales" activity. Flowers maintains its "own separate sales and marketing teams" that communicate directly with the large retailers to determine what products will be sold. *Rehberg v. Flowers Baking Co. of Jamestown, LLC*, 162 F. Supp. 3d 490, 501-02 (W.D.N.C. 2016). These large retailers account for the majority of Flowers' business. *See Goro*, 2021 WL 4295294, at *12.

[7] Even if Flowers were correct that title somehow passed to Brock, in other contexts, this Court has rejected the argument that an alleged passing of title ends the interstate journey of goods. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943) ("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.").

Thus, although Flowers relies heavily upon the language of its Distributor Agreement purporting to define Brock as engaging in local sales to his own local customers, these contractual terms do not match the reality that is revealed in Flowers' own internal documents. Brock and others are simply workers performing the same interstate deliveries as employees of Flowers.

Alternatively, if the Court accepts Flowers' argument that its drivers perform exclusively "local" work, then the FAA would not apply in any event, since Section 2 of the FAA (and the Commerce Clause) limits the FAA's coverage to contracts related to interstate commerce. 9 U.S.C. § 2. In other words, if drivers are engaged in interstate commerce, then they are exempt from the FAA under Section 1; but if they are not engaged in interstate commerce, then the FAA does not apply pursuant to Section 2. Either way, Brock cannot be compelled to arbitration under the FAA.

This Court has recently explained that the "interstate commerce" requirements in Sections 1 and 2 of the FAA *must be defined in relation to each other*. *New Prime*, 586 U.S. at 110 ("§ 1 helps define § 2's terms."). Thus, while Section 1 of the FAA exempts from the FAA's coverage transportation workers engaged in interstate commerce, Section 2 makes clear that any contracts must involve interstate commerce to fall under the coverage of the FAA in the first place. Indeed, the FAA could not apply to contracts unrelated to interstate commerce because such regulations would be outside Congress'

power under the Constitution's Commerce Clause.[8] *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (recognizing that the Commerce Clause limits the reach of the FAA).

Therefore, if this Court were to agree with Flowers that Brock and similar drivers were not engaged in interstate commerce because their deliveries were exclusively "local," then it should also find that the FAA does not apply at all because these deliveries do not involve interstate commerce for the purposes of Section 2.

III. FLOWERS' BUSINESS MODEL—A FORM OF INDEPENDENT CONTRACTOR MISCLASSIFICATION ENDEMIC IN COMMERCIAL TRUCKING—DOES NOT MAKE ITS ARBITRATION CLAUSES ENFORCEABLE

Flowers is not the only company that has relied upon the fiction that its commercial truck drivers operate independent businesses to create distance between itself and the workers. This ploy has been routinely rejected. As a litany of caselaw makes clear, forcing drivers to incorporate does not magically

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[8] In a similar context, the Tenth Circuit noted the interplay between Sections 1 and 2 of the FAA in *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 823 F.2d 466, 473 n.10 (11th Cir. 1987), noting that work not involving "commerce," though not subject to the exclusionary language of Section 1, would *also* not be subject to the inclusionary language of Section 2.

transform their activities as independent, nor does it allow companies like Flowers to evade statutory protections like the FAA's Section 1 exemption. This incorporation fiction has long been attempted to evade such protections and has repeatedly been batted down by reviewing courts.

Decades of case law make it crystal clear that incorporation does not shield employers from liability under a wide array of federal and state employment statutes. *See*, *e.g.*, *Frankel v. Bally, Inc.*, 987 F.2d 86, 90–91 (2d Cir. 1993) ("[T]he corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA.") And in the trucking industry, countless cases uniformly hold that the fact of incorporation does not defeat employment status.[9]

