

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FLOWERS FOODS, INC., ET AL.,)
 Petitioners,)
 v.) No. 24-935
ANGELO BROCK,)
 Respondent.)

Pages: 1 through 90
Place: Washington, D.C.
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10 Washington, D.C.

11 Wednesday, March 25, 2026

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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:08 a.m.

16

17

18 APPEARANCES:

19 TRACI L. LOVITT, ESQUIRE, New York, New York; on
20 behalf of the Petitioners.

21 JENNIFER D. BENNETT, ESQUIRE, San Francisco,
22 California; on behalf of the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-935, Flowers Foods versus Brock.

Ms. Lovitt.

ORAL ARGUMENT OF TRACI L. LOVITT

ON BEHALF OF THE PETITIONERS

MS. LOVITT: Thank you, Mr. Chief Justice, and may it please the Court:

In Bissonnette and Saxon, this Court held that a Section 1 transportation worker must be actively engaged in transportation of goods across borders. The class of workers must be directly and actively performing cross-border transportation work.

Brock picks up goods from a warehouse in Colorado and delivers them to retail outlets in Colorado. When he takes the goods, they've crossed their last border and they have been unloaded from the interstate vehicle carrying them. Mr. Brock performs no work in cross-border transportation and is not exempt under Section 1.

This result is faithful to Section 1's

1 text and to this Court's precedent because it
2 focuses the inquiry on the worker's
3 connectivity to cross-border transportation
4 work. Brock's rule departs from text and
5 precedent by focusing on the worker's
6 relationship to a good and the good's
7 relationship to interstate commerce.

8 And Brock's approach would lead to
9 unlimited chaos. It is a world where
10 everything is dispositive and -- everything is
11 relevant and nothing is dispositive. We know
12 that because that's what's happening in the
13 First, Ninth, and Tenth Circuits today, all of
14 which follow Brock's approach.

15 And Brock's approach sweeps in too
16 many workers into Section 1. Today, in the
17 Ninth Circuit, workers who deliver The New York
18 Times in the State of California have been
19 deemed Section 1 exempt workers by the Ninth
20 Circuit because The New York Times is printed
21 in another state and arrives in California in
22 boxes from another state.

23 Under that logic, the store clerk who
24 unpacks boxes from another state and transports
25 them to the shelf should also be exempt. But,

1 in 1925, no one viewed the store clerk or the
2 paperboy as a cross-border transportation
3 worker.

4 The Court should pick up where
5 Bissonnette left off and reaffirm that Section
6 1 does not have limitless terms.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Ms. Lovitt, what is
9 the final destination for the product in this
10 case?

11 MS. LOVITT: I'm not sure. I think
12 that's a -- a question better posed to our
13 opponent because one could argue that the final
14 destination is the shelves, one could argue
15 it's the warehouse, one could --

16 JUSTICE THOMAS: Well, I mean, it's
17 your product, so, if it's -- if it's -- if it's
18 Flowers's product, then what should be the
19 final destination?

20 MS. LOVITT: Again, I think that is a
21 question that can be answered on many levels.
22 Under the Federal Motor Carriers Act, the
23 destination is to the ultimate retailer. Under
24 the Commerce Clause, it's -- it's -- it's --
25 you know, I'm not sure because the final

1 destination cases don't give you a framework by
2 which to judge the final destination.

3 JUSTICE SOTOMAYOR: I thought, at the
4 cert stage, you told us that you conceded that
5 Brock's is Flowers's -- Flowers's last-mile
6 driver who delivers Flowers's goods that have
7 traveled across state lines from local
8 warehouses to local retailers.

9 Now whether the district court and the
10 circuit were right in making that finding is
11 irrelevant. You gave us a concession. So that
12 concession answers the question. The contract
13 was between Flowers and its retail -- and its
14 local retailers.

15 MS. LOVITT: I -- I think --

16 JUSTICE SOTOMAYOR: So I don't know
17 why you're saying it depends. The concession
18 told us.

19 MS. LOVITT: Because it begs the
20 question, last-mile driver of what? Of the
21 good or of the final mile of cross-border
22 transportation? He may be the --

23 JUSTICE SOTOMAYOR: Well, counsel,
24 it's the goods, so the goods are traveling in
25 interstate commerce. Now the question is, is

1 this driver helping that interstate process?

2 MS. LOVITT: So --

3 JUSTICE SOTOMAYOR: Is he involved?

4 MS. LOVITT: Is he involved from a
5 Commerce Clause --

6 JUSTICE SOTOMAYOR: Is it related?

7 Yes.

8 MS. LOVITT: From a Commerce Clause
9 perspective, yes. Otherwise, we wouldn't fall
10 within Section 2 of the FAA. We're not pushing
11 back on the fact that Mr. Brock is engaged in
12 interstate commerce from a Commerce Clause
13 perspective.

14 But this Court for -- twice in four
15 years has held that Section 1 requires more
16 than a Commerce Clause analysis. It requires
17 an analysis of the actual work the worker is
18 performing. And the worker is performing the
19 work of a local delivery here, not any
20 cross-border transportation.

21 And, on this, I think Saxon is quite
22 informative on what is cross-border --

23 JUSTICE SOTOMAYOR: The problem is
24 that we have too many cases that say you don't
25 have to be the person who actually does the

1 transport. The baggage carrier that's
2 unloading from an airplane hasn't transported
3 the goods across --

4 MS. LOVITT: Well, in --

5 JUSTICE SOTOMAYOR: -- interstate
6 lines. We have a slew of cases that talk about
7 people who don't cross state lines. So it's
8 not that.

9 MS. LOVITT: That's not our position.
10 We fully embrace Saxon. In our view, Saxon was
11 asking the question, what is cross-border
12 transportation? And it looked through to cases
13 in the bill-of-lading context and said
14 transportation ends when a good is unloaded.

15 So we read -- I think it's a fair
16 extension of Saxon to say --

17 JUSTICE SOTOMAYOR: When goods are
18 unloaded, and that's what Mr. Brock does as the
19 last-mile driver for Flowers, which is a
20 concession you made.

21 MS. LOVITT: But he's unloading in a
22 intrastate journey. And the -- the question
23 is, when does the interstate journey end? And
24 it ends at the warehouse when the goods are
25 unloaded by someone other than Mr. Brock.

1 CHIEF JUSTICE ROBERTS: I -- I
2 understood -- and maybe it's very
3 oversimplistic -- I understood the case to
4 involve a dispute between whether we look to
5 the goods or whether we look to essentially the
6 vehicle. Is that a fair oversimplification?

7 MS. LOVITT: I -- I think it's fair
8 but a slight oversimplification. We would say
9 that you look to the work of cross-border
10 transportation. And the direct and active
11 engagement that Saxon and Bissonnette require,
12 it's hard to imagine a situation where you
13 wouldn't have some interaction with the vehicle
14 to be directly and actively engaged. I mean,
15 Ms. Saxon had interaction with the vehicle.

16 But it's not our position -- I want to
17 just be clear for the record that you have to
18 be crossing the border. That's been a
19 characterization of our position that's
20 inaccurate.

21 Our -- our position is you have to be
22 performing the work of cross-border
23 transportation. And Saxon says that begins at
24 the loading process and it ends at the
25 unloading process, and the cross-border

1 movement in between is a relevant
2 transportation.

3 Mr. Brock loads for an intrastate
4 journey and unloads on an intrastate journey
5 and never performs any actual transportation
6 work that -- that involves cross-border
7 performance.

8 JUSTICE JACKSON: But that's -- it's
9 really only, I think, if you ignore what is
10 happening to the goods. And I -- the thing
11 that's a little puzzling to me about your
12 analysis is that you set it up in a way that
13 would end up having different workers along the
14 journey of a particular good being
15 characterized differently.

16 And I don't understand why Congress
17 would do that or how that even makes sense.
18 So, I mean, take Flowers, right? Suppose you
19 have a worker who drives the bread from
20 Flowers's bakery in Kansas to the border
21 between Kansas and Colorado, but that worker
22 doesn't cross state lines.

23 And then you have a second worker who
24 unloads the bread from the first worker's truck
25 inside, still inside Kansas, puts it on his own

1 truck, drives it across the border and unloads
2 the bread at a warehouse in Colorado.

3 And you have a third worker, like
4 Brock, who picks up the bread in Colorado and
5 delivers it to a store in Colorado. I think
6 your analysis has only the second worker
7 covered by Section 1 exemption, and I'm not
8 sure I understand why that would be.

9 MS. LOVITT: I -- I -- I think that's
10 an accurate characterization. It's because
11 crossing a border matters. It matters from a
12 legal perspective, and it's express in the
13 residual clause that you --

14 JUSTICE JACKSON: But doesn't it only
15 matter because the goods are crossing the
16 border?

17 MS. LOVITT: No, it matters --

18 JUSTICE JACKSON: The person is not
19 crossing the border. So what -- what -- what
20 relevance is it to your analysis that you have
21 a particular worker in the middle of a good's
22 journey who himself crosses the border or who
23 touches a vehicle that crosses the border?

24 It would seem to me that the only real
25 thing that makes sense about characterizing any

1 of these people as interstate transportation
2 workers is that they're working with respect to
3 goods that are making this interstate journey.

4 MS. LOVITT: Because this Court,
5 again, has held twice in four years that you're
6 looking at the work that's performed. You're
7 look -- and the workers' performance --

8 JUSTICE JACKSON: Right, but it's the
9 work that is performed relative to goods that
10 are crossing the border, I think, as opposed to
11 your theory, which is the work that is
12 performed in a particular leg of the good's
13 journey that has crossed somehow.

14 MS. LOVITT: There -- there's nothing
15 textually in Section 1 that's compelling a
16 focus on the good. To the contrary, Section 1
17 is sort of dripping with workers' work and
18 vehicles. The enumerated classes are defined
19 by the relationship between workers and
20 vehicles, by definition, seamen or crew on a
21 vessel.

22 JUSTICE JACKSON: So Ms. Saxon is not
23 herself on a vehicle, moving a vehicle, going
24 across the border, but you say she counts under
25 your view because why? She has loaded or

1 unloaded cargo off of a vehicle that crossed
2 the border?

3 MS. LOVITT: Because Saxon held that
4 the cross-border transportation begins at
5 loading and ends at unloading.

6 JUSTICE JACKSON: Yeah, but it's
7 loading what? It's loading goods. So I -- I
8 don't know how you can isolate the goods and
9 take them out of it. She's not going across
10 the border. The vehicle that she's touching is
11 not going across the border at the time she's
12 touching it.

13 What -- what causes the interstateness
14 of that scenario is the goods, she's picking up
15 and touching goods that have crossed.

