No. 23-51

In the Supreme Court of the United States

NEAL BISSONNETTE and TYLER WOJNAROWSKI,
on behalf of themselves and all others similarly situated,
Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, and FLOWERS FOODS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF CERTIORARI

HAROLD L. LICHTEN
MATTHEW THOMSON
ZACHARY L. RUBIN
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street
Suite 2000
Boston, MA 02116
(617) 994-5800

JENNIFER D. BENNETT
Counsel of Record
GUPTA WESSLER LLP
505 Montgomery Street
Suite 625
San Francisco, CA 94111
(415) 573-0336
jennifer@guptawessler.com

LINNET DAVIS-STERMITZ
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

Flowers Foods' brief in opposition only confirms that certiorari is warranted here: The company concedes that there is a square circuit split on a question that affects millions of transportation workers across the country and numerous large employers like Amazon and Walmart. The truck drivers Walmart hires in the First, Seventh, and Ninth Circuits are exempt from the Federal Arbitration Act, while those it hires in the Second and Eleventh Circuits are not. Even before the decision below, the Chamber of Commerce warned that this "non-uniformity" is "untenable." Br. Chamber of Commerce of United States of America at 8, *Domino's Pizza LLC v. Carmona* (S. Ct. July 18, 2022) (No. 21-1572). Since that warning, the conflict has only grown deeper.

Flowers can't seriously contest the need for this Court's intervention. Nor can it convincingly defend the Second Circuit's decision on the merits: The company concedes that in 1925, when the FAA was passed, transportation workers did not need to work for a transportation company to be engaged in interstate transportation and, therefore, interstate commerce. And it concedes that many "seamen" did not work for shipping companies. The company thus does not dispute that under the ordinary meaning of the exemption's words, transportation workers need not work for a transportation company. So its merits argument boils down to the argument that the FAA should be interpreted differently than any other statute—an assertion that this Court has repeatedly rejected.

Unable to defend the Second Circuit's decision or explain why this Court should wait to resolve an already "untenable" conflict, Flowers tries to muddy the waters—

spending much of its opposition attempting to convince the Court of its version of the facts underlying this case. Notably absent from the company's lengthy factual digression, however, is any explanation of why it matters. There is only one fact that's relevant to the question presented, and it's undisputed: The petitioners are commercial truck drivers who spent most of their working hours hauling goods for Flowers Foods. That's why, ultimately, Flowers doesn't—and can't—dispute that this case cleanly presents the question whether transportation workers must work for a transportation company to be exempt from the FAA.

That question sorely needs an answer from this Court. And this case offers the perfect vehicle to provide it.

1. Flowers concedes (at 16) that the circuits are split on whether the FAA's worker exemption contains an unwritten industry requirement. And—though Flowers does not mention it—that split has only grown deeper since the petition was filed. In *Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023), the Ninth Circuit recently held that truck drivers were exempt from the Federal Arbitration Act even though they did not work for a company in the transportation industry. *See id.* at 1136–38. So there is now a 3-2 split: In the First, Seventh, and Ninth Circuits, the FAA exempts transportation workers engaged in commerce, regardless of whether they work for a transportation company; but in the Second and Eleventh Circuits, workers must be employed by a company in the transportation industry. *See id.*; Pet. 14–17.[1]

[1] Unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

Flowers tries to downplay the split as merely two circuits' "disagreement," but its own opposition belies that characterization. *See* BIO 17–19 (listing several other circuits Flowers itself says have weighed in on the issue). As do the cases themselves. *Compare, e.g.*, *Fraga v. Premium Retail Servs., Inc.*, 61 F.4th 228, 234–35 (1st Cir. 2023), *Canales v. CK Sales Co., LLC*, 67 F.4th 38, 40–43, 45–47 (1st Cir. 2023) , *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021), *aff'd,* 142 S. Ct. 1783 (2022) ("[A] transportation worker need not work for a transportation company."), *and Int'l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast LLC*, 702 F.3d 954 (7th Cir. 2012), *with Bissonnette v. LePage Bakeries Park St.*, 49 F.4th 655 (2d Cir. 2022), *and Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021).

2. Flowers asks this Court to just let the conflict fester, but the circuits' disagreement is—in the words of the Chamber of Commerce—"untenable." Br. Chamber of Commerce of United States of America at 8, *Carmona*, (No. 21-1572). As our petition explained, there are millions of truck drivers in this country who don't work for traditional trucking companies, drivers who work for companies like Amazon or Walmart or Flowers. *See* Pet. 17–19. As it stands, a long-haul trucker for Amazon based in Massachusetts would be exempt from the FAA. But if the same trucker happened to be based in New York, the exemption would depend on whether Amazon is in the transportation industry—which, in turn, would depend on a complicated, fact-intensive inquiry into whether the company "pegs its charges chiefly to the movement of goods" and whether its "predominant source of commercial revenue is generated by that movement." App. 48a.

