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 AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF RESPONDENT

LOUIS LOPEZ
Counsel of Record
WILLIAM ALVARADO RIVERA
DEAN GRAYBILL
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
202-322-4180
llopez@aarp.org

January 22, 2026 Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With a nationwide presence, AARP strengthens communities and advocates for what matters most to the more than 100 million Americans 50-plus and their families: health and financial security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works for and with vulnerable people over 50 to end senior poverty and reduce financial hardship by building economic opportunity.

Amici have long advocated on behalf of older adults by filing litigation cases and amicus briefs challenging practices that pose a threat to their financial security. This has included, among other things, filing amicus briefs urging that pre-dispute mandatory arbitration agreements be accurately construed and not pose an improper bar to judicial relief prescribed by Congress and state legislatures. *See, e.g., GGNSC Louisville Hillcreek, LLC v. Estate of Bramer*, 932 F.3d 480, 482 (6th Cir. 2019) (denying nursing home's FAA § 2 motion to compel arbitration of wrongful death claims); *Harrod v. Country Oaks Partners, LLC*, 15 Cal. 5th 939, 946 (2024) (finding nursing home resident's representative lacked authority to consent to arbitration of elder abuse

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[1] Pursuant to Supreme Court Rules 37.2 and 27.6, amici certify that no counsel for either party authored the brief in whole or in part. In addition, no person or entity, other than amici, their members, and their counsel, has made any monetary contribution to the preparation and submission of this brief.

claims); *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1090 (9th Cir. 2018) (denying retirement plan's FAA § 2 motion to compel arbitration and permitting ERISA breach of fiduciary duty claims to proceed in federal court).

SUMMARY OF ARGUMENT

The trucking industry, employing over 1.6 million older adults, plays a vital role in the American economy, with the vast majority of trucking firms presumably complying with federal and state fair labor laws governing their work. However, there also is evidence that a significant minority of firms may be violating those laws, denying truck drivers minimum wage and overtime pay; imposing unjust costs; failing to observe regulations relating to rest periods and waiting time; failing to pay workers' compensation; and committing other offenses. For the estimated 300,000 low-income workers over 50 years old in the trucking industry, such violations can pose an existential threat to their financial security.

Workers' access to the courts to address these alleged labor violations is increasingly being displaced by ineffectual mandatory arbitration agreements utilized by employers, including many in the trucking industry. Emerging data reveals alarming news—that practically nobody actually arbitrates workers' rights disputes. One can debate the reasons, but the daunting challenges faced by victims (*e.g.*, fear of retaliation, the difficulty of finding counsel, lack of adequate discovery for complex cases, and the lack of

meaningful remedies) are certainly some of the most common explanations.

The Federal Arbitration Act (FAA), passed by Congress in 1925, provides for arbitration as an alternative means to resolve private disputes while still protecting the free flow of goods via its longstanding statutory exemption for workers "engaged in foreign or interstate commerce." In this case, the truck driver accepted the company's baked goods from out of state, loaded them on his truck within 24 hours, and drove them intrastate to the company's retail customers in Colorado. The Tenth Circuit found the driver to fall within the exemption because he served as an integral part of a single, unbroken stream of commerce. The company's disagreement with the Tenth Circuit—and proposed alternative test—has no basis in the statute or Supreme Court precedent, belies common sense, and threatens the free flow of goods by contributing to poverty wages and the chronic shortage of drivers in the trucking industry. But perhaps most troubling, the proffered test blows a gaping hole in FAA § 1 coverage by failing to exempt even workers who undeniably play critical roles in nationwide transit and suffer severe wage-and-hour abuses not amenable to arbitration. Congress cannot have intended this result.

ARGUMENT

I. TRUCKING IS A VITAL "AGING" INDUSTRY WITH A DISPROPORTIONATE NUMBER OF OLDER WORKERS SEEKING LABOR PROTECTIONS FROM THE COURTS

Truck driving, employing over 3.7 million people, is an "aging" industry disproportionately populated by older adults.[2] A study by the American Trucking Research Institute cited 20 years of data showing a trend toward an "aging driver workforce," including a 2024 survey showing "an average driver age of 58 years old."[3] Respondent Angelo Brock, himself, is 54 years old. In absolute terms, some 1.6 million adults over 50 years of age work in this line of commerce.[4]

Many older adults are proud to be in this industry, and for good reason. Trucking is a challenging profession that plays a vital role in this nation's economy. In the United States, supply chains rely on trucking for about 80 percent of the value of

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[2] U.S. Census Bur., *Current Population Survey, 2025 Annual Social and Economic Supplement* (March 2025), https://www.census.gov/data/datasets/time-series/demo/cps/cps-asec.html (cited figures from unpublished AARP Foundation analysis of Census data).