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[9] *See, e.g.*, *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1103 (9th Cir. 2014) ("While purporting to relinquish some control to the drivers by making the drivers form their own businesses and hire helpers, [the defendant] retained absolute overall control over the key parts of the business") (internal quotations omitted); *DaSilva v. Border Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 402 (D. Mass. 2017) ("[I]ncorporation cannot be a shield to prevent liability under the Wage Act"); *Anderson v. Homedeliveryamerica.com, Inc.*, 2013 WL 6860745 at *2 (D. Mass. Dec. 30, 2013) (internal citation omitted) ("[A] worker can qualify as an employee … even if he has incorporated his business…."); *In re FedEx Ground Package System, Inc.*, 712 F. Supp. 2d 776, 793 (N.D. Ind. 2010) ("[I]f FedEx retains the right to control unincorporated [ ] drivers, it retains the right to control incorporated [ ] drivers."); *Parilla v. Allcom Constr. & Install. Svcs., LLC*, 2009 WL 2868432 at *5 (M.D. Fla. 2009) (finding plaintiff who incorporated was an employee; incorporation was a "façade").

If businesses could avoid their obligations under labor and employment laws simply by requiring their workers to incorporate and paying them through corporations rather than paying them directly, such laws "would be rendered useless." *Padovano v. FedEx Ground Package System, Inc.*, No. 16-CV-17-FPG, 2016 WL 7056574, at *4 (W.D.N.Y. Dec. 5, 2016). The same is true of the FAA. Employers like Flowers Foods cannot avoid the transportation worker exemption in Section 1 by requiring their drivers to incorporate.

Flowers' business model is not unique at all.[10] A number of other food distribution companies and major multi-national corporations like FedEx all have essentially identical business models. They call their workers independent businesses, sell them the rights to do work they once did as employees, and require them to incorporate — all while continuing to exercise significant control over the work they do and what they get paid.

Snyder's-Lance, most famous for its ubiquitous pretzels, is a good example. Like Flowers, it deemed all of its distributors to be independent contractors, requiring them to sign standardized "Distributor Agreements" that granted the distributors the rights to sell its products to various stores at certain prices. *Mode v. S-L Distribution Co., LLC*, 2021 WL

[10] Indeed, in both *New Prime* and *Bissonnette*, the workers were required to incorporate and the agreements before this Court were signed on behalf of their corporate entities. *See Bissonnette*, 601 U.S. 246; *New Prime*, 586 U.S. 105.

3921344, *2 (W.D.N.C. Sept. 1, 2021). But, as one district court concluded, Snyder's-Lance exercised "substantial control" over how workers were required to perform their jobs and allowed workers only "limited" opportunities for profit and loss, demonstrating that the drivers were misclassified employees. *See id.* at *6-8.[11]

A more familiar example is FedEx. FedEx Ground and Home Delivery has long used the same business model as Flowers: treating its delivery drivers as "contractors" who had to purchase their rights to distribute FedEx's packages within a certain region and crafting lengthy independent contractor agreements that purported to allow the drivers to operate their own businesses. Multiple federal courts have held that these drivers are nonetheless employees. *See Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014) (holding that FedEx delivery drivers were employees under Oregon's wage laws); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (holding that FedEx delivery drivers were employees

[11] Another example is the largest bakery product manufacturing company in the United States, Bimbo Bakeries. Bimbo hired its commercial truck drivers pursuant to an indistinguishable distribution arrangement from the one used by Flowers Foods, labeling them independent contractors and delegating theoretical control in its contracts. But the Connecticut Department of Labor, looking at all the facts, determined that the truck drivers were in fact employees of Bimbo's predecessor, irrespective of how they were labelled. *Ricky Proctor v. George Weston Bakery*, Board Case No. 9007-BR-09 (Conn. Dept. of Lab., Employment Security App. Div., Nov. 18, 2009).

for purposes of California's wage laws); *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 92 (Kan. 2014) (holding that FedEx delivery drivers were employees for purposes of Kansas' wage laws).