16 MS. LOVITT: No. What the Court
17 held -- with -- with all due respect --

18 JUSTICE JACKSON: Yes.

19 MS. LOVITT: -- I read Saxon to say
20 that the -- the interconnection is not just the
21 loading of the goods. It's loading the goods
22 on a vehicle that's on an interstate journey.

23 That second -- the Court would not
24 have needed to -- to -- to labor as much as it
25 did over the fact that the vehicle was in -- is

1 on an interstate journey and to labor over the
2 fact that you have to be crossing the border --

3 JUSTICE GORSUCH: Ms. --

4 MS. LOVITT: -- if the test was an
5 easy as a goods test.

6 JUSTICE GORSUCH: Ms. Lovitt, there --

7 MS. LOVITT: Yes?

8 JUSTICE GORSUCH: -- there does seem
9 to me a lot of room for dispute about who owned
10 the goods and who ordered from whom and lots of
11 facts here. We have some excellent diagrams in
12 the Tenth Circuit opinion that are helpful to
13 me at least.

14 But I -- I wonder whether we need to
15 really get into any of that because, as I
16 understand it, you're advocating for a
17 bright-line rule. You -- you think there needs
18 to be clarity here. And the bright-line rule I
19 think you're asking us to adopt is that a -- a
20 delivery driver is in interstate commerce
21 unless he does not cross state borders and he
22 doesn't interact with vehicles that cross state
23 borders, right?

24 MS. LOVITT: Close. I think we would
25 say you bookend the transportation with loading

1 and unloading. That's -- that's the result you
2 held in Saxon.

3 JUSTICE GORSUCH: No, but -- but --
4 but --

5 MS. LOVITT: Yeah.

6 JUSTICE GORSUCH: -- I'm -- I'm -- I'm
7 not really interested in any of that.

8 MS. LOVITT: Yep.

9 JUSTICE GORSUCH: I -- I'm saying I
10 don't see that in the QP, okay? I don't see
11 goods. I don't see anything like that in the
12 QP and -- and unloading and whatever. I see --
13 but do not transport the goods across borders
14 nor -- that means and -- interact with vehicles
15 across borders.

16 That's the question you asked us to
17 decide, right?

18 MS. LOVITT: Correct.

19 JUSTICE GORSUCH: Should we adopt a
20 bright-line rule that -- that drive -- delivery
21 drivers are in interstate commerce unless they
22 do both of those things?

23 MS. LOVITT: Unless -- I would say
24 unless they do either of those things.

25 JUSTICE GORSUCH: Well, you say, okay,

1 either.

2 MS. LOVITT: Right. Unless they're --

3 JUSTICE GORSUCH: Either of those
4 things.

5 MS. LOVITT: -- they're loading or
6 unloading a cross-border vehicle.

7 JUSTICE GORSUCH: Either interacting
8 with vehicles or crossing the borders
9 themselves?

10 MS. LOVITT: Yeah.

11 JUSTICE GORSUCH: And if -- we -- we
12 can answer that question yes or no and be done
13 with this case?

14 MS. LOVITT: And I -- yes.

15 JUSTICE GORSUCH: Okay.

16 MS. LOVITT: And I think Section 1 is
17 demanding as -- as a threshold requirement,
18 it's -- it's -- it's -- it's --

19 JUSTICE GORSUCH: No, I understand
20 it's a -- it's a -- it's a bright-line rule.

21 MS. LOVITT: It's a bright-line rule.

22 JUSTICE GORSUCH: Okay. Yeah.

23 MS. LOVITT: And -- and in our view --

24 JUSTICE GORSUCH: That you're asking
25 for. You're not -- you're not asking us to get

1 into whether Brock takes title to the goods,
2 whether the grocery stores order products from
3 him or from you, how long the goods stay in a
4 warehouse in Colorado after arriving from out
5 of state, whether the goods are transformed or
6 repackaged, whether the contract here with --
7 with a corporation is covered by -- by -- by
8 the FAA, or how much control Flowers has over
9 Brock.

10 None of those questions we need to get
11 into?

12 MS. LOVITT: Correct. And I think
13 that's what's steering the Tenth Circuit in the
14 wrong direction because none of those facts
15 have anything to do with the worker's work.

16 JUSTICE GORSUCH: Well, whether they
17 do or don't, we don't need to get into them?

18 MS. LOVITT: Exactly.

19 JUSTICE GORSUCH: Okay.

20 MS. LOVITT: I mean, I think they're
21 another ground on which we win, but that's not
22 what we're arguing here.

23 JUSTICE SOTOMAYOR: The problem with
24 that --

25 JUSTICE ALITO: Suppose a company

1 structures its delivery drivers so that Driver
2 1 drives 10 hours on an intrastate leg. Then
3 Driver 2 drives one minute across an interstate
4 border. Then Driver 3 completes the journey
5 with another 10-hour intrastate drive. Each
6 driver uses a different vehicle.

7 Is Driver 2 the only person covered by
8 the exemption?

9 MS. LOVITT: Can I ask a clarifying
10 question, is -- because, as I read Saxon, the
11 cross-border transportation ends with
12 unloading. So, if there's no unloading, that's
13 one cross-border transportation.

14 But, if you're -- when you added
15 different vehicles, it makes me question
16 whether you have an unloading process, which
17 would demarcate a new leg of transportation.

18 JUSTICE ALITO: Yeah, there's an
19 unloading. Obviously, the -- the goods have to
20 get from one truck to another. But, under that
21 situation, only Driver 2 would be covered by
22 the exemption?

23 MS. LOVITT: Yeah, because the
24 bookends are loading and unloading. And Saxon
25 says that the transportation continues until

1 the unloading process.

2 And we read that -- and -- and looking
3 through to the cases that Saxon's citing, those
4 cases are about when does transportation end
5 because transportation needs to end at some
6 point.

7 And they're holding that cross-border
8 transportation ends at the unloading process,
9 which makes sense. If you've ever been stuck
10 on the subway and you can't get out, you really
11 feel like your transportation hasn't ended
12 until the doors open. And those cases are
13 saying there is a clear demarcation in
14 transportation, loading, unloading, and the
15 movement in between.

16 And if the movement in between is
17 cross-border or interstate, it falls within the
18 rule. And it -- it may sound simple, but this
19 is the kind of clarity that Section 1 really
20 needs to have because it is a threshold
21 requirement. And the -- the --

22 JUSTICE ALITO: It's -- it's clear,
23 but where does it come from?

24 MS. LOVITT: It comes from -- it comes
25 from a combination of ejusdem, which tells us

1 that the workers in the residual clause are
2 transportation workers, and then it also comes
3 from this Court's --

4 JUSTICE ALITO: Where does it come
5 from in the language of the statute?

6 MS. LOVITT: Engaged in. This Court
7 interpreted "engaged in" in both Saxon and
8 Bissonnette as being directly and actively
9 employed. And then add to it the interstate
10 component, which requires interstate
11 transportation because you're talking about
12 transportation workers, it's all three of those
13 principles coming together that say you have to
14 be a transportation worker that's actively and
15 directly involved in cross-border
16 transportation.

17 And then Saxon asked the question,
18 well, what is cross-border transportation? Is
19 it just the movement of the vehicle? And the
20 Court held no, actually, that process continues
21 through loading and unloading. That --

22 JUSTICE SOTOMAYOR: I'm sorry.
23 This -- Justice Alito is asking you a lot of
24 questions. I'm trying to deal with our cases,
25 and we have a bunch of them. At the time of

1 the FAA, okay, which said -- let's start with
2 Philadelphia & Reading versus Hancock -- this
3 Court held that a first-mile trainman, whose
4 duties involved transporting coal from a mine
5 to a storage yard solely within Philadelphia,
6 and that coal was then transferred by a
7 different crew to another train that was going
8 in interstate commerce, the Court explained
9 that that first-mile driver, not the last-mile
10 driver that had done everything in Philadelphia
11 and the goods were unloaded and reshipped
12 somewhere else, the Court said that shipment
13 was but a step in the transportation of the
14 coal to real and ultimate destinations in
15 another state, and so that trainman, that first
16 trainman, was involved in interstate commerce.

17 You want to distinguish that case?

18 MS. LOVITT: Yeah.

19 JUSTICE SOTOMAYOR: Here, the same
20 thing happened. You want to distinguish all
21 the cases with first-mile drivers, second-mile
22 drivers. You want to create a new test. And I
23 still want to come to where in the language of
24 the FAA that uses the word "engaged," which is
25 the same word we used in Saxon, that defined

1 all of these people as engaged in interstate
2 commerce?

3 MS. LOVITT: So two -- two answers to
4 your question. The first is we would disagree
5 with the characterization of Hancock because,
6 in Hancock, that was a railcar, a single
7 railcar, that started at -- at the mines and
8 went interstate. It was never unloaded. So
9 the corollary here to Hancock would be if
10 Mr. Brock got into the truck that actually --
11 and -- and drove the final 10 miles to the
12 warehouse. That's the corollary to Hancock.
13 That's not what Mr. Brock is doing.

14 And -- and -- and, again, FELA is
15 focused on what exactly are the
16 instrumentalities of the rail carrier doing.
17 The instrumentality, the railcar, was crossing
18 state lines. So it's actually close --

19 JUSTICE SOTOMAYOR: But it's not --

20 CHIEF JUSTICE ROBERTS: Oh --

21 JUSTICE SOTOMAYOR: -- the issue of
22 the railcar. And you're saying don't look at
23 the goods; look at the worker. And the worker
24 wasn't doing any of that.

25 MS. LOVITT: Well, I mean, we're

1 saying FELA's inapposite. You shouldn't be in
2 the -- you know, these are FELA cases that have
3 a very different text and structure.

4 JUSTICE SOTOMAYOR: But I don't
5 understand.

6 MS. LOVITT: But --

7 JUSTICE SOTOMAYOR: You just tried to
8 distinguish them, but they're what we relied on
9 in Saxon.

10 MS. LOVITT: Yeah. Well, it -- we
11 did -- you did rely on it in -- you actually
12 relied -- relied on two cases in Saxon, which
13 were Burtch and Shuart. The Burtch case is a
14 FELA case which said that cargo -- that
15 transportation continues until you're unloaded.
16 And -- and Shuart was a bill-of-lading case
17 that held the same principle.

18 JUSTICE SOTOMAYOR: Unloaded at --

19 CHIEF JUSTICE ROBERTS: How --

20 JUSTICE SOTOMAYOR: -- the point of
21 destination.

22 MS. LOVITT: Unloading of the vehicle.
23 Unloading of the vehicle. And because
24 they're -- they're -- they're defining what
25 transportation is, they're -- transportation

1 needs -- can have an end that's different from
2 the good's end.