[3] Am. Transp. Rsch. Inst., *Evolving Truck Driver Demographics: Issues and Opportunities* (July 2025) at 18, https://truckingresearch.org/2025/07/evolving-truck-driver-demographics-issues-and-opportunities/.

[4] U.S. Census Bur., *supra* note 2.

freight transport.[5] Supply chain disruptions during the pandemic and subsequent years have revealed the extent to which the economy depends on that reliable freight transport.[6] For many, there is the lure of the open road and the possibility of living the American Dream of running your own business.[7]

The industry consists of large trucking firms whose fleets serve numerous clients; retail or wholesale firms with their own delivery fleets; small and solo independent firms; and others. While a few major carriers dominate a portion of the market, the industry is largely composed of a vast number of small and medium-sized companies.[8] The worker-compensation model includes both employer-employee

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[5] Shengyang Ju & Michael H. Belzer, *Follow the Money: Trucker pay incentives, working time, and safety,* The Economic and Labour Relations Review, Vol. 35, Issue 1 (March 2024), at 7, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/71B27AFF3CEA61551453CF15E4358912/S1035304624000005Xa.pdf/follow-the-money-trucker-pay-incentives-working-time-and-safety.pdf.

[6] *Id*.

[7] Steve Viscelli, *The Big Rig: Trucking and the Decline of the American Dream* 105, 110 (2016) ("'knights of the road'" desiring to "make good money and see the country"); *see also id.* at 116-19 (advertisements touting the "American Dream" of being an independent operator).

[8] According to one recent report, 91.5 percent of carriers operate 10 or fewer trucks and 99.3 percent of carriers operate fewer than 100 trucks. Am. Trucking Ass'ns, *American Trucking Trends 2025* (Aug. 2025), https://www.trucking.org/news-insights/ata-american-trucking-trends-2025.

arrangements and a variety of independent contractor models described as "the heart of the industry."[9]

As in any industry, there's a wide range of pay for truck drivers. The American Trucking Associations reported that employee drivers in 2023 made a range of $76,000 to $95,000 per year, with some independent contractors earning more.[10] However, industry testimony before Congress, along with the prevalence of trucker lawsuits, indicate that there also are large numbers of drivers suffering from alleged predatory truck leasing schemes and violations of wage-and-hour laws. As the executive vice president of a major industry association recently testified before the Senate:

> Predatory truck leasing schemes are another longstanding problem within our industry. While traditional lease agreements can allow truckers to operate as independent small-businesses, there is a subset of leasing arrangements that almost always exploit[] drivers . . . Companies peddling these supposed 'opportunities' typically offer the false promise of fair compensation, future ownership of the truck, and

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[9] *Shifting Gears: Issues Impacting the Trucking and Commercial Bus Industries, Hearing Before the S. Subcomm. on Surf. Transp., Freight, Pipelines & Safety*, 119th Cong. 1 (July 22, 2025) at 12 (Testimony of Chris Spear of the American Trucking Ass'ns), https://www.congress.gov/119/chrg/CHRG-119shrg61704/CHRG-119shrg61704.pdf.

[10] *Id.* at 11-12.

> independence from employer-employee requirements.[11]

Notably, these practices include the alleged failure to pay minimum wage and other "wage theft" violations of the Fair Labor Standards Act (FLSA) and other state labor laws.[12] Additional class action lawsuits filed by truck drivers and government authorities in recent years provide further evidence of prevalent wage-and-hour violations.[13]

Of the alleged labor violations, perhaps the greatest threat to older workers is an employer's failure to pay minimum wage (a paltry $7.25 per hour in many states). Trucking firms may fail to pay minimum wage through various forms of wage theft,

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[11] *Id.* at 23 (Testimony of Lewie Pugh of the Owner-Operator Independent Drivers Ass'n).

[12] *See, e.g., Alvarez v. XPO Logistics Cartage, LLC,* No. 2:18-cv-03736, 2022 WL 644168, at *1 (C.D. Cal. Feb. 8, 2022) (settlement of $20 million for wage-and-hour claims and other predatory practices including unlawful deductions to cover lease payments); *Arellano v. XPO Port Service Inc.,* No. 2:18-cv-08220, 2021 WL 6882163, at *4 (C.D. Cal. Oct. 8, 2021) (settlement of $9.5 million for similar state wage-and-hour violations).