In sum, this "business model" that Petitioners tout as meriting special consideration under the FAA is not at all unique. It is a widespread form of independent contractor misclassification — an illegal business practice, endemic in trucking, that denies workers their rights under labor and employment law and deprives state and federal coffers of important funds.[12] Petitioners now suggests this same misclassification scheme — the scheme that Brock alleges illegally deprived him of overtime pay under federal law — as a reason for this Court to compel workers' claims into arbitration. But the question of whether Flowers misclassified its commercial truck drivers and violated their employment rights under the Fair Labor Standards Act is the central question that should be answered, on the merits, by a federal court. Flowers cannot use its misclassification scheme as a shield to shunt Petitioner's claims into private and individualized

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[12] Employers who misclassify workers are able to unlawfully lower their operating costs by avoiding compliance with labor and employment laws and by dodging taxes and other payroll costs required for employees. *See Independent Contractor Misclassification Imposes Huge Costs On Workers And Federal And State Treasuries*, NAT'L EMPLOYMENT L. PROJECT (Oct. 2020), *available at* https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf.

arbitration and avoid a public judicial resolution. Indeed, the Second Circuit recently "decline[d] to allow employers to circumvent Congress's exception of transportation workers from the FAA's reach by requiring those workers to take the corporate form." *Silva*, 162 F.4th at 363. This Court should likewise decline to create a special rule under Section 1 for employers like Flowers that require workers to form business entities.

IV. FLOWERS ITSELF HAS EMPHASIZED IN PRIOR LITIGATION THAT ITS DRIVERS, LIKE BROCK, ARE DELIVERING BREAD ON A CONTINUOUS INTERSTATE JOURNEY

To the extent there was any doubt that Brock and other drivers are engaged in interstate commerce, Flowers has affirmatively demonstrated this fact in prior litigation.

In *Ash v. Flowers Foods, Inc.*, No. 23-30356, 2024 WL 1329970 (5th Cir. Mar. 28, 2024), a group of Flowers drivers from Louisiana brought suit under the Fair Labor Standards Act ("FLSA"). Based upon nearly indistinguishable facts to this case, Flowers argued, and both the district court and Fifth Circuit agreed, that the plaintiff-drivers who performed identical work to Brock were engaged in interstate commerce because they transported goods that were

on the final leg of a continuous interstate journey.[13] The court relied upon Flowers' evidence that showed the following:

> Plaintiffs ordered products based on sales history and projections for particular stores. The bread products were baked accordingly, before being shipped into Louisiana. Within hours of the products' arrival at the warehouses in Louisiana, they were picked up by Plaintiffs and transported to the customers….It is clear that Flowers had the intention, when it shipped the specially-ordered products from its out-of-state facilities, that the products would reach Louisiana customers.

Id. at *2. Although the products briefly stopped at Flowers' warehouse, the warehouses served "only as temporary storage to permit orderly and convenient transfer of goods in the course of what the shipper intends to be a continuous movement to destination, the continuity of the movement is not broken at the warehouse." *Id.* at *3 (quoting *Policy Statement—*

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[13] The plaintiffs in *Ash* had argued that the FLSA's Motor Carrier Act overtime exemption for drivers in interstate commerce did not apply because plaintiffs did not cross state lines. *See Ash*, 2024 WL 1329970, at *2. Flowers countered that the products were on a continuous interstate journey from out-of-state bakeries, and the court ultimately agreed with Flowers. *Id.* at 2–3. Though *Amicus* does not endorse the Fifth Circuit's framework for analyzing this question under the FLSA, it is significant that Flowers made a detailed, factual showing regarding the continuous interstate journey of its goods.

Motor Carrier Interstate Transportation—From Out-Of-State Through Warehouses to Points in Same State, 8 I.C.C.2d 470 (I.C.C. Apr. 27, 1992).[14]

Thus, in *Ash*, these same Defendants successfully demonstrated that "[t]he Distributors' leg of the journey from a Louisiana warehouse to the Louisiana customer was part and parcel of the baked goods' interstate transportation from the out-of-state bakeries to the Louisiana customers." Brief of Appellees, *Ash v. Flowers Foods Inc.*, No. 23-30356 (5th Cir.), ECF No. 45 at 12. The identical facts are present here, and the same result should apply.

Flowers should not be allowed to claim that its drivers are engaged in interstate commerce when it suits them, and then argue the opposite in related litigation. Indeed, Flowers' about-face on this issue is simply further evidence that Flowers' arguments regarding the alleged "local" nature of Brock's deliveries are not grounded in Brock's actual work or the reality of the relationship. Rather, Flowers' arguments are mere window dressing to conceal the true interstate nature of the work that Flowers itself established in *Ash*.