3 JUSTICE SOTOMAYOR: All right. Would
4 you go back --

5 MS. LOVITT: And what section -- to
6 add as your second --

7 JUSTICE SOTOMAYOR: I'm sorry, I may
8 have interrupted Judge Alito, and I --

9 MS. LOVITT: I'm sorry, Chief.

10 CHIEF JUSTICE ROBERTS: I'll just
11 ask -- I'll just ask one or two questions.

12 JUSTICE ALITO: I've asked -- I've
13 asked all my questions.

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: What -- how do
16 you handle first-mile drivers? Is that -- is
17 your analysis different than those?

18 MS. LOVITT: No. They're the mirror
19 image of Brock. If a first-mile driver -- so
20 that's -- and to clarify terms because I
21 don't -- there's a lot of loading of what first
22 and last mile mean. If the driver were to pick
23 up the goods at the bakery and take them to a
24 local warehouse, where they were -- and -- and
25 unload them, that's, to me, the first-mile

1 driver. That's the mirror image of Brock. And
2 they would not be exempt.

3 CHIEF JUSTICE ROBERTS: Okay. Thank
4 you.

5 JUSTICE KAGAN: I mean, just to go
6 back to, I think, the point that Justice Alito
7 was making with his hypothetical is, like,
8 whether or not your test is clear, it has a --
9 a real arbitrariness to it.

10 Practically speaking, what you want to
11 be thinking about here, it would seem to me, is
12 there's a manufacturer of bread and the
13 manufacturer of bread needs to get it to all
14 the local markets that sell bread.

15 And so, when we think of what's in
16 interstate commerce, what we're thinking of is
17 the trip by which the manufacturer, it might be
18 one leg or three legs or eight legs. It
19 might -- different legs might cross different
20 state boundaries or not. But what the
21 manufacturer needs to do is to get the bread
22 from the factory to the supermarket.

23 And if that's in interstate commerce,
24 if your -- if the goods, the cargo, the bread,
25 is crossing state lines, then everybody who's

1 involved in making the goods cross those state
2 lines ought to fall into the same category, not
3 be split up based on the sort of happenstance
4 of did you take the first mile, did your
5 10-mile -- did your 10-hour shift cross a state
6 line or didn't it or whatnot.

7 MS. LOVITT: So, to answer your
8 question, I think the textual hook here is
9 "engaged in." And this Court held in Saxon and
10 in Bissonnette that "engaged in" requires
11 direct and active employment in cross-border
12 transportation, the performance of cross-border
13 transportation, not in interstate commerce.

14 And, second, in Bissonnette --

15 JUSTICE KAGAN: Well, they're all
16 what -- regardless of which leg that they're
17 exactly on, they're all directly engaged in the
18 interstate shipment of your bread.

19 MS. LOVITT: But that's -- that's not
20 the -- that's not the test -- respectfully, as
21 we read Saxon and Bissonnette, the text is,
22 what is the -- what is the class of workers
23 doing? What work are they performing? And
24 Bissonnette says you shouldn't be looking at
25 what Flowers is doing. I mean, that was the --

1 the hard lesson we learned from Bissonnette, is
2 it doesn't matter that we're in the industry of
3 selling bread cross-borders, that the Court
4 shouldn't be looking at that.

5 That was the -- the clear takeaway
6 from Bissonnette. It should be looking at what
7 is this class of workers doing, what's their
8 task, what's their job, what are they
9 performing.

10 JUSTICE KAGAN: They're -- they're all
11 driving the trucks that get your bread from the
12 factory to the supermarket. That's what all of
13 them are doing.

14 And when the -- those trucks, when
15 that trip is an interstate trip, they're all
16 doing the same thing, regardless of the
17 happenstance of whether one or the other of
18 them is crossing a state line.

19 MS. LOVITT: And that's where we
20 respectfully disagree because we think crossing
21 the state line matters. It's in the text of
22 Section 1 that it has to be interstate. And
23 so, if you're looking at whether the -- the
24 class of workers is actually performing
25 cross-border transportation, they need to be

1 crossing the border. And crossing the border
2 is legally significant.

3 JUSTICE KAGAN: Well, the Saxon
4 workers were not crossing the border.

5 MS. LOVITT: Well, they --

6 JUSTICE KAGAN: So we've given that
7 one up already.

8 MS. LOVITT: Well, they -- the
9 Saxon --

10 JUSTICE KAGAN: But -- but they
11 were -- but they were involved in shipments of
12 goods that did cross borders, and that's what
13 mattered.

14 MS. LOVITT: Well, as I -- again, as I
15 read Saxon, it's saying that cross-border
16 transportation is a definable thing that starts
17 with loading and ends with unloading. And if
18 you're loading on a vehicle that's traveling
19 interstate, that is part and parcel of -- of
20 the journey across the border because you can't
21 journey across the border until the good's
22 loaded. You can't end the journey until the
23 good's off.

24 And I -- I think that's --

25 JUSTICE JACKSON: Can I ask you a

1 question about that to just test your
2 hypothetical? What -- what if the goods were
3 always in state, but the vehicle somehow
4 crossed the border? Is that not going to --
5 you say loading and unloading, and I guess
6 you're assuming that it's loaded in another
7 state and unloaded in this one. Or could it be
8 that you are a worker who is working with
9 vehicles that have themselves crossed the
10 border regardless of where the loading and
11 unloading happens?

12 MS. LOVITT: So this -- you know, this
13 Court has always talked about moving goods, but
14 I think, in your example, if your class of
15 workers are -- are interstate truck drivers --
16 and -- and this is actually akin to the Zachary
17 case, where you -- you have an empty truck and
18 you're -- you're driving the truck across state
19 lines to pick something up, I would think
20 that --

21 JUSTICE JACKSON: No, not across state
22 lines. Not across. You -- Ms. Saxon didn't go
23 across state lines. So let's hold the worker
24 constant. They're not moving.

25 You say what makes Saxon count is not

1 that the goods that she was loading and
2 unloading had been across state lines; it was
3 that the airplane that she was loading from had
4 been across state lines.

5 So I'm testing this hypothetical or
6 this theory by isolating the goods, having the
7 goods remain in state, and just having workers
8 who are working with vehicles that have crossed
9 state lines.

10 In that situation, are the workers
11 interstate workers from your perspective?

12 MS. LOVITT: I'm going to have to ask
13 a clarifying question because I'm not
14 understanding what the workers' relationship is
15 with the vehicle.

16 JUSTICE JACKSON: The -- the --

17 MS. LOVITT: Are they loading it?

18 JUSTICE JACKSON: Yeah, they're
19 loading it, but they're loading it for goods
20 that were loaded still in the state. But the
21 vehicle has crossed state lines. The vehicle
22 themselves -- for some reason -- for some
23 reason, in my hypothetical --

24 MS. LOVITT: I mean --

25 JUSTICE JACKSON: -- the -- the

1 vehicle is moving across state lines, but the
2 goods have always remained in the state.

3 MS. LOVITT: So --

4 JUSTICE JACKSON: So the worker is
5 working with the kind of vehicle that you say
6 counts, and I -- and the goods are staying put
7 in the same state. Do -- do -- is that person
8 an interstate -- in the class of workers that
9 is operating interstate in your view?

10 MS. LOVITT: So, if the class of
11 workers is loading a vehicle that is not in
12 interstate -- it's not --

13 JUSTICE JACKSON: No, the vehicle is
14 in interstate. The vehicle comes in from New
15 York, and I'm in New Jersey. And I'm the
16 worker, and I'm loading this vehicle in New
17 Jersey with goods that started in New Jersey
18 and that are going to end in New Jersey, but
19 the vehicle came in in the morning from New
20 York. The vehicle has been in interstate
21 commerce or interstate traffic.

22 For your purposes, is that worker an
23 interstate class of worker?

24 MS. LOVITT: Under Saxon, the
25 transportation, that leg of transportation,

1 begins with loading. And so you wouldn't look
2 at where the vehicle came from.

3 JUSTICE JACKSON: So you don't look at
4 the vehicle at that point --

5 MS. LOVITT: You -- you --

6 JUSTICE JACKSON: -- in that part of
7 the analysis?

8 MS. LOVITT: Because, no, the question
9 is when does cross-border transportation begin
10 and end, and Saxon says it begins with loading
11 and it continues through to the unloading. So
12 that leg, you would start the analysis at the
13 loading and say where -- now where is this
14 vehicle going.

15 JUSTICE JACKSON: Without regard --
16 without regard to where the vehicle came from?

17 MS. LOVITT: Yeah, because --

18 JUSTICE JACKSON: All right.

19 MS. LOVITT: -- Saxon draws a clear
20 line at loading.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 Justice Sotomayor?

2 Justice -- okay.

3 Justice Gorsuch?

4 JUSTICE GORSUCH: Quick question. Why
5 didn't you argue title, that -- that the title
6 changed? Once you delivered it to Brock in
7 Colorado, you're done? That would have been an
8 interesting argument.

9 MS. LOVITT: We -- we argued that at
10 the lower courts.

11 JUSTICE GORSUCH: I know. You lost
12 that one below, but --

13 MS. LOVITT: And there was no
14 circuit --

15 JUSTICE GORSUCH: -- but it hasn't
16 stopped you from -- from no circuit split.

17 MS. LOVITT: There's no circuit split.

18 JUSTICE GORSUCH: Ah. Okay.

19 MS. LOVITT: So it -- it made for a --
20 you know --

21 JUSTICE GORSUCH: So that's a --

22 MS. LOVITT: -- it would be an
23 interesting question for that.

24 JUSTICE GORSUCH: That's a -- that's a
25 question for another day?

1 MS. LOVITT: Just an honest answer.

2 JUSTICE GORSUCH: So it's a question
3 for another day?

4 MS. LOVITT: Yeah.

5 JUSTICE GORSUCH: Thank you.

6 MS. LOVITT: Well, if you -- I
7 don't -- I mean, just to --

8 JUSTICE GORSUCH: Well, if -- if -- if
9 you win, there's no need to resolve it.

10 MS. LOVITT: Exactly.

11 JUSTICE GORSUCH: But, if you -- if
12 you should lose, it's a question for another
13 day.

14 MS. LOVITT: And just to -- I think,
15 if -- if we prevail on this rule, you're
16 solving --

17 JUSTICE GORSUCH: No, I understand.

18 MS. LOVITT: -- 999 cases out of a
19 thousand.

20 JUSTICE GORSUCH: I understand that.

21 MS. LOVITT: Okay.

22 JUSTICE GORSUCH: And -- but if --
23 if -- if -- it could happen, it might?

24 MS. LOVITT: It could happen.

25 JUSTICE GORSUCH: If you should lose,

1 that's a question for another day?

2 MS. LOVITT: And then maybe you'll see
3 me here again in another year.

4 (Laughter.)