[13] *See, e.g., Bonilla v. Young's Market Co., LLC,* No. 24-cv-03489-EMC, 2025 WL 916020, at *5 (N.D. Cal. Mar. 26, 2025); *Cross v. Amazon, Inc.,* No. 23-cv-02099, 2024 WL 4346414, at *4-5 (D. Colo. Sept. 30, 2024); *Mejia v. RXO Last Mile, Inc.*, No. 22-cv-08976, 2023 WL 5184153, at *2-3 (N.D. Cal. Aug. 10, 2023); *Walsh v. Procorp LLC*, No. 20-cv-11447-SFC, 2021 WL 5860774, at *4-5 (E.D. Mich. Aug. 12, 2021); *Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 493-94 (N.D. Cal. 2017); *Hayes v. XPO Last Mile Inc.*, No. 1:17-CV-319, 2017 WL 4900387, at *1, *7 (W.D. Mich. Aug. 21, 2017); *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 776 (2014).

including unpaid "off-the-clock" work, illegal paycheck deductions, misclassifying employees as independent contractors, and other means. Failure to pay time-and-a-half overtime is also a killer in an industry where truck drivers work an average of 63 hours per week, and much longer hours in many circumstances.[14] And there can be further penalties—firms unlawfully failing to pay workers' compensation, requiring employees to pay double FICA, and imposing inappropriate costs such as diesel fuel, vehicle insurance, maintenance repair costs, so-called administrative fees, equipment rental fees, and other fees. Put it all together, and one has the poverty wages seen in an anecdote described in *USA Today*—a truck driver's tax return showing gross annual income of $94,000, but only $21,000 in net pay after costs.[15]

Unlawful penalties of this size can pose an existential threat to older truck drivers' financial security. It is well-established that there already is a full-blown retirement crisis for older adults in this country—workers aging with inadequate savings and

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[14] Ju & Belzer, *supra* note 5, at 17 (citing 2010 NIOSH survey data). Amici recognize that trucking firms following the employer-employee model can lawfully avoid paying overtime time-and-a-half rates if meeting certain requirements under the Motor Carrier Act (MCA), 29 U.S.C. § 213(b)(1).

[15] Brett Murphy, *Rigged: Forced into debt. Worked past exhaustion. Left with nothing.*, USA TODAY (June 16, 2017), https://web.archive.org/web/20250827182326/https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/.

struggling to afford essential expenses.[16] And the trucking industry is no exception in that regard. There are some 300,000 truck drivers over 50 years of age who are categorized as "low income" and struggling to survive.[17] A survey of the industry at large also found that 63 percent of drivers stated they lacked savings needed to retire; that 58 percent of drivers age 55 and above had fallen short on saving for retirement; and that 34 percent of truckers cited financial necessity as the reason they continued driving.[18]

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[16] *See, e.g.,* S. Kathi Brown, *Increase in Overall Sense of Financial Security and Spike in Optimism, Though Common Financial Worries Persist*, AARP POLICY RESEARCH INSTITUTE (Sept. 24, 2025), https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/financial-security-trends-survey/ ("Prices, retirement security, and unexpected expenses continue to be top financial worries while worry about health care costs increased.").

[17] Some 297,000 truckers over age 50 live in households that have total annual earnings below 250% of the federal poverty level. *See* U.S. Census Bur., *supra* note 2 (AARP Foundation analysis of Census data).

[18] David Hollis, *Retirement: Not a choice for many drivers; a lot say they can't afford it*, TRUCKERS NEWS (July 18, 2023), https://www.truckersnews.com/home/article/15542236/retirement-not-a-choice-for-many-drivers-a-lot-say-they-cant-afford-it.

II. MANDATORY ARBITRATION HAS PROVEN TO BE AN INEFFECTIVE SUBSTITUTE FOR COURTS AND THEIR REMEDIES IN THE WORKERS' RIGHTS REALM, WARRANTING PRESERVATION OF THE FAA § 1 EXEMPTION IN FULL MEASURE

About a century ago, Congress passed the FAA, providing for the non-judicial facilitation of private disputes through arbitration. *See* 9 U.S.C. § 1 *et seq*. While the FAA mandates the judicial enforcement of arbitration agreements, there has been an exception—since the statute's inception—for workers "engaged in foreign or interstate commerce." 9 U.S.C. § 1.

In 1938, 13 years after the FAA's passage, Congress enacted the FLSA, proclaiming that "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" leads to various obstructions in the flow of commerce. 29 U.S.C. § 202(a). Congress further declared the proper remedy for unfair labor practices under the FLSA is to seek individual and collective action relief in federal or state court. *See* 29 U.S.C. § 216. The Supreme Court later noted, "the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive a fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 739 (1981) (citation modified) (emphasis in original). Importantly, the Court

affirmed that the FLSA's "statutory enforcement scheme grants individual employees broad access to the courts . . . permit[ting] an aggrieved employee to bring his statutory wage and hour claim in any Federal or State court of competent jurisdiction." *Id.* at 740 (citation modified). In so doing, the Court emphasized it had often "held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.*

Today, however, workers' access to the courts is increasingly being displaced by ineffectual mandatory arbitration agreements.[19] While the exact percentage of truck drivers bound by these agreements is difficult to measure,[20] the estimate is that they are found in more than 50 percent of all establishments in the transportation sector.[21] The prevalence of mandatory arbitration can also be seen in the many recent

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[19] Amici exclude from their analysis the prevalence and efficacy of labor arbitration procedures seen in the unionized setting. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights* 14, ECON. POLICY INST. (Dec. 7, 2015), https://files.epi.org/2015/arbitration-epidemic.pdf (citing numerous differences in the establishment and management of the two systems).