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[14] Flowers may argue that the interstate commerce requirement under the Motor Carrier Act (and the related exemption in the FLSA) are somehow distinct from the definition of interstate commerce used in the FAA. Putting aside this potential legal argument, the assertions by Flowers in *Ash* were comprised of *factual evidence* regarding how the products were ordered, where they were intended to go, and how long they remained in the warehouse. Flowers should be bound by this factual showing.

V. FLOWERS' "LAST-MILE" DRIVERS ROUTINELY CROSS STATE LINES, UNDERCUTTING FLOWERS' PROPOSED RULE

Not only does Flowers ignore the reality of the interstate journey of its goods, but Flowers also attempts to obscure the fact that many of its drivers deliver products across state lines.

This is significant because Flowers urges this Court to focus the Section 1 analysis entirely on whether drivers themselves cross state lines or interact with vehicles that cross state lines. But many of Flowers' "last-mile" drivers — who hold the same position and perform the exact same work as Brock for the very same company — regularly cross state lines to perform their "last-mile" deliveries. This dichotomy demonstrates that Flowers' proposed test is fundamentally flawed: Its drivers who deliver bread to grocery stores have the same effect on commerce regardless of whether they cross state lines or not, and a rule exempting some workers but not others who perform the exact same job is inconsistent with this Court's instructions that the proper measure for defining the "class of workers" exempt under Section 1, 9 U.S.C. § 1, is the work they perform. Flowers' argument is dependent upon the nonsensical notion that drivers performing identical work somehow have divergent levels of engagement with interstate commerce.

In other litigation, Flowers has freely admitted that significant numbers of their "last-mile" drivers deliver to their customers along routes that cross state lines. For example, in the almost identical case of *Carr v. Flowers Foods, Inc.*, No. CV 15-6391, 2019 WL 2027299, at *11 (E.D. Pa. May 7, 2019), the court recounted: "It is true, as Defendants point out, that approximately forty members of the three state classes work across state lines, operating in geographic areas covering both New Jersey and Pennsylvania, for example, or Maryland and Virginia." There, Flowers vigorously opposed Plaintiff's Rule 23 motion for class certification on the basis that many of the putative class members drove "last-mile" routes that spanned different states. Def.s Opp. Summ. J. at 29, Dkt. No. 268, *Carr* (Nov. 30, 2018). Flowers further emphasized:

> Defendants do not collect or maintain records regarding the hours of work performed by independent distributors, and consequently they have no means to determine exactly how much time a distributor spends working in any given state. For example, Plaintiff Castleberry, whose territory includes accounts in both Pennsylvania and New Jersey, admitted that he does not record the hours he spends working in each state.…Plaintiff Boulange, who lives in Pennsylvania and spends five days a week driving between a warehouse in Pennsylvania and customer

> accounts in New Jersey, also does not record his hours of work.

Id. at 31 (footnotes omitted).[15]

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[15] The underlying record in *Carr* is replete with other examples of Flowers' "last-mile" delivery drivers performing identical work to Brock having regular routes that cross state lines. *See, e.g.*, Dkt. No. 268-3 (testimony of Flowers "last-mile" driver that throughout his time working for Flowers, he always had routes wherein he delivered to customers in both New Jersey and Pennsylvania); Dkt. No. 85-17 (recounting drivers whose deliveries respectively involved crossing from Maryland into Pennsylvania and West Virginia); *see also* Dkt. No. 268-53 (declaration of Flowers corporate representative noting plethora of drivers' "territories (including the warehouse and customer service area) that overlap a border of Pennsylvania, Maryland, or New Jersey" and "straddle the borders of: Pennsylvania and Maryland, Pennsylvania and New Jersey, Pennsylvania and Delaware, Maryland and West Virginia, Maryland and the District of Columbia, Maryland and Virginia, Maryland and Delaware, New Jersey and New York, and New Jersey and Delaware").