5 JUSTICE GORSUCH: Yeah. Well, I --
6 I -- I'll look forward to it.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 Justice Barrett?

10 JUSTICE BARRETT: So that's one
11 question that might be reserved. Let -- let's
12 just -- let's imagine a hypothetical world that
13 you don't want to be in in which you do lose.

14 Things that you would want to reserve
15 would be this title question?

16 MS. LOVITT: Correct.

17 JUSTICE BARRETT: What else?

18 MS. LOVITT: Contract of employment.
19 And that's where the next circuit split is
20 developing, is, you know, when do you have a
21 contract of employment as opposed to a
22 third-party service provider.

23 JUSTICE BARRETT: Okay. And if I
24 envision the movement, the interstate movement
25 of goods, in a relay race way -- this goes to

1 some of the hypotheticals Justices Alito and
2 Kagan were asking you -- you know, where the
3 goods pass from one to the other, so it doesn't
4 really matter, you know, if the drive -- if the
5 Mile 3 driver was solely intrastate or not,
6 what -- and, again, we're imagining a world in
7 which that is viewed as a continuous journey.
8 What would, in your view, be an interrupting
9 point?

10 Because they're being -- it can't just
11 be -- in -- in that world, it can't just be
12 loading and unloading because they're loading
13 and unloading into trucks.

14 Would it be when they're off wheels,
15 and so then they're put into a warehouse? I
16 mean, what -- what would be the danger spots in
17 your view in that?

18 MS. LOVITT: I -- I think Saxon draws
19 a bright line at unloading. Saxon says that
20 the -- the -- the transportation process
21 continues until unloading. So I think, once
22 the goods are off the vehicle, that's --

23 JUSTICE BARRETT: But -- but I'm
24 imagining a world in which you lose that
25 point --

1 MS. LOVITT: Yeah.

2 JUSTICE BARRETT: -- because it goes
3 right to another vehicle. In Saxon, they were
4 unloaded and then, you know, maybe they went on
5 to the little cart in the airport that moves
6 them to the -- to the line, but, I mean, they
7 had reached their destination.

8 In the hypothetical Justices Kagan and
9 Alito were giving you, in that series of
10 hypotheticals, they were being loaded from one
11 truck to another truck. So maybe there was
12 always movement. It was just like a relay
13 race, where it went from one to another, but it
14 wasn't unloaded at a destination, right, in
15 that -- in those hypotheticals?

16 MS. LOVITT: In -- in those
17 hypotheticals, in -- in -- in our view, it
18 doesn't matter if it's at its destination or
19 not because you're not looking at the goods,
20 you're looking at the worker. So, if it's
21 unloaded -- but, if it's a true relay, if it's
22 like the Hancock case and you have Mr. Brock
23 jumping into the truck or, you know, the true
24 analogy to Hancock is you take the trailer and
25 you put it on a new tractor, you know, that is

1 not the -- you know, the taking the goods off
2 of the vehicle. It's the relay. And the relay
3 counts until the goods actually come off of the
4 vehicle under Saxon.

5 JUSTICE BARRETT: Okay. Thank you.

6 MS. LOVITT: Mm-hmm.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson, anything further?

9 JUSTICE JACKSON: Can I just clarify
10 that the title, contract of employment, all
11 those issues are just factors that help us to
12 determine whether this person is a last-mile
13 driver, and so the reason why they weren't
14 raised or argued here is because you assumed
15 that, you conceded that at the beginning, for
16 the purpose of this case?

17 MS. LOVITT: Well, for the purposes of
18 the case.

19 JUSTICE JACKSON: For the purpose of
20 this case --

21 MS. LOVITT: For the purpose of this
22 case, yes.

23 JUSTICE JACKSON: -- we -- we were
24 just to focus on, assuming he's a last-mile
25 driver, what is the answer, and those questions

1 about title and contract and whatnot that the
2 Tenth Circuit actually grappled with are about
3 whether he qualifies as a last-mile driver,
4 right?

5 MS. LOVITT: Well, I -- I mean, not to
6 push back on the term "last-mile driver," but I
7 think that begs the question of last mile of
8 what? You know, our argument is he's not the
9 last-mile driver of the cross-border
10 transportation.

11 But, to your point, I think that, you
12 know, this Court could, if it wanted to, look
13 at those factors, but that's -- that's
14 definitely --

15 JUSTICE JACKSON: It doesn't answer
16 the question that's before us today.

17 MS. LOVITT: It doesn't -- it
18 doesn't -- it doesn't answer the question
19 before -- it doesn't resolve the split.

20 JUSTICE JACKSON: Yeah. Thank you.

21 MS. LOVITT: Mm-hmm.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Ms. Bennett.

25

1 ORAL ARGUMENT OF JENNIFER D. BENNETT
2 ON BEHALF OF THE RESPONDENT

3 MS. BENNETT: Mr. Chief Justice, and
4 may it please the Court:

5 As this Court recognized in Saxon,
6 interstate commerce is not merely the act of
7 crossing a state line. It is trade and traffic
8 between the people of different states. That's
9 why interstate commerce has never been
10 understood to end the moment that freight
11 crosses the border.

12 It ends when the goods reach their
13 final destination. And workers who transport
14 goods that are traveling in interstate commerce
15 are, by definition, engaged in that commerce,
16 regardless of whether they personally cross
17 state lines or interact with a vehicle that
18 does.

19 These principles were well established
20 in 1925 when Congress exempted any class of
21 workers engaged in interstate commerce. And
22 last-mile drivers transport goods on the last
23 leg of an interstate journey. Under the FAA's
24 plain text, these last-mile drivers are exempt.

25 Now Flowers asks this Court to add an

1 additional requirement that workers interact
2 with a border crossing vehicle, but, as I just
3 heard, Flowers can't point to a single case in
4 any context from any time period where a court
5 has ever adopted that requirement.

6 So not only is this interpretation
7 atextual, it would require courts to develop a
8 whole new jurisprudence about what it means to
9 interact with a vehicle. So we just heard that
10 if the trailer goes from one truck to another,
11 that counts. I'm not sure whether the trailer
12 is a vehicle or not, but, apparently, it is.

13 What if the goods were taken directly
14 off the first truck and handed to Mr. Brock to
15 put on his truck? Would that count? Highway
16 gas station attendants touch cross-border
17 vehicles all the time. Are they exempt?

18 And none of this would eliminate the
19 need to determine where an interstate journey
20 begins and ends because you can't know if a
21 vehicle is in interstate commerce without
22 knowing where that journey begins and ends.

23 But, on Flowers's view, history and
24 precedent can't help answer that question
25 because the words of the FAA mean something

1 different than they've ever meant in any other
2 context at any other time. So this requirement
3 of interaction with a vehicle doesn't make the
4 worker exemption easier to apply. It just
5 makes it more arbitrary.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: In Saxon, we referred
8 to activities within the flow of interstate
9 commerce, and that at some point begins and it
10 ends.

11 In this case, what would be the final
12 destination of the bread?

13 MS. BENNETT: The final destination in
14 this case is the retail stores that are
15 Flowers's customers, so the Walmart, the Sam's
16 Club, and the reason for that is because, in
17 1925, it was really clear that what the final
18 destination was is where the parties to the
19 commerce intended the journey to end.

20 And I realize the Tenth Circuit's
21 decision is written in a complicated way, but I
22 think this case is actually a straightforward
23 case, as most cases will be.

24 Flowers repeatedly has admitted and
25 described what's going on here as -- as that

1 the destination are its retail stores. So, if
2 you look at, for example, the court of appeals
3 joint appendix at 272, Flowers says the
4 destination of these goods is the retail stores
5 and the distribution depots are just a
6 temporary pause.

7 And if you look at the contract,
8 Mr. Brock would be fired if he didn't bring the
9 goods to the retail store.

10 JUSTICE THOMAS: If the --

11 CHIEF JUSTICE ROBERTS: Well, but --
12 I'm sorry.

13 JUSTICE THOMAS: No, go ahead, Chief.

14 CHIEF JUSTICE ROBERTS: Well, but, I
15 mean, look, the other way, why isn't the
16 ultimate destination your -- the person who
17 eats the bread, right? And -- and, without
18 that, there's no reason. And -- and it's just
19 I don't know how you -- you over -- you -- you
20 skip over the step from the warehouse to the
21 driver but not skip over -- particularly skip
22 over the step from the store to the consumer,
23 particularly now since a lot of people, you
24 know, don't even go to the store, they use one
25 of these services that will get the bread from

1 the -- the local warehouse.

2 MS. BENNETT: Sure. So this question
3 came up in 1925.

4 CHIEF JUSTICE ROBERTS: I didn't
5 remember that.

6 (Laughter.)

7 MS. BENNETT: And -- and the way
8 courts answered that, how do you figure out
9 what the final destination of one journey is
10 and where there's an independent journey, you
11 look at the intention of the shipper and the
12 parties to the commerce. So, when Flowers,
13 Flowers is the shipper here, when Flowers
14 shipped its goods, the journey was to the
15 retail store.

16 The -- the commerce of a local, you
17 know, retail store sending by Instacart or
18 something groceries to a local consumer, there
19 are different parties to that commerce. It's a
20 separate journey.

21 JUSTICE GORSUCH: Well, Ms. Bennett,
22 though, I mean, do we need to get into any of
23 that? I mean, one might argue that in some
24 cases at least, the manufacturer really doesn't
25 care what happens once it passes title to a

1 wholesaler, right? I mean, it delivers it to
2 Brock's warehouse. Let's just suppose
3 hypothetically title passed.

4 It doesn't care whether that bread
5 gets to a store, a consumer, or spoils. It's
6 got its money. It's done. One could see that
7 argument. But that's not in this case. So why
8 are we -- why are we fussing over it?

9 MS. BENNETT: I -- I think that's
10 right. And I think the -- the question you
11 just asked is exactly the -- the question that
12 was asked in 1925, which is, when this good was
13 shipped, where was the end of that journey, and
14 if the shipper doesn't care it -- if it goes
15 beyond a particular point, that's the end of
16 the journey.

17 JUSTICE GORSUCH: That's the end of
18 the journey, right.

19 MS. BENNETT: And --

20 JUSTICE GORSUCH: So that could be the
21 answer and that -- if you prevail, that --
22 that -- that's an argument that will be
23 available to Ms. Lovitt and her friends in the
24 next case, along with what a contract of
25 employment is, along with can -- can a

1 corporation be a transportation worker, along
2 with a whole bunch of other things.