[20] *Id.* at 15.

[21] Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 Chi.-Kent L. Rev. 3, 14 (2019) (table showing 51.3% adoption rate in transportation industry).

trucking industry cases involving motions to compel arbitration.[22]

Amici are mindful of the Court's view in recent years that arbitration is an entirely viable and, in some instances, preferable and less costly avenue for vindicating workers' rights.[23] However, more than 30 years after *Gilmer,*[24] we now have new data casting serious doubt on that premise. What does that data show? That practically no workers' rights disputes are actually resolved in arbitration. In one observer's words, mandatory arbitration has proven to be "a black hole into which matter collapses and no light escapes."[25]

Until recently, comparing the number of workers' rights court cases filed, versus arbitrations, was almost impossible to measure. Arbitrations are conducted in secret and the results kept confidential. However, a clearer picture has emerged due to state laws requiring greater disclosure of arbitration data,

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[22] S*ee supra* note 13 (citing, *inter alia*, *Bonilla v. Young's Market Co., LLC*; *Cross v. Amazon, Inc.*; *Mejia v. RXO Last Mile, Inc.*; *Hayes v. XPO Last Mile, Inc.*). The many additional trucking-related FAA cases cited in the parties' briefs are further evidence.

[23] *See, e.g., Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184-85 (2019) (quoting *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (citing lower cost, speed, and the "ability to choose expert adjudicators").

[24] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) is viewed as the first case upholding the FAA's application to workers' rights claims (there under the Age Discrimination in Employment Act).

[25] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 680-82 (Mar. 2018).

the willingness of the American Arbitration Association (AAA) to disclose aggregate data, and intrepid scholarly research.[26] For example, the number of employee rights matters filed as arbitrations in 2016, versus the federal court cases, tells a sobering tale. That year, data shows that 56 percent of non-union private sector workers—or about 60 million employees—were subject to mandatory arbitration agreements.[27] Of those, about 5,126 employees filed arbitration cases that year.[28] By comparison, the other 44 percent of workers not subject to mandatory arbitration agreements filed some 31,881 federal workers' rights lawsuits.[29] When an estimated 195,000 *state* court employment actions

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[26] *Id*. at 687-89.

[27] *Id*. at 689 (citing Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration* 4, Econ. Policy Inst. (2017), http://www.epi.org/files/pdf/135056.pdf).

[28] *Id*. at 690. Estlund arrives at this number based on AAA reports that 2,879 individuals filed employment cases with the AAA under employer-promulgated procedures, and the further assumption, based on others' studies, that this would represent half of all such arbitrations. Recognizing the many assumptions at play, the author offers a wide range of calculations in favor of both arbitration and court action. *Id*. at 689-99 (offering alternative calculations). She notes that however one looks at the numbers, "except for a relative handful of cases, arbitration does not take place at all." *Id*. at 700.

[29] This 2016 figure encompasses five sub-categories drawn from federal court filing data: Civil Rights/Employment (11,878 cases); ADA-Employment (2,231); FLSA (8,686); ERISA (6,831); and FMLA (1,255). U.S. Courts, U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2012 Through 2016, http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf.

are added into the mix the comparison becomes more stark: 226,881 lawsuits versus 5,126 arbitrations.[30]

The paucity of filed arbitrations should not be a surprise given the procedural hurdles and the low prospects of meaningful relief. In the trucking industry, workers subject to mandatory arbitration often will have to arbitrate quite complex FLSA claims[31] on a solo basis.[32] This requires hiring counsel, an insurmountable barrier in and of itself for many with low income. One study of workers' rights cases showed federal court cases reaping monetary relief 6.1 times higher than arbitrated awards, and state court cases earning 13.9 times higher.[33] That disparity, in turn, impacts the likelihood that a worker will find a lawyer willing to take the arbitration case on contingency.[34]

Assuming the truck driver obtains counsel, the worker then faces one or more of the oft-cited challenges of arbitration procedure. These include,

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[30] Estlund, *supra* note 25, at 693-94.

[31] A frequent dispute in the trucking industry is the alleged misclassification of drivers as independent contractors rather than employees, an inherently complex undertaking for plaintiffs. *See Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468 (N.D. Cal. 2017) (applying multi-factorial FLSA "economic reality" test).