The extensiveness of Flowers' "last-mile" drivers crossing state lines all across the country is also well-documented in other parallel litigation. *See, e.g.*, *Neff v. Flowers Foods*, No. 5:15-cv-00254-gwc, Dkt. No. 31-3 (D. Vt. May 6, 2016) (Flowers' subsidiary's franchise agreement stating "[s]everal territories run across state lines. We reported based on the state in which the territory's distribution center is located"); Dkt. No. 42 at 5 (Flowers' Opp. Class Cert.) (noting a "territory that operates in New Hampshire and Massachusetts"); Dkt. No. 42-1 at ¶ 3 (Flowers' Declaration in Opp. to Mot. Class Cert.) (noting of the five sales warehouses out of which Flowers' drivers who perform deliveries in Vermont are affiliated, one is in New Hampshire and one is in New York); Dkt. No. 42-4 (Flowers' Declaration in Opp. to Mot. Class Cert.) (referencing "Distributors who operate either part or all of their corporate distributorships in Vermont" and "geographically defined franchised territories that are,

This underscores that Flowers' proposed Section 1 rule of myopically looking at whether individual drivers cross state lines is so divorced from the interstate nature of the drivers' actual work that — under its proposed approach — some of Flowers' own "last-mile" drivers would be exempt and some would not. This is inconsistent with Section 1's requirement that courts look to the "class of workers." 9 U.S.C. §1. The question is not centered around an individual plaintiff like Brock, but rather whether the plaintiff "falls within a 'class of workers engaged in foreign or interstate commerce.'" *Saxon*, 596 U.S. at 455 (quoting 9 U.S.C. § 1).[16] Yet Flowers brushes right past the relevant class of workers and instead focuses exclusively on the fact that Brock did not cross state lines. Even if the Court were to indulge Flowers' state line crossing red herring, it would require this Court to turn a blind eye to the factual reality of the actual work of the class of drivers.

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entirely or in part, in Vermont").

[16] *Accord* Petrs. Br. 20 (original emphasis and citations omitted; emphasis added) (quoting *Bissonnette*, 601 U.S. at 256) ("Putting the textual pieces together, § 1's terms require an examination of **the relevant class of workers**' transportation work, and the exemption is triggered only when **the class of workers** is directly and actively part of moving 'goods across borders via the channels of foreign or interstate commerce.' [*S*]*ee also Wallace v. Grubhub Hldgs., Inc.,* 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.) (holding that **the class** must be 'actively engaged in the movement of goods across interstate lines').").

Finally, Flowers repeatedly touts that its line-crossing rules would somehow make courts' Section 1 inquiries *more* straightforward. But in reality, such a rule would invite a mess of sticky downstream questions in stark contrast to the simplicity of Respondent's approach. For instance, under Petitioners' rule, courts would need to analyze and authorize discovery into questions like:

- How many members of the class of workers performing the same work as a plaintiff must regularly deliver goods across state lines for the class to be considered exempt under Section 1?
- If a driver occasionally delivers across state lines, is this enough to entitle the driver to the exemption? If so, what is considered occasional — once a year? Once a month? Once a week? Once a day?

In short, Flowers' proposed bright-line state-crossing rule is not only divorced from the work actually being performed by the class at issue; it also would invite a plethora of these (and more) murky downstream questions rather than simplify the analysis. This sort of fact-intensive exercise would frustrate the purposes of the FAA and would be wholly inconsistent with Congress's statutory intent.[17]

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[17] *See, e.g.*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 275–278 (1995) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983)) (rejecting an interpretation of the FAA that would result in "unnecessarily complicating the law and breeding litigation

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the judgment below.

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Respectfully submitted,

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from a statute that seeks to avoid it," rhetorically asking "[w]hy would Congress intend a test that risks the very kind of costs and delay through litigation…that Congress wrote the Act to help the parties avoid?," and noting "the Act 'calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses'"). This Court should decline to invite the many sticky complexities that Flowers' proposed bright-line rule and its strategically tailored definition of "class of workers" would rue.

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