That makes no sense. As the Chamber of Commerce has explained, this "non-uniformity makes it enormously difficult for nationwide businesses" like Amazon to determine how to "structure [their] contractual relationships with their employees." See Br. Chamber of Commerce of United States of America at 8, *Carmona*, (No. 21-1572). Only this Court's intervention can solve the problem. Indeed, Flowers itself apparently recognizes the need for this Court's intervention: It has asked for an extension of time to allow it to file a petition for certiorari from the First Circuit's decision on this issue in *Canales*. *See* Application, *C.K. Sales Co., LLC v. Canales* (No. 23A92) (S. Ct. July 27, 2023).

Flowers doesn't even attempt to argue otherwise. Instead, the company tries to change the subject, asserting (at 21) that the "real hot topic" in FAA worker-exemption cases is the exemption's application to so-called last-mile drivers. But Flowers doesn't explain why that issue necessitates this Court's intervention.[2]

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[2] In an effort to manufacture a conflict on this score, Flowers conflates (at 21) actual last-mile drivers—drivers who are responsible for the last (typically intrastate) leg of a good's journey from one state or country to another—with food-delivery workers who deliver meals from local restaurants to local customers. But there is widespread agreement among the lower courts about how to treat these two groups of workers. Relying on the ordinary meaning of the phrase "engaged in commerce" in 1925, courts have largely agreed that last-mile drivers are exempt, while food delivery workers are not. *See, e.g.*, *Rittman v. Amazon.com, Inc.*, 971 F.3d 904, 915–19 (9th Cir. 2020) (last-mile drivers exempt from the FAA); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 17–26 (1st Cir. 2020) (same); *Immediato v. Postmates, Inc.*, 54 F.4th 67, 74–80 (1st Cir. 2022) (local food delivery workers non-exempt); *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801–03 (7th Cir. 2020) (Barrett, J.) (same).

And, in any event, an important question of statutory interpretation is not less cert-worthy simply because there may also be other cert-worthy questions involving the same statute. Still, if this Court does wish to consider the application of the Federal Arbitration Act to last-mile drivers, it may add the question here. Although the Second Circuit did not decide the case on that ground, it is presented in this case and was briefed below. *See* Response Brief at 34–37, *Bissonnette v. LePage Bakeries, LLC*, 49 F. 4th 655 (2d Cir. 2022) (No. 20-1681); Reply Brief at 19–20, *Bissonnette v. LePage Bakeries, LLC*, 49 F. 4th 655 (2d Cir. 2022) (No. 20-1681).[3]

3. Unable to seriously dispute the need for this Court's intervention, Flowers quibbles (at 19–24) with this case as a vehicle. But in fact, the case presents an ideal vehicle to review the question presented.

As Flowers concedes (at 14), the court of appeal held that the transportation-industry requirement was dispositive here—and ruled solely on that issue. The decision thus cleanly presents the question whether the FAA's worker exemption requires that a transportation worker be employed by a company that "pegs its charges chiefly to the movement of goods or passengers" and derives the "predominant source" of its "commercial revenue from that movement." App. 48a.

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[3] Contrary to Flowers' halfhearted assertion (at 21), its purported business model would not impede this Court from reviewing the application of the FAA to last-mile drivers. The last-mile question is whether workers who are responsible for the last leg of a good's journey from one state to another are "engaged in commerce" within the meaning of the FAA, even if that last leg is entirely within a single state. That's a purely legal question to which Flowers' business model is irrelevant. And there's no dispute that the petitioners were so-called last-mile drivers.

Flowers complains (at 23–24) that it has other arguments, besides the transportation-industry requirement, for why this case should be compelled to arbitration. But the company does not—and could not—contend that the availability of other arguments on remand would somehow impede this Court's review of the question presented. Companies seeking to compel arbitration almost always claim to have several arguments for why they may do so. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) ("declin[ing] to tangle with" an alternative argument for arbitration because the Court "granted certiorari only to resolve" a particular basis for arbitration, "not to explore other avenues for reaching [that] destination"); *Oliveira v. New Prime, Inc.*, 424 F. Supp. 3d 206, 210–14 (D. Mass. 2019) (rejecting alternative grounds for arbitration on remand from this Court). If this Court refused to grant certiorari unless the defendant had made only one argument in support of arbitration, it would never be able to resolve important, frequently-recurring arbitration questions.

Flowers fares no better trying to rely on its supposedly "unique, franchise-based business model" to avoid review. As an initial matter, what the company calls a "franchise-based business model" is just another name for its practice of misclassifying its truck driver employees as independent contractors. *See* Pet. 8–9; *Canales*, 67 F.4th at 41 (explaining that Flowers initially treated the workers "as employees"). And there is nothing "unique" about it. Companies that seek to avoid employment laws often require their workers to create shell corporations and sign contracts purporting to render them independent businesses. *See, e.g.*, *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 997–98 (8th Cir. 2015); *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1110–12

(9th Cir. 2021); *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 471 (3d Cir. 2020); *Huddleston v. John Christner Trucking, LLC*, 2020 WL 489181, at *1 (N.D. Okla. Jan. 30, 2020).