[32] *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-38 (2013) (upholding contractual waiver of class arbitration); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) (invalidating a law conditioning enforcement of arbitration on the availability of class procedure).

[33] Stone & Colvin, *supra* note 19, at 21.

[34] *Id.*

among others, (1) the lack of comparable discovery (a must in many FLSA cases); (2) the employer's advantage in using "repeat player" arbitrators; (3) altered due process procedures (*e.g.*, statutes of limitations, time to present case, burdens of proof); (4) the absence of appeal rights; (5) the costliness of fighting off compelled arbitration; (6) bans on class or collective actions that might help to defray costs; and (7) sometimes, forbidding "loser pays all arbitration fees" clauses.[35]

The FAA § 1 exemption gives workers engaged in interstate commerce who are forced to sign mandatory arbitration agreements a greater fighting chance to have their day in court. Employers, if unconstrained by the exemption, will file FAA § 2 motions seeking to nullify all state laws and court decisions specifically protecting these workers from unfair arbitration provisions.[36] This critical exemption, upheld regularly by this Court, gives covered workers the freedom to avail themselves of such laws and, if successful, either file suit in court or at least to arbitrate on fairer terms (*e.g.,* permitting collective action or severing financially onerous

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[35] Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 Stan. L. Rev. 1631, 1648-53 (2005).

[36] Section 2 of the FAA states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . ." 9 U.S.C. § 2. That leaves arbitration-specific protections as fair game for preemption under current Supreme Court precedents, *see, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (preempting Montana statutory defense that franchisor failed to give prominent notice of arbitration requirement in franchise agreements).

clauses). *See, e.g., Miller v. Amazon.com. Inc.*, No. 21-36048, 2023 WL 5665771, at *2 (9th Cir. Sept. 1, 2023) (finding worker exempt under FAA § 1 and arbitration agreement unenforceable under Delaware state law); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 13 (1st Cir. 2020), *cert. denied*, ____ U.S. ___ (2021) (same under FAA and Massachusetts law); *Rittman v. Amazon.com., Inc.,* 971 F.3d 904, 919-20, 921 (9th Cir. 2020), *cert. denied*, ___ U.S. ___ (2021) (same under FAA and Washington law); *Peter v. Priority Dispatch, Inc.*, 681 F. Supp. 3d 800, 802 n.3 (S.D. Ohio 2023) (same under FAA and Ohio law).

III. PETITIONER'S PROPOSED TEST FOR FAA § 1 COVERAGE IS AT ODDS WITH SETTLED PRECEDENT, WOULD IMPEDE THE "FREE FLOW OF GOODS," AND PORTENDS DIRE CONSEQUENCES FOR MANY OLDER TRUCK DRIVERS

A. Petitioner's test for inclusion in FAA § 1's exemption is inconsistent with established precedent and Congress's concern over the "free flow of goods"

Flowers Foods manufactures baked goods for delivery to its retailer customers across the country (*e.g.,* Walmart, Safeway, Costco). To reach those retailers in "certain parts of" Colorado, Flowers ships the goods to its distributor Angelo Brock, who within 24 hours loads the goods onto a truck and personally drives them to those retailers' receiving locations. *See Brock v. Flowers Foods, Inc.*, 121 F.4th 753, 758 (10th

Cir. 2024). Although Flowers contends that Brock is an independent business serving as Flowers's true customer and the endpoint of the journey, the Tenth Circuit, applying precedent and common sense, ruled that "Brock's intrastate delivery . . . forms the last leg of an interstate route," *id.* at 769, because he is "'an integral part of a single, unbroken stream of commerce.'" *Id.* at 768 (quoting *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 867 (9th Cir. 2021)). As such, the Tenth Circuit held that Brock falls within the FAA § 1 exemption for interstate transportation workers. *Id.* at 770.

Flowers contends that the Tenth Circuit's approach will result in the courts being "flooded with litigation" having "to determine the various customer relationships, when an employer exercises control over third-party transactions, and when a good's interstate journey begins and ends." Pet. Br. 42. To remedy this, Petitioner appears to urge a supposedly simpler test that the worker, to fall within FAA § 1, must either personally transport goods across state lines or interact with a vehicle that crosses state lines. Pet. Br. i, 21-22. This novel test is inconsistent with established precedent, elevates so-called "simplicity" over common sense, and threatens the "free flow of goods." The impropriety of the first part of the test was settled in *Southwest Airlines Co. v. Saxon*, where the Court held that a baggage handler for the airline was exempt under FAA § 1 despite not personally transporting goods across state lines. 596 U.S. 450, 461-63 (2022). The Court ruled there was no basis in the FAA's text for such limitation. *Id.*