3 All we need to decide in this case is
4 Ms. Lovitt's proposed bright-line rule that
5 you're in interstate commerce unless you drive
6 across state lines or -- and I take the or --
7 interact with vehicles that do. And we --

8 MS. BENNETT: That's right.

9 JUSTICE GORSUCH: -- just need to
10 answer that question and be done in this case?

11 MS. BENNETT: That's exactly right,
12 Your Honor. There's lots of things that
13 Flowers conceded for purposes of this
14 particular question presented.

15 JUSTICE GORSUCH: And we will get to
16 see you back here again and again and again,
17 right?

18 MS. BENNETT: You -- you would.

19 JUSTICE GORSUCH: Yeah.

20 JUSTICE BARRETT: Counsel, can I ask
21 you a question? How would you define the class
22 of workers here? I mean, "last-mile driver"
23 seems fairly imprecise because you could be a
24 last-mile driver for the -- for this purpose.
25 You could be a last-mile driver of a fully

1 intrastate journey. You could be a last -- I
2 mean, there are many different ways in which
3 that term could be used.

4 So how would you define the class of
5 workers here that's engaged in interstate
6 commerce?

7 MS. BENNETT: I would define it as
8 workers who perform the last leg of an
9 interstate journey. And that's similar to the
10 way --

11 JUSTICE BARRETT: Well, why do you
12 want us to define it that way? Because it
13 could be the third leg of an interstate journey
14 if we're answering the question that Ms. Lovitt
15 proposed. It could be driving the third leg of
16 an interstate journey but only an intrastate
17 portion of it.

18 So why do we have to use this word
19 "last-mile drivers" at all? Is it truckers?
20 Is it -- what -- who is the class here to whom
21 your client -- to which your client belongs?

22 MS. BENNETT: Sure. You don't have
23 to. I would have no objection to "drivers who
24 drive an intrastate leg of an interstate
25 journey." I think that also works.

1 I think, potentially, the class of
2 truck drivers is analogous to seamen and
3 railroad employees, with the caveat of Saxon
4 that because truck drivers are doing the actual
5 transportation work, we're not pulling in any
6 other employees, although that's not the
7 question presented here.

8 The reason we have picked "last-mile
9 drivers" -- well, two reasons. In the cert
10 petition and the reply, that is the class of
11 workers that Flowers said we were talking
12 about --

13 JUSTICE BARRETT: Sure.

14 MS. LOVITT: -- but --

15 JUSTICE ALITO: Well, let me take you
16 back to the --

17 MS. BENNETT: Sure.

18 JUSTICE BARRETT: Can I -- can I --

19 JUSTICE ALITO: Sure, sure.

20 JUSTICE BARRETT: But is that a
21 term -- I get -- I mean, my concern here is do
22 we spin off the jurisprudence of what is a
23 last-mile driver and does that apply to
24 different contexts. So just to wrap this up,
25 you're not wed to this term? You don't think

1 that this term particularly matters? The class
2 could be defined differently?

3 MS. BENNETT: No, and I think you
4 could -- you know, you see in the real --
5 the -- you know, what we're getting at is a --
6 is a class of workers that exists in the real
7 world, is well established, it's not
8 gerrymandered for this case, like seamen and
9 railroad employees. And in 1925 and now, in
10 the real world, you can advertise for
11 essentially an intrastate leg of an interstate
12 journey. They're often called last-mile
13 drivers regardless of what leg they're in,
14 but -- but no objection to -- to defining it
15 that way.

16 JUSTICE ALITO: Let me take you back
17 to the Chief Justice's question. So suppose a
18 grocery -- a -- a grocery item is produced in
19 one state, it is shipped across state lines to
20 a grocery store in another state, and then an
21 Uber Eats driver picks up goods that have been
22 ordered by a customer, gets in a vehicle,
23 drives to that person's house, delivers the
24 goods. Is that person within the exemption?

25 MS. BENNETT: No, and here's why.

1 JUSTICE ALITO: Why? He's the
2 last-minute driver --

3 MS. BENNETT: Because --

4 JUSTICE ALITO: -- I mean the
5 last-mile driver.

6 MS. BENNETT: For the same reason that
7 he wouldn't have been in 1925. And what we're
8 looking at is the intent of the parties to the
9 commerce to see whether the journey -- where
10 the journey begins and ends.

11 So, here, Flowers shipped its goods to
12 retail stores and had -- and -- and the parties
13 to that commerce are Flowers and the retail
14 stores. The parties to commerce of an Uber
15 Eats driver is a local consumer, a local store,
16 and a local driver. And -- and that case
17 was -- was clear in 1925. You can look at the
18 Weigle versus Curtice Brothers case.

19 JUSTICE ALITO: I mean, that -- I find
20 that hard to understand. The -- the person
21 who -- the company that produces the goods out
22 of states -- out of state intends to be paid
23 for those goods and is not going to be paid for
24 those goods unless they're sold. The intent of
25 that company is not just to have them shipped

1 to a grocery store and sit there.

2 MS. BENNETT: So my understanding is
3 that the sale is from Flowers to the grocery
4 store, and so Flowers doesn't care whether the
5 grocery store sells the goods or not. Flowers
6 has completed its sale when its purchase then
7 arrives at the grocery store. And what the
8 grocery store is buying is the goods plus
9 transportation. There is a separate sale
10 between a retail store and a local consumer.

11 And, again, that line was clear in
12 1925. It's the Weigle case. And lower courts
13 are unanimous on this question. They have had
14 no trouble distinguishing last-mile drivers,
15 that is, people who are doing the last leg --
16 you know, goods are ordered from -- from one
17 state, ordered from another state, and people
18 who are doing the last leg of that journey
19 to -- to get the goods from one state to
20 another --

21 JUSTICE ALITO: Okay. So I -- I make
22 these -- I produce these goods in one state. I
23 sell them to someone else. Title passes. Then
24 that company ships them to the grocery store
25 and that's the end of it. The person who --

1 the -- the shipment from the -- from the person
2 to whom I sold the goods to the grocery store,
3 that's -- that's not -- that person's not
4 engaged in interstate commerce?

5 MS. BENNETT: I -- I think it might
6 depend. And, again, I want to -- you know,
7 what we're asking about here is not whether
8 last-mile drivers, however defined, are a class
9 of workers that are exempt. What we're talking
10 about now is, how do you know whether someone
11 is in that class? How do you know what is an
12 independent journey from an interstate journey?

13 And I think, on your hypothetical, as
14 I understand it, you have a manufacturer
15 shipping goods to either a distributor or
16 retailer, and that's the end of that
17 transaction. The manufacturer doesn't care
18 what happens to those goods and what the
19 retail -- what is purchased is just
20 transportation from the manufacturer to
21 someone in one state.

22 JUSTICE KAGAN: But, if I -- if I
23 understand what you're saying -- and this is a
24 clarification question. In other words, you
25 could have Manufacturer A, and Manufacturer A

1 wants to get his goods all the way to the
2 stores, the grocery stores. And then you could
3 have Manufacturer B, and Manufacturer B just
4 conceives of his business in a different way
5 and just wants to get the goods to wholesalers,
6 and after that, what the wholesalers do, how
7 they get the goods to grocery stores or anybody
8 else, is up to them.

9 So -- so then, if Manufacturer B just
10 got the goods to the wholesaler, that would be
11 it?

12 MS. BENNETT: That's exactly right.
13 You know, what we're looking at is, what was
14 the intent of the shipper at the time it was
15 shipped? And --

16 JUSTICE KAGAN: And so do you just
17 look to contracts for this? Is -- is it -- is
18 it always going to be clear whether the
19 manufacturer is just dealing with a wholesaler
20 or whether the manufacturer is engaged in
21 getting goods to retailers? What -- how -- how
22 do you decide that?

23 MS. BENNETT: So I think the easiest
24 way is the manufacturer will in or the employer
25 will in almost every case, I think every case,

1 will just -- will know that. And so all you
2 will need is a declaration that says here's
3 where we're shipping our goods, here's the
4 intended final destination.

5 In fact, you know, Flowers -- here,
6 there was no discovery, there was no
7 mini-trial, but Flowers describes its work in
8 documents that just --

9 JUSTICE GORSUCH: Well --

10 MS. BENNETT: -- and declarations that
11 say our intended destination is the retail
12 store.

13 JUSTICE GORSUCH: Well --

14 MS. BENNETT: And you will be able to
15 get that easily in -- in every case, I think.

16 JUSTICE GORSUCH: Well, Ms. Bennett, I
17 don't know about that. So a title is a clear
18 line, right? If title passes, boom. And you
19 seem to be sort of endorsing that, that -- that
20 view, once title passes, that's it.

21 But, if you look at this case, the
22 contract's kind of muddled, right? It says
23 title passes to Brock. So you might think -- I
24 know this isn't in the case, so we don't have
25 to decide it. Great, and I'm grateful for

1 that. But it says title passes. But then
2 Flowers also maintains lots of control over
3 Brock and what happens in the retail.

4 What do you do when you've got a
5 muddled contract like that?

6 MS. BENNETT: Sure. So I don't think
7 that title is the -- is the line. It could be
8 evidence. If you -- if you're having trouble
9 figuring out where the end of the journey is,
10 it could be some evidence. But, again, I don't
11 think it -- it is usually going to matter.

12 But let me -- there's two parts of
13 that. So, one, does title matter? And I think
14 the answer to that is -- is no. If you look
15 at --

16 JUSTICE GORSUCH: Title doesn't matter
17 at all?

18 MS. BENNETT: It -- it -- it will
19 matter as evidence of what the end of the
20 journey is.

21 JUSTICE GORSUCH: Okay.

22 MS. BENNETT: But the fact that title
23 passes is not dispositive. If you -- this
24 Court said that in the Rearick case, which was
25 the case where -- very different from here.

1 JUSTICE GORSUCH: So -- so what's
2 dispositive, is what I get -- I'm get --
3 because, often, Manufacturer B in Justice
4 Kagan's hypothetical will have lots of
5 restrictions on how Wholesaler C, I dare,
6 behaves and interacts with grocery stores as
7 representatives de facto of the manufacturer.

8 And, you know, there are varying
9 levels of that. There are an infinite variety.
10 I mean, are we -- are we going to wind up in
11 Ms. Lovitt's world where everything's relevant
12 and nothing's dispositive?

13 MS. BENNETT: I don't think so because
14 the only -- you know, the thing that is
15 relevant is the intended final destination of
16 the shipper.

17 JUSTICE GORSUCH: So, so long as the
18 parties say I intend it to end here, period, is
19 that dispositive?

20 MS. BENNETT: I think unless you think
21 what's happening is obfuscation. So there are,
22 you know --

23 JUSTICE GORSUCH: Well, it's a -- it's
24 a contract. It's a contract. Now you -- are
25 you going to say it's a contract of adhesion

1 and -- and, you know, I had to sign it and, you
2 know, public policy and -- I mean, where are we
3 going to go with this? How far down the rabbit
4 hole are you going to take us, Ms. Bennett?