Indeed, that's precisely what the defendant in *New Prime* did. *See Oliveira v. New Prime, Inc.*, 857 F.3d 7, 10 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019). And the whole point of this Court's decision in *New Prime* was that Section 1 is concerned with the work a worker does, not the type of contract their employer makes them sign. *See* 139 S. Ct. at 539–43.

However the plaintiffs here are classified, there is no dispute that they spent the bulk of their working hours driving commercial trucks for Flowers. App. 67a n.1. Whether Flowers can avoid paying those drivers overtime or deduct its business expenses from their paychecks merely because its contract purports to classify them as independent contractors is the core of the parties' dispute on the merits. *Cf. Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) ("Th[is] inquiry is not governed by the label put on the relationship by the parties or the contract controlling that relationship, but rather focuses on whether the work done, in its essence, follows the usual path of an employee.").

But it has nothing to do with the question presented before this Court. The question presented here is whether the FAA's worker exemption has an unwritten requirement that transportation workers be employed by a company that "pegs its charges chiefly to the movement of goods or passengers" and derives the "predominant source" of its "commercial revenue from that movement." App. 48a. That's a straightforward legal question. As the

court below recognized, Flowers' claims about its business model are irrelevant to answering it. *See* App. 50a–51a.

4. Finally, Flowers attempts to avoid review by defending the Second Circuit's decision on the merits. But review is warranted even if the decision below is correct because several other circuits disagree. *See* Pet. 14–19. And in any event, Flowers' cursory effort to defend the decision fails. The company can't point to anything in the FAA supporting the claim that the exemption applies only to transportation workers employed by companies that "peg[their] charges chiefly to the movement of goods or passengers" and derive the "predominant source" of their "commercial revenue from that movement. App. 48a.

To the contrary, the company concedes (at 26) that when the FAA was passed, transportation workers did not need to be employed by a transportation company to be engaged in interstate transportation—and therefore "engaged in commerce." And it admits (at 27) that workers did not need to be employed by a shipping company to be considered "seamen." Flowers argues that this ordinary usage is irrelevant to Section 1, but this Court has held precisely the opposite: "It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime*, 139 S. Ct. at 539.

Unable to rely on the ordinary meaning of the statute's words, Flowers parrots (at 25) the Second Circuit's conclusory assertion that the terms "seamen" and "railroad employees" "locate" a transportation worker in "the context of a transportation industry." But the Second Circuit offered no basis for that assertion. And neither does Flowers. What's more, this Court rejected that very

argument in *Saxon*: The terms of the statute, this Court held, focus on the "actual work" a worker performs, not on what "industry" they are a part of. *Sw. Airlines Co. v. Saxon,* 142 S. Ct. 1783, 1788 (2022).

To reconcile its interpretation of the FAA with *Saxon*, Flowers tries (at 30) the same move the Second Circuit did: *Saxon*, it says, held only that "not *everyone* who works in the transportation industry is a transportation worker," but it did not rule out the possibility of some future transportation-industry requirement. But that argument "ignore[s]" the opinion's "textual reasoning." App. 82a. As *Saxon* explained, the FAA's use of the words "workers" and "engaged" emphasizes "the actual work that the members of the class, as a whole, typically carry out"—not what work their employer performs generally. 142 S. Ct. at 1788.

Finally, Flowers takes refuge (at 28–32) in policy. But there, too, it falls short. The company does not explain why a strike by the millions of transportation workers who work directly for companies like Walmart, Amazon, and Flowers would cause less disruption to interstate commerce than it would if those workers were hired by a trucking company. And it does not even attempt to show how courts could possibly determine at the outset of a case whether a company does what the Second Circuit says it must to be a part of the "transportation industry"—that is, "peg[] its charges chiefly to the movement of goods or passengers" and derive the "predominant source" of their "commercial revenue from that movement." App. 48a.

The decision below is as unworkable as it is wrong. This Court should either grant plenary review or summarily reverse.

CONCLUSION

This Court should grant the petition for certiorari.

September 5, 2023

Respectfully submitted,

JENNIFER D. BENNETT
Counsel of Record
GUPTA WESSLER LLP
505 Montgomery Street
Suite 625
San Francisco, CA 94111
(415) 573-0336
jennifer@guptawessler.com

LINNET DAVIS-STERMITZ
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741

HAROLD L. LICHTEN
MATTHEW THOMSON
ZACHARY L. RUBIN
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street
Suite 2000
Boston, MA 02116
(617) 994-5800

Counsel for Petitioners