Petitioner's test—as a whole—also conflicts with contemporaneous precedents at the time of FAA's passage. For example, cases construing the Federal Employers' Liability Act (FELA)—containing language nearly identical to FAA § 1[37]—held that workers engaged in the wholly-intrastate first or last leg of an interstate carriage of goods were engaged in interstate commerce. *See, e.g., Seaboard Air Line Railway v. Moore*, 228 U.S. 433, 434-35 (1913) (Florida intrastate carriage of goods destined for New Jersey); *Philadelphia & Reading Ry. Co. v. Hancock*, 253 U.S. 284, 285-86 (1920) (intrastate movement of coal in Pennsylvania destined for interstate shipping). Today, and perhaps more importantly, this common-sense approach has been adopted in several circuits, including the First, Second, Third, Ninth, and Tenth Circuits.[38]

Petitioner's contention that the "undue complexity" of the Tenth Circuit's approach supports its new test is baseless and ironic in the extreme. Any court reviewing this record would see the peril of accepting at face value Flowers's claims that Brock

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[37] As one court later noted, Congress "must have had [the FELA] in mind" when drafting the residual clause in Section 1 of the FAA, given that Congress "incorporate[d] almost exactly the same phraseology." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.,* (U.E.) Local 437, 207 F.2d 450, 453 (3d Cir. 1953).

[38] *Waithaka v. Amazon.com*, *Inc.*, 966 F.3d 10, 26 (1st Cir. 2020), *cert. denied, __ U.S. __ (2021)*; *Bissonnette v. LePage Bakeries Park St., LLC*, 123 F.4th 103, 106-07 (2d Cir. 2024); *Adler v. Gruma Corp.,* 135 F.4th 55, 67-68 (3d Cir. 2025); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 910-18 (9th Cir. 2020), *cert. denied, __ U.S. __ (2021)*; *Brock*, 121 F.4th at 762-64.

was a wholly independent business acting as the true purchaser of the goods and endpoint of the journey. This is especially true as Flowers: (1) stated in Security and Exchange Commission (SEC) filings that the Costcos and Safeways of the world, not Brock, are *its* customers;[39] (2) observed in an internal memorandum that the "primary purpose [of its distributors] . . . is to deliver bread products for us [Flowers] to our customers";[40] (3) wrote a distributor agreement containing numerous indicia of control over Brock's business;[41] and (4) contended in another lawsuit that its distributors performing purely intrastate "last leg" deliveries in Louisiana *were* engaged in interstate commerce for purposes of the MCA, thereby enabling Flowers to avoid paying them overtime. *See Ash v. Flowers*, No. 23-30356, 2024 WL 1329970, at *2-3 (5th Cir. Mar. 28, 2024).[42]

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[39] *Brock*, 121 F.4th at 768 (Tenth Circuit describing 2022 Form 10-K filed with SEC).

[40] Tenth Circuit J.A. at 263.

[41] Sample indicia include that (1) Brock continued the journey within 24 hours of the receipt of goods; (2) Brock was forbidden to sell competing products; (3) Flowers retained ownership of Brock's distribution route; and (4) Flowers micromanaged Brock's relations with the ultimate customers despite Flowers's contention that they belonged only to Brock. *Brock*, 121 F.4th at 766-69.

[42] Under the MCA, 29 U.S.C. § 213(b)(1), goods carried intrastate are "in the flow of interstate commerce" when, considering "the totality of all the facts and circumstances . . . a shipper has the requisite intent to move goods continuously in interstate commerce." Brief of Appellees at *10, *Ash v. Flowers, Inc.*, No. 23-30356, 2023 WL 6930370 (5th Cir. Oct. 10, 2023). Flowers, though correctly noting distinctions between the MCA and FAA § 1 (*id.* at *18 n.2), nevertheless asserted such facts as (1) Flowers's clear intent to move goods to a retailer endpoint, not

Turning a blind eye to such relevant facts is not a court's job. Nor, for the sake of supposed simplicity, is it a court's job to apply a test so absurd that Brock would be exempt under FAA § 1 if he happened to unload the Flowers truck on arrival, but would not be exempt if he didn't. *See* Pet. Br. at 9 (making special note that goods arriving at Brock's warehouse "are unloaded and sorted by Flowers personnel," not Brock). Moreover, the Tenth Circuit's approach also sidesteps the complexities attendant to the classification of ride share and food-delivery drivers. *See Brock*, 121 F.4th at 763-74 (distinguishing these cases).