5 MS. BENNETT: I don't think very far
6 at all if -- I don't think you need to get in
7 the rabbit hole, and here's why. You know,
8 look at -- you can take this case, right,
9 the -- the --

10 JUSTICE GORSUCH: Well, don't take
11 this case. Help me with the precedents from
12 1925, of which you are so knowledgeable --

13 MS. BENNETT: Sure.

14 JUSTICE GORSUCH: -- because this is
15 what the understanding of the Commerce Clause
16 meant a long time ago.

17 MS. BENNETT: Yes.

18 JUSTICE GORSUCH: Pre-Wickard.

19 MS. BENNETT: Yes.

20 JUSTICE GORSUCH: And -- and there
21 have to be cases deciding all these questions.
22 And what's -- what's the rule that you're going
23 to advocate for?

24 MS. BENNETT: That's right. So the
25 rule I would advocate for is intended final

1 destination. And I hear you saying that
2 sometimes that might have a line-drawing
3 problem. Usually, it doesn't, you know,
4 because shippers know where they sent their
5 goods. And if you say file a declaration under
6 oath to where you intended these goods to go,
7 unless they're lying under oath, that will
8 answer the question.

9 JUSTICE GORSUCH: How do the cases
10 handle this?

11 MS. BENNETT: So the --

12 JUSTICE GORSUCH: This complicated
13 question, the rabbit hole questions.

14 MS. BENNETT: So I am happy to give
15 you, you know, sort of where the lines were,
16 and they're the same lines that the lower
17 courts have had no trouble adopting here.
18 There are really, I think, three categories of
19 cases that were hard potentially in 1925 and,
20 because they're solved in 1925, are not hard
21 here.

22 So one is the question of -- I think
23 Justice Alito was asking, how do you
24 distinguish between the first sale or
25 transaction from, say, you know, the

1 manufacturer out of state or the wholesaler to
2 the retailer and the -- and then is the
3 retailer to the -- to the consumer a separate
4 journey? And that -- the Weigle case answers
5 that in 1925, separate journeys. So that's
6 established. Courts have all agreed on that.

7 The second kind of case is the case
8 where manufacturers are sending their goods,
9 they're essentially pre-shipping their goods
10 and sending them to a place where they know a
11 customer is going to order them, but the
12 customer hasn't yet ordered them. The customer
13 orders it either along the way or sometime very
14 quickly thereafter.

15 You can think of part of Amazon's
16 business like that. That's -- that seems like
17 it should be a genuinely hard question except
18 that's exactly how the livestock industry
19 worked in 1925. And so, if you look at cases
20 like Schechter, like Stafford v. Wallace, those
21 questions -- and the third case, there's a set
22 of three cases, one is Stafford v. Wallace, one
23 is Schechter, and one is Swift versus the
24 United States, and those cases dealt with
25 exactly this anticipatory shipping question and

1 answered that. And that's why, again, the
2 lower courts are all in agreement about how
3 that case comes out because they apply that
4 rule.

5 JUSTICE ALITO: I find this
6 extremely -- your argument extremely confusing.
7 Maybe that is inherent in the pre-1925 case
8 law. I would think that anybody who produces
9 consumer goods intends for the final
10 destination of those goods to be with the
11 consumer because, unless the consumer pays for
12 the goods, then the producer of the goods isn't
13 going to make any money.

14 So I don't understand what it means to
15 ask what is the intended end point of the --
16 the distribution chain.

17 MS. BENNETT: So let me try to clarify
18 that. It is not -- the -- the question that
19 was asked in 1925 and that we would say should
20 be asked here is not the final end point of the
21 distribution chain. It's when you shipped --

22 JUSTICE ALITO: It's the final end
23 point of what?

24 MS. BENNETT: Of -- of the journey
25 when you shipped the goods. So the goods

1 here -- you take -- take a case -- you know,
2 you ship through UPS. Most of this kind of
3 commerce happens through something like UPS,
4 FedEx. You ship through UPS. Where are you
5 trying to get those goods to go to when you
6 ship them, not where are they then going to
7 subsequent -- subsequently go after that.

8 So, here, the -- when Flowers ships
9 its goods, where it's trying to get them to go
10 is the retail stores. That's the end of that
11 journey. There may be a separate journey if
12 someone buys that bread from the retail store.

13 JUSTICE ALITO: Why do you say Flowers
14 intends the retail stores to be the end of the
15 journey?

16 MS. BENNETT: Because that is how
17 Flowers describes what is happening here.
18 Flowers, in the record, has said the
19 destination -- again, this is at court of
20 appeal joint appendix at 272 -- the destination
21 is the retail stores and distribution depots
22 are just a temporary pause. And if Brock
23 doesn't deliver to the retail stores, he's
24 fired.

25 JUSTICE ALITO: So -- so suppose

1 Flowers had said, I intend for my bread to make
2 it to consumers. This would be a different
3 case?

4 MS. BENNETT: I think, if Flowers
5 ships its bread to consumers, if consumers
6 ordered from Flowers, that would be a different
7 case. And -- and maybe I can explain it -- let
8 me try a different way, which is to say, you
9 know, in 1925, the easy cases were cases where
10 somebody orders it from one state, orders
11 something from another state. That journey is
12 from shipment in the other state to the person
13 or business who ordered it.

14 And that is what is going on here.
15 The retail stores order goods, and -- and
16 Flowers ships them from another state. That is
17 engaged in interstate commerce in 1925, and
18 there's a host of cases, most of which don't
19 involve interacting with a vehicle at all.
20 I'll give you some examples.

21 So the Rearick case, for example, is a
22 case of brooms that were manufactured in one
23 state, ordered by customers from another, and
24 workers exactly like those here --

25 JUSTICE ALITO: So I -- I don't want

1 to --

2 MS. BENNETT: Sure.

3 JUSTICE ALITO: I can read the cases,
4 and I appreciate your descriptions of them.

5 So is what you're saying that the
6 Federal Arbitration Act incorporates the 1925
7 understanding of the limits of the Interstate
8 Commerce Clause, and so we have to go back and
9 try to sort out what that meant? That was a
10 body of case law with a lot of arbitrary lines.
11 That's what you want us to do?

12 MS. BENNETT: No, Your Honor.

13 JUSTICE ALITO: And -- and follow what
14 the lower courts at that time thought about the
15 limits of interstate -- of the inter- -- of
16 Congress's power to regulate interstate
17 commerce?

18 MS. BENNETT: No, Your Honor, and I
19 want to be really clear about this. This
20 Court -- this case has nothing to do with what
21 the limits of the Commerce Clause were in 1925.
22 What we're asking this Court to do is look at
23 what the meaning of the words "interstate
24 commerce" meant in 1925 and then what it meant
25 to be engaged in interstate commerce.

1 And whether you look at, you know,
2 cases under any body of law, if you look at
3 cases under the Commerce Clause, if you look at
4 cases under FELA, if you look at cases under
5 the Interstate Commerce Act, under the Motor
6 Carrier Act, which was passed a little bit
7 later, those cases are not defining -- the --
8 the utility of those cases is that they're
9 showing what it means -- meant to be engaged in
10 interstate commerce within the meaning of those
11 words.

12 JUSTICE ALITO: And those courts were
13 not -- they were not trying to understand --
14 they were not basing their understanding of the
15 meaning of "interstate commerce" on the meaning
16 of "interstate commerce" under the Commerce
17 Clause? This was -- this was independent of
18 that?

19 MS. BENNETT: They -- I think the --
20 the scope of the Commerce Clause is about not
21 what the meaning of "interstate commerce" is.
22 It's about what relationship to interstate
23 commerce an activity has to have to be
24 regulable.

25 So, under any doctrine, the meaning of

1 the words "interstate commerce" was the same,
2 and the question under various cases, under
3 various statutes, and under the Commerce Clause
4 is, is this activity have the relationship
5 required either by the Commerce Clause or
6 various statutes to interstate commerce to
7 count, so --

8 JUSTICE JACKSON: And that's not --
9 that's not before us, right? I mean, that's --

10 MS. BENNETT: No.

11 JUSTICE JACKSON: So can I focus us on
12 what is before us?

13 MS. BENNETT: Sure.

14 JUSTICE JACKSON: I think I'm just
15 trying to really get back to the issue of the
16 day. As I understand your argument, you are
17 starting or we are all starting from the
18 position of taking for the purpose of today
19 that both sides agree that the retail stores
20 were the end of the journey at issue.

21 MS. BENNETT: That's right.

22 JUSTICE JACKSON: Right. So no
23 dispute on that. For the purpose -- I know
24 they're going to argue about it later, but,
25 right now, everybody says, okay, retail stores

1 are the end.

2 And we know that Mr. Brock drives
3 these goods to the retail stores intrastate.
4 He gets the goods in the state and he gets them
5 to the retail store. That is the end of this
6 interstate journey that the goods have been on.

7 MS. BENNETT: That's right.

8 JUSTICE JACKSON: All right. So the
9 only question before us right now is how do we
10 characterize Mr. Brock, his role, his work in
11 that particular journey or set of
12 circumstances?

13 Your friend on the other side,
14 Ms. Lovitt, says we have to look at the class
15 of cross-border workers, that the only way that
16 Mr. Brock gets to have this exemption is that
17 if we can say that he is a class -- a
18 cross-border worker, I think she has that
19 terminology -- the worker at -- at each leg or
20 at his leg has to be engaged in cross-border
21 transportation work.

22 Now we know that we've already said he
23 himself doesn't have to cross the border. So
24 she says how you make that determination about
25 cross-border transportation work is whether he

1 engages in vehicles that have crossed the
2 border.

3 What is your response to why she's
4 wrong about the extent to which he would have
5 to engage -- you know, to -- the extent to --
6 first of all, is she right that we should be
7 looking at whether he is engaged in
8 "cross-border transportation work" and, if so,
9 is she right that the way to do that is to
10 focus on his engagement with the vehicle?

11 MS. BENNETT: Sure. So, in 1925, the
12 ordinary meaning of the words "engaged in
13 interstate commerce" -- and I took Flowers to
14 agree with this in their opening brief but
15 maybe have backed away from it -- is a worker
16 who is engaged in interstate transportation or
17 work that is so closely related to that to be
18 practically a part of it.

19 So what we're looking at, this,
20 Mr. Brock, and drivers like him are engaged in
21 interstate transportation, that's the question.

22 And so the question is -- and -- and
23 to be engaged in interstate transportation in
24 1925, you do not have to interact with a
25 vehicle. And with apologies to Justice Alito,

1 I'll just give you a few examples. There's the
2 Rearick case, which I mentioned. That's
3 workers exactly like this held to be engaged in
4 interstate commerce. There's a case called
5 Seaboard Air Line Railroad versus Moore, which
6 is in our brief. There, the worker is a
7 railroad worker who is held to be "actually
8 engaged in interstate commerce" even though his
9 work didn't take him out of Florida, and the
10 reason for that is because he transported a
11 train that had lumber, and that lumber was then
12 unloaded and put on a boat to a different
13 state. So it's, again, exact --

14 JUSTICE JACKSON: So it was the goods
15 that was do -- that --

16 MS. BENNETT: Exactly right.

17 JUSTICE JACKSON: I mean, I think
18 that's the key question.

19 MS. BENNETT: Correct.

20 JUSTICE JACKSON: Do you get it
21 because you are working or engaging with goods
22 that have been in -- in interstate commerce or
23 not.

24 MS. BENNETT: That's right. And it's
25 exactly right. You know, Hancock, the

1 question, they said a worker is employed in
2 interstate commerce if any of the cars in his
3 train contained interstate freight. So it's
4 keyed to the freight.

5 And the cars was actually a harder
6 question in 1925. You could -- of course, some
7 workers were either engaged in interstate
8 transportation or worked so closely related to
9 it because they interacted with
10 instrumentalities of commerce. That was a hard
11 question in 1925. If you --

12 JUSTICE JACKSON: Right. I was just
13 saying, in Hancock, I mean, it doesn't seem to
14 me that you get clearer than the statement,
15 "The determining circumstance is that the
16 shipment was but a step in the transportation
17 of the coal to real and ultimate destinations
18 in another state."

19 So it was the coal that was moving in
20 interstate commerce that became the
21 "determining circumstance" in Hancock, is that
22 right?

23 MS. BENNETT: That's exactly right.
24 And the Zachary case that they mentioned, what
25 the -- what the Court said is, because the cars

1 crossed state lines, there's a reasonable
2 inference that the freight did, and that would
3 make the worker engaged in interstate commerce.

4 JUSTICE ALITO: So the oranges that
5 are delivered by the Uber Eats guy in Colorado
6 to the -- so then he's -- I think you -- you
7 just shifted to the goods.

8 MS. BENNETT: So I want to be clear.
9 The question isn't whether the goods have been
10 transported in interstate commerce. So your
11 question is, once it gets to the retail store,
12 is the next leg still in interstate commerce?

13 I'll flag that that's a different
14 question than the question here, which is, is
15 it in -- are -- is the -- are the goods in
16 interstate commerce for the part of the -- for
17 the journey to the retail store.

18 So, if there's a separate journey for
19 the Instacart driver and the oranges, the
20 question there is, are those oranges still in
21 interstate commerce? I think the answer to
22 that is no. Again, that's the -- the Weigle
23 case. And it's all, you know, where -- when
24 goods were ordered. If you look at the
25 Lipscomb case, if you look at the -- the

1 Rearick case, the Seaboard case, when goods are
2 ordered from one state or from another state,
3 the -- the interstate journey is from the
4 manufacturing plant or whoever's selling those
5 goods to the person or company who ordered
6 them. That's the journey.

7 JUSTICE KAGAN: So, in a -- when a
8 ultimate consumer does the ordering, I mean,
9 suppose that I get on the Internet and I click
10 into some cosmetics company, and so I'm getting
11 these cosmetics from the cosmetics company.

12 Then it's everything that happens from
13 where the cosmetics company is making the
14 product to the ultimate consumer, isn't it?

15 MS. BENNETT: Right, because it's --
16 it's -- you look at who ordered the goods, and
17 the shipment from whoever's selling or
18 manufacturing the goods to who ordered them,
19 that's a journey. And then anything --

20 JUSTICE KAGAN: And does it matter
21 if --

22 MS. BENNETT: -- that happens after
23 that --

24 JUSTICE KAGAN: -- when I order those
25 goods from the cosmetics company, the cosmetics

1 company actually has a way of, like, signaling
2 some wholesaler or signaling even a retail
3 store, you know, get the cosmetics to
4 Ms. Kagan?

5 MS. BENNETT: I don't think so, but,
6 again, to answer that question, what I would do
7 is say, would that have counted as interstate
8 transportation in 1925? And I would look at
9 the -- the livestock cases actually that I was
10 mentioning to Justice Gorsuch to -- to figure
11 that out because this wasn't an uncommon
12 situation then.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 If you have a -- a big wholesaler,
16 right, and you know -- you know that -- I
17 understand your argument there. And then you
18 say, well, between the wholesaler and the
19 consumer, no, right? Well, the way business is
20 these days in products, in consumer products,
21 there are often big wholesalers and then little
22 wholesalers. And -- and so, I mean, you can
23 chop this up as many ways as you want.

24 Is it -- well, what is it between the
25 big wholesaler in -- in, you know, Chicago and

1 the little wholesaler in a little town outside
2 of Chicago? I mean, it doesn't always go from
3 the big wholesaling to -- to the individual
4 home.

5 So where do you -- where do you
6 stop -- what's your choice between those two?
7 Big wholesaler to little wholesaler, little
8 wholesaler to home, you're -- you're saying, I
9 guess, that doesn't count. But what about the
10 link between the two different types of
11 wholesalers?

12 MS. BENNETT: If I understand
13 correctly, you're saying somebody in -- you
14 know, a wholesaler orders goods from a bigger
15 wholesaler in the state. I think, when those
16 goods are shipped to the person who ordered
17 them, that journey is over.

18 And then you look to the -- there may
19 be a subsequent journey after that that's
20 independent that may or may not be interstate.
21 But, when goods are shipped to the -- the
22 person or company that ordered them, that's the
23 journey.

24 CHIEF JUSTICE ROBERTS: Even if it's
25 not the -- even if they've already stopped at a

1 wholesale facility apart from the -- the truck?

2 MS. BENNETT: I --

3 CHIEF JUSTICE ROBERTS: Maybe I'm not
4 understanding you. Here's the -- the -- the
5 truck goes to the wholesaler, right, and the
6 wholesaler, instead of going right to the
7 consumer, goes to another wholesale facility,
8 which happens a lot.

9 MS. BENNETT: Right. I -- I -- I
10 think -- but, if the -- if what's happening is
11 the consumer is ordering a good from out of
12 state and the -- what's happening when the
13 out-of-state company ships the good, that --
14 that journey is in interstate commerce from the
15 time it leaves the manufacturing or first
16 wholesaler until it gets to the consumer
17 because -- because that was well established
18 in -- in 1925.

19 If you look at Lipscomb or Rearick,
20 what you'll see is the -- the interstate
21 journey is from order to place that is selling
22 or manufacturing it.

23 CHIEF JUSTICE ROBERTS: Well, I don't
24 know if they had the sophisticated and
25 multi-variegated distribution system we have

1 today in 1925.

2 MS. BENNETT: That is, I think, a
3 little bit less, but you'd be surprised. So,
4 again, these livestock cases had these kinds of
5 complicated arrangements. But -- but they
6 often boiled down to fundamental principles,
7 which is, what did the parties to the commerce
8 intend the shipment to be? When you shipped
9 this good, where was it going?

10 And if somebody orders a good that
11 gets shipped to them from out of state, that's
12 a journey, and whatever happens after that
13 is -- is an independent journey. But -- but
14 that -- but that's where I would put the -- the
15 beginning and end.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 JUSTICE KAGAN: Whatever happens --

18 CHIEF JUSTICE ROBERTS: Justice --

19 JUSTICE KAGAN: I'm sorry.

20 CHIEF JUSTICE ROBERTS: Yeah.

21 Justice Thomas?

22 JUSTICE THOMAS: If Flowers were to
23 simply ship to its final -- a final destination
24 at a distribution center and relinquish title
25 to your client, would that change your

1 argument?

2 MS. BENNETT: I think, if the commerce
3 was truly between Flowers and Mr. Brock --

4 JUSTICE THOMAS: Yeah.

5 MS. BENNETT: -- that -- that would be
6 a different case. Mr. Brock would then
7 essentially be a retailer like Walmart or Sam's
8 Club, but -- but -- yeah.

9 CHIEF JUSTICE ROBERTS: Justice Alito?
10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: The cases you're
12 relying on are all Supreme Court cases,
13 correct?

14 MS. BENNETT: Correct.

15 JUSTICE SOTOMAYOR: So they're not
16 lower court cases. They're what the cases
17 defined as interstate commerce and workers
18 involved in interstate commerce, correct?

19 MS. BENNETT: Correct.

20 JUSTICE SOTOMAYOR: For purposes of
21 FELA and many examples, but it was what
22 "engaged in commerce" meant at the time?

23 MS. BENNETT: That's exactly right.
24 And that's what this Court -- you know, you
25 have cases from 1925. You have this Court's

1 decision in *Morris versus McComb*, which --
2 which says that drivers are engaged in
3 interstate commerce when they do this kind of
4 last-mile -- mile journeys.

5 There are a number of precedents from
6 this Court that this Court, I think, would have
7 to overrule to say that last-mile drivers or
8 intrastate-like drivers are not engaged in
9 interstate commerce, or the Court would have to
10 say the FAA means something different with
11 those words than it has meant -- those words
12 have ever meant.

13 JUSTICE SOTOMAYOR: And Justice
14 Gorsuch has put a question to your adversary
15 about what -- or opposing counsel -- I
16 shouldn't use the word "adversary" -- opposing
17 counsel about how to define her -- the question
18 presented.

19 Answer the question he posed. It
20 would be, no, it doesn't matter whether --

21 MS. BENNETT: I -- I would say the
22 answer, I think, to the question presented as
23 posed, which I take to be: Are workers who
24 don't physically cross state lines and don't
25 interact with a vehicle engaged in interstate

1 commerce are exempt from the FAA? I would say
2 it depends on what class of workers they are,
3 are a member of, and what the work of that
4 class is.

5 JUSTICE SOTOMAYOR: Okay.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 Justice Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: Two questions.

10 MS. BENNETT: Sure.

11 JUSTICE KAVANAUGH: One, you said in
12 response to Justice Barrett "last-mile drivers"
13 doesn't need to be the term. I wasn't clear on
14 what the exact phrase you would use as a
15 substitute for the term.

16 MS. BENNETT: Sure. I understood the
17 question to be could we define the class as
18 people who perform an intrastate leg of an
19 interstate journey.

20 JUSTICE KAVANAUGH: And that's --
21 you're good with that --

22 MS. BENNETT: I --

23 JUSTICE KAVANAUGH: -- phrasing right
24 there?

25 MS. BENNETT: Absolutely, yeah.

1 JUSTICE KAVANAUGH: Okay. And then,
2 in response to Justice Gorsuch, I think you
3 were going through, very helpfully, categories
4 of cases, and you got through one and two,
5 which I'm not sure you got through the third,
6 but maybe you covered it in later questions. I
7 just want to make sure I'm not missing that
8 third category.