In addition, Petitioner's position conflicts with Congress's intent that the FAA § 1 exemption help to protect the "free flow of goods." *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 (2001) (recognizing this goal of FAA § 1). When passing the FLSA, Congress expressed a similar concern that unfair labor practices also not "burden[] commerce and the free flow of goods in commerce," 29 U.S.C. § 202, decreeing that *access to the courts*—not mandatory arbitration—was the preferred protective measure. 29 U.S.C. § 216(b). Congress's concern was prescient, indeed. Today, the main threat to the free flow of goods in the trucking industry is a chronic shortage of drivers and enormous turnover, caused in part by

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the distributor; (2) the relevance of its distributors' quick turnaround at the warehouse; and (3) that the passage of the goods' title to the distributor did not interrupt this interstate journey of goods. *Id*. at *27-31.

wage-and-hour violations leading to poverty wages.[43] As noted in the industry's Senate testimony:

> While the purported goal of these [leasing] agreements is for the driver to become a full-fledged owner-operator at the end of the lease, these schemes rarely work. Instead, drivers are paid pennies on the dollar and have their work limited by the leasing entity to prevent them from ever securing ownership of the truck they lease. They are also provided no independence to seek better compensation or more steady work with other motor carriers. This system pushes individuals who genuinely desire a career in trucking out of the industry and further contributes to driver turnover . . . ."[44]

Congress, when enacting the FAA in 1925, cannot have intended that its future legislation prescribing court action as the cure for wage-and-hour abuses should take a second seat to mandated arbitration in these circumstances.

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[43] Ju & Belzer, *supra* note 5, at 7, 9-11 (shortage of drivers and 100% worker turnover).

[44] Testimony of Lewie Pugh, *supra* note 11.

B. Petitioner's test would have excluded even the egregious "first leg" Los Angeles port truck driver abuses from the FAA § 1 exemption

A *USA Today* exposé in 2017 detailed the plight of some 13,000 Los Angeles port truck drivers who allegedly were coerced into starvation wages even after working hours exceeding federal labor laws.[45] The findings of a year-long investigation, based on accounts of 300 drivers and reviews of labor dispute testimony, company contracts, and other sources, included the following allegations.

The truck drivers moved almost half of the nation's container imports out of Los Angeles area ports. They can confidently be described as handling the intrastate "first leg" of interstate journeys, driving goods "to nearby rail yards or storage depots, a key step in the goods' journey to some of the nation's leading retail stores."[46] The article stated:

> "Most car parts manufactured across the Pacific come through Southern California. [The] same with electronics from China, Thailand or Indonesia. If you've bought anything from Walmart, Amazon, JC Penney, or any other store at the mall, there's a good chance it

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[45] Murphy, *supra* note 15.

[46] Editorial Board, *Rigged system rips off port truckers*, USA TODAY (June 20, 2017), https://www.usatoday.com/story/opinion/2017/06/20/rigged-system-rips-off-port-truckers-editorials-debates/103015290/.

> started its trip across the U.S. with the port truckers around Los Angeles."[47]

One driver was described as "driv[ing] more than 16 hours straight hauling LG dishwashers and Kumbo tires to warehouses around Los Angeles, on their way to retail stores nationwide."[48] According to the article:

> "Over the past decade, many companies pushed drivers into debt by requiring them to buy trucks through company-sponsored lease-to-own programs. Drivers found themselves trapped in jobs that paid them pennies per hour after expenses. If they complained or refused to work past the legal limit, they could be fired and lose their truck along with thousands they paid toward its purchase."[49]

Truck drivers at dozens of companies described the same basic scene. They were handed a lease-to-own contract by their employer and given a choice: sign immediately or be fired. Many drivers who spoke little English said "managers gave them no time to seek legal advice or even an interpreter to read the

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[47] Murphy, *supra* note 15.

[48] Brett Murphy, *Asleep at the Wheel: Companies risk lives by putting sleep-deprived port truckers on the road*, USA TODAY (Dec. 28, 2017), https://web.archive.org/web/20200427101400/https://www.usatoday.com/pages/interactives/news/rigged-asleep-at-the-wheel/.

[49] *Id.*

contract."[50] Drivers gave their old trucks—many of which they owned outright—to their company as a down payment. "And just like that they were up to $100,000 in debt to their own employer. The same guys would have had a tough time qualifying for a Hyundai days earlier."[51]

Trucking firms, allegedly misclassifying truck drivers as independent contractors, denied them minimum wage and overtime pay, and imposed costs ordinarily borne by employers (*e.g.*, diesel fuel, insurance, laptop rental, others). Further anecdotes included drivers living in fear of managers refusing to send them business (called "starving them out of the truck"); a driver working 20 hours a day, six days a week, and earning a total of 67 cents; firms physically barring workers from going home at night; and 100 worker interviewees reporting threats and retaliation.[52] The veracity of these allegations is supported by California administrative rulings over the years that Los Angeles port authority firms had misclassified their workers, awarding them some $50 million in compensation.[53]

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[50] Murphy, *supra* note 15.

[51] *Id.*

[52] *Id.*

[53] As of 2017, at least 1,150 Los Angeles port truck drivers had since 2010 filed claims in civil court or with the California administrative agencies—with judges ruling 97% of the time that port workers had been misclassified. *Id.*; *see, e.g.,* Margot Roosevelt, *Port truckers win $30 million in wage theft settlements*, LOS ANGELES TIMES (Oct. 13, 2021), https://www.latimes.com/business/story/2021-10-s13/la-fi-port-trucker-xpo settlements.

The *USA Today* articles sparked Senate hearings, wide-ranging federal and state inquiries to involved trucking firms, proposed legislation, and other measures.[54] More to the point, two classes of victims not forced to arbitrate made the most of their access to the courts, reaping $30 million in damages against XPO Logistics, one of the world's largest trucking companies.[55]

(1) *Alvarez v. XPO Logistics Cartage, LLC*, No. 2:18-cv-03736, 2022 WL 644168 (C.D. Cal. Feb. 8, 2022) (three consolidated cases brought under California law resulting in a settlement fund of $20 million for among other allegations, "failure to pay minimum wage," "wages for missed meal periods," "wages for missed rest periods," "failure to reimburse business expenses," and "waiting time penalties"). The case also included, as a matter of deterrence, the imposition of civil penalties under California's Labor Code Private Attorney Act (Cal. Lab. Code §§ 2698 *et seq*.); and

(2) *Arellano v. XPO Port Service Inc.,* No. 2:18-cv-08220, 2021 WL 6882163 (C.D. Cal. Oct. 8, 2021) (settlement of $9.5 million for various alleged violations of

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[54] Brett Murphy, *"Shameful" labor abuse of truckers*, USA TODAY (July 31, 2017), https://www.usatoday.com/story/news/2017/07/31/senators-pressure-retailers-root-out-shameful-labor-abuse-truckers/104168828.

[55] Roosevelt, *supra* note 53.

> the California Labor Code, including, *inter alia*, misclassification, unpaid minimum wages, violations relating to rest periods and waiting time, and unfair business practices).

Courts in the First, Second, Third, Ninth, and Tenth Circuits—if confronting the same fact pattern—almost certainly would have ruled that these truck drivers, if forced to sign mandatory arbitration agreements, were performing the "first leg" of an interstate journey and therefore fell within the FAA § 1 exemption. But not so, if the Court accepts Petitioner's test. These drivers, though obviously participating in interstate commerce, neither crossed state lines nor interacted with a vehicle that did. They were short-haul drivers usually driving to warehouses and rail yards within California, dropping off containers and returning to the Los Angeles port for more loads rather than lingering to help re-load those containers onto long-haul trucks or rail cars.[56] The idea that these victims possibly *would* fall within the FAA § 1 exemption, if only they waited around to help load interstate trucks or rail cars, demonstrates the absurdity of Petitioner's test.

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[56] *See, e.g.,* Plaintiffs "are short-haul drivers . . . who operate(d) within a 100-mile radius and 150 miles after 2020." 5th Am. Compl. 22, *Arellano*, 2:18-cv-08220, ECF No. 129 (C.D. Cal. Apr. 5, 2021); *see also* Flat World Global Solutions, *The Ins and Outs of Intermodal Shipping Logistics* (July 18, 2022), https://flatworldgs.com/intermodal-shipping-logistics/ (describing Los Angeles port intermodal shipping as involving port authority truckers taking containers to in-state warehouses, whereupon other transportation firms later pick them up for

If found to lack FAA § 1 protection, the Los Angeles port truck drivers would have faced the impossible task of trying to arbitrate their complex FLSA claims almost certainly on a solo basis, with FAA § 2 preempting all California state laws giving them added protection against unfair arbitration agreements.[57] Congress, in enacting the FAA in 1925 and the FLSA in 1938, cannot have intended so unjust a result. And there is every reason to believe that, if Petitioner's test is adopted, the types of abuses seen in this cautionary tale will be the subject of future FAA § 1 litigation in jurisdictions across the country.

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loading onto rail); Murphy, *supra* note 48 (citing example of port truck drivers handling two to three loads per day).

[57] *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (FAA § 2 preempting the judicial rule in California that waivers of class action in arbitration agreements are unconscionable in certain circumstances).

CONCLUSION

For the foregoing reasons, amici curiae respectfully request this Court affirm the decision of the United States Court of Appeals for the Tenth Circuit.

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Respectfully submitted,

LOUIS LOPEZ
Counsel of Record
WILLIAM ALVARADO RIVERA
DEAN GRAYBILL
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
202-322-4180
llopez@aarp.org

Counsel for Amici Curiae