9 MS. BENNETT: Sure. So I think there
10 were -- there are three. And I think the ones
11 I got through were anticipatory shipping, so
12 what do you do when the order is anticipated
13 but not actually delivered.

14 JUSTICE KAVANAUGH: Got that one,
15 yeah.

16 MS. BENNETT: I think the second one,
17 I actually don't remember what the second one
18 was that I -- that I answered to you, so I'm
19 not sure what two and three are, but -- but the
20 second one, I think, was the retail stores,
21 also clear line in 1925. And that's, again, it
22 follows from the order.

23 And then the third one is this
24 obfuscation question, where a company was
25 trying to obfuscate exactly what the

1 commerce -- what commerce is happening or where
2 the journey begins and ends. That was very
3 common in 1925, where companies would try to
4 get out of, say, the Interstate Commerce Act or
5 FELA by obfuscating where the beginning and end
6 of the journey is.

7 And there are lots of cases about that
8 in 1925 that says you can't convert an
9 interstate shipment into intrastate
10 transportation just by dividing up the legs.
11 You can look at the Baer Brothers case. You
12 can look at the Southern Pacific Terminal case.
13 You can look at the Sabine Tram case, and --
14 and that's how those courts analyzed it. What
15 we're going to do is we're going to look at
16 where were the goods ordered and where were
17 they ordered from.

18 JUSTICE KAVANAUGH: Thank you.

19 MS. BENNETT: Mm-hmm.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: I just want to be
23 sure I understand your position.

24 MS. BENNETT: Sure.

25 JUSTICE BARRETT: You've been asked a

1 lot of questions about the line-drawing in your
2 position because it does involve some
3 complicated lines. You said, I think, in
4 response to Justice Sotomayor that the answer
5 to the QP technically in your view would be it
6 depends.

7 MS. BENNETT: Mm-hmm.

8 JUSTICE BARRETT: It seems to me that
9 the further question of depends on what is
10 pretty complicated. How do you figure out
11 intent? Are we looking at when title passes?
12 Are we looking at some sort of declaration?
13 Are we looking at who gets the profit, how
14 the -- I mean, you can start to see why a
15 Tenth -- the Tenth Circuit's opinion was quite
16 complicated, right?

17 But I think those are questions for
18 another day. Is that your position?

19 MS. BENNETT: Yes.

20 JUSTICE BARRETT: Like, just answer it
21 depends, there's no automatic rule of
22 exclusion, but what it depends on can be very
23 complicated. And it may not always be the case
24 that these 1925 cases you're pointing us to
25 answer the question in -- in the modern,

1 complicated world with different kinds of
2 distribution chains. Livestock, maybe there
3 are some good analogies to be drawn between
4 livestock and, you know, computer equipment,
5 but those are pretty complicated questions, and
6 I think Ms. Lovitt correctly points out that
7 there would be very difficult line-drawing
8 questions that, even if your position is right,
9 that courts would have to face.

10 So we could say it depends and not
11 depends on what?

12 MS. BENNETT: Yes, although I want to
13 be clear. I think, in most cases, there will
14 not be complicated line-drawing questions. And
15 you see this because, you know, most of the
16 cases Flowers cites for their complicated
17 line-drawing questions are cases where the
18 district courts easily granted a motion to
19 compel arbitration and had almost nothing to do
20 with last-mile drivers.

21 But -- and -- and the other categories
22 of cases are ride-share cases, which, on our
23 view, that comes -- case comes to the court
24 once. And what you would look at, I think the
25 difficulty with ride-share drivers is that some

1 of them cross state lines. They're in Kansas
2 City or D.C.

3 And, in our view, the question there
4 would be, in 1925, where workers who were
5 performing what is fundamentally local
6 transportation but sometimes cross state lines,
7 were they engaged in interstate commerce?

8 JUSTICE BARRETT: Did the horses and
9 buggies cross state lines?

10 MS. BENNETT: I mean, they were --
11 they were crossing state lines.

12 JUSTICE BARRETT: But -- but we don't
13 have to answer those questions.

14 MS. BENNETT: Correct.

15 JUSTICE BARRETT: Yes. Okay.

16 MS. BENNETT: You don't have to answer
17 any of these questions. The only thing this
18 Court has to say to answer the question
19 presented is there is no absolute requirement
20 that you physically cross a state line or
21 interact with a vehicle that does, whatever it
22 might mean to interact with a vehicle.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: One final quick

1 thing.

2 You -- you say or you've set this all
3 up to have the analysis turning on the intended
4 destination of the goods or the freight, as the
5 parties agreed.

6 Ms. Lovitt has it turning on loading
7 and unloading. There was a -- a -- a key part
8 of her analysis that was about loading and
9 unloading. In 1925, is there any evidence that
10 that was a factor in how we're supposed to be
11 thinking about this?

12 MS. BENNETT: So the -- yes and no,
13 which is to say I think, in 1925, the
14 interstate transportation ended when the goods
15 were unloaded at their final destination.

16 JUSTICE JACKSON: I see.

17 MS. BENNETT: So I think it's clear
18 that anything that happens once you get to the
19 destination and unload the goods, that's out.
20 But there -- but it wasn't whether the goods
21 were unloaded and unload -- loaded and unloaded
22 at intermediate points.

23 The -- the Rearick case, loaded and
24 unloaded. The Seaboard Air Line case, that's
25 lumber that is in --

1 JUSTICE JACKSON: So that's not a
2 factor, you think, in isolating or answering
3 this question?

4 MS. BENNETT: No, I don't think -- I
5 don't think that's a factor. It does help
6 answer -- you know, make clear about why some
7 of the hypotheticals posed about what's going
8 to happen afterwards --

9 JUSTICE JACKSON: Yeah.

10 MS. BENNETT: -- are not implicated by
11 this case. You know, a -- a retail clerk that
12 handles goods after they've been unloaded at
13 the final destination, that commerce has ended.

14 JUSTICE JACKSON: Yeah.

15 MS. BENNETT: But -- but it doesn't
16 answer the intermediate question.

17 JUSTICE JACKSON: Thank you.

18 MS. BENNETT: Mm-hmm.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Rebuttal, Ms. Lovitt.

22 REBUTTAL ARGUMENT OF TRACI L. LOVITT

23 ON BEHALF OF THE PETITIONERS

24 MS. LOVITT: Yes. Thank you,
25 Mr. Chief Justice.

1 Section 1 asks a fundamentally
2 different question than the Commerce Clause was
3 asking in 1925. It's asking whether or not the
4 transportation worker is engaged in
5 cross-border transportation work. That's what
6 this Court held in Saxon and Bissonnette.

7 It's different from the Commerce
8 Clause analysis because of the words "engaged
9 in," which this Court has twice held are
10 narrower than the scope of the Commerce Clause
11 and are intended to limit to something --
12 something much more direct and active in the
13 movement of goods across borders.

14 So, to answer the question, you
15 shouldn't -- you shouldn't be looking to
16 Commerce Clause cases. Those are going far too
17 broadly. The key -- the key cases in -- in
18 this context are Saxon and Bissonnette, and
19 they explain the question is, what is the work
20 the worker is performing?

21 Ms. Saxon's work, the task that she
22 was performing, was loading and unloading goods
23 onto vehicles that were traveling to different
24 states. It is the transportation work that
25 matters, not the destination of the good.

1 So you heard a lot -- you -- you heard
2 a lot in the last 35 minutes, you heard a lot
3 about parties' intent. You heard about, well,
4 you have to know where the profit turns, you
5 have to know where things are preordered, you
6 have to know whether you're Manufacturer A or
7 Manufacturer B, all of which Bissonnette says
8 shouldn't matter because that's about the
9 business that the -- the manufacturer is in,
10 not the business of what the worker is doing.

11 What you didn't hear about was any
12 defense of the four court -- circuit court
13 decisions that have adopted Brock's approach,
14 not in the briefing and not here today. That's
15 because all you have to do is read those four
16 cases and see how quickly this analysis spins
17 out of control.

18 Or read Judge Bress's dissent in
19 Rittmann, the first case that adopted this
20 approach. He predicted that exactly this would
21 occur because, in 1925, the lines weren't
22 bright, they weren't clear, they were so
23 muddled that people were asking questions about
24 whether brooms were in the same package that
25 they were or whether they'd been disentangled.

1 That is not the kind of bright-line
2 rule that a threshold requirement like Section
3 1 should have. Clarity is needed for rules
4 that establish the threshold, particularly
5 under the FAA, the whole point of which is to
6 avoid litigation, to have speed and efficiency
7 in resolving conflicts.

8 This is now adding a whole separate
9 layer. Brock's approach is adding a whole
10 separate layer of litigation over intent.
11 There's no more fact-bound question in the law
12 than, what are the parties' intent? And you
13 heard that today because you can't answer it
14 without "it depends."

15 And Section 1 is answer -- is begging
16 for an answer other than "it depends." And
17 that answer is directly from the text of
18 Section 1. It's not an ambiguous rule. It's
19 not a made-up rule. Section 1 is saying you
20 have to be engaged in cross-border movement,
21 cross-border transportation, and we know that
22 from Saxon and Bissonnette.

23 If you -- and I think the lower courts
24 are showing what happens when you don't
25 approach -- what -- what happens when you adopt

1 this rule. For 100 years, this Court has lived
2 with the FAA Section 1, and there has not been
3 any lack of clarity because the industry
4 understands what it means to be a
5 transportation worker.

6 You move a good across a border, you
7 load it, you unload it. That's where
8 transportation begins and ends. That rule's
9 been clear since 1925 because this Court in
10 Saxon cited the cases showing that that's how
11 transportation work, not interstate commerce
12 but transportation work was judged in 1925,
13 from the point of loading and unloading.

14 The question of final destination is a
15 question of interstate commerce under the
16 Commerce Clause. And the Commerce Clause,
17 despite what counsel says, and none of the
18 cases that she's citing under the Commerce
19 Clause define the terms "engaged in."

20 You can read the Commerce Clause for a
21 long time and you won't find those terms within
22 the Commerce Clause. You will find them in
23 Section 1, and it's "engaged in interstate
24 commerce" that's used in conjunction with
25 ejusdem that tells you that the commerce that

1 these -- the workers have to be engaged in
2 isn't a transaction in interstate commerce,
3 it's transportation that crosses the border.

4 In our view, this is a clear case, and
5 Section 1 demands a clear rule. The clearer
6 rule, the narrower the disputes, and that's
7 what Section 1 demands.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:27 a.m., the case
12 was submitted.)

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