No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The First and Seventh Circuits have held that this exemption applies to any member of a class of workers that is engaged in foreign or interstate commerce in the same way as seamen and railroad employees—that is, any worker "actively engaged" in the interstate transportation of goods. The Second and Eleventh Circuits have added an additional requirement: The worker's employer must also be in the "transportation industry."

The question presented is:

To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Neal Bissonnette and Tyler Wojnarowski were the plaintiffs in the district court and the appellants in the court of appeals.

Respondents LePage Bakeries Park St., LLC, C.K. Sales Co., LLC, and Flowers Foods, Inc. were the defendants in the district court and the appellees in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Bissonnette v. LePage Bakeries Park St., LLC*, No. 3:19-cv-00965 (D. Conn.) (judgment entered May 15, 2020)
- *Bissonnette v. LePage Bakeries Park St., LLC*, No. 20-1681 (2d Cir.) (judgment entered Feb. 22, 2023)

There are no related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

Are truck drivers transportation workers? That question may seem unlikely to provoke serious disagreement. But in the context of the Federal Arbitration Act's transportation-worker exemption, it has split the circuits.

The FAA exempts the employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has explained that the exemption applies to workers who are "engaged in commerce" in the same way as "seamen" and "railroad employees"—that is, workers who are "actively engaged" in the transportation of goods through the channels of interstate commerce. *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1790 (2022). Or, put simply, "transportation workers." *Id.*

The plaintiffs in this case are commercial truck drivers whose job was to haul goods to market for Flowers Foods, the baked goods conglomerate that manufactures Wonder Bread. Although they were "actively engaged" in transporting goods through the channels of interstate commerce, the Second Circuit held that they were not exempt from the FAA. That's because, according to the Second Circuit, a worker whose job is transportation is not a "transportation worker" unless they are also employed in the "transportation industry." App. 46a. And because the plaintiffs here were hired directly by Flowers rather than a trucking company, the court held, they were in the "bakery industry," not the "transportation industry." App. 48a–49a.

The Second Circuit did not locate its transportation-industry requirement in the text of the FAA. It couldn't have. In 1925, when the FAA was passed, a worker who transported interstate goods would have been understood

to be "engaged in interstate commerce" regardless of whether they worked for a transportation company. And there were plenty of "seamen" and "railroad employees" who were not employed in the transportation industry—for example, logging companies had their own railroads and fishing companies had their own boats. Rather than look to the meaning of the FAA in 1925, the court grafted onto the statute an industry requirement of its own making because, in the court's view, it made the exemption easier to administer.

In doing so, the Second Circuit ran afoul of this Court's decision in *Southwest v. Saxon*. *Saxon* explicitly rejected an industry-based approach to the transportation-worker exemption. Because the text of the statute focuses on the commerce in which the "workers" themselves are "engaged"—not their employer—*Saxon* held, so too must courts. 142 S. Ct. at 1788. What matters, this Court emphasized, is the "actual work" the worker performs, not what business their employer is in "generally." *Id.* And courts are "not free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal." *Id.* at 1792.

For that reason, almost immediately after the decision below was issued, the First Circuit explicitly rejected its approach as inconsistent with *Saxon* and the text of the FAA itself. *See Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228, 234–35 (1st Cir. 2023). There is now a square and acknowledged circuit split on whether courts may add a threshold industry requirement to the FAA's transportation-worker exemption. The First Circuit, along with the Seventh, has rejected an industry requirement, while the Second and Eleventh Circuits have adopted one. In fact, based on this disagreement, the circuits have even split over whether the very workers at

issue in this case—truck drivers for Flowers Foods—are exempt.

This division cannot stand. The FAA cannot mean different things for truck drivers doing the same work for the same company merely because they drive through different circuits. This Court should grant certiorari and reverse the Second Circuit.

OPINIONS BELOW

The Second Circuit's initial opinion is reported at 33 F.4th 650 (2d Cir. 2022) and reproduced at App. 1a. Its amended opinion issued on rehearing is reported at 49 F.4th 655 (2d Cir. 2022) and reproduced at App. 38a. The district court's decision granting the motion to dismiss in favor of arbitration is reported at 460 F. Supp. 3d 191 (D. Conn. 2020) and reproduced at App. 99a.

JURISDICTION

The Second Circuit entered its initial decision on May 5, 2022. App. 1a. It granted petitioners' timely petition for rehearing and issued an amended opinion on September 26, 2022. App. 38a. It denied petitioners' timely petition for rehearing en banc of the amended decision on February 15, 2023, App. 78a, and entered judgment on February 22, 2023. On May 11, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to June 15, 2023, and on June 8, 2023, Justice Sotomayor extended the time within which to file that petition to July 17, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides, in relevant part:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT

A. Statutory background

The Federal Arbitration Act requires courts to enforce arbitration clauses. 9 U.S.C. § 2. But that mandate is subject to an important exception: "[N]othing" in the Act, the statute says, "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.[1]

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[1] For simplicity, this brief omits ellipses when shortening "engaged in foreign or interstate commerce" to "engaged in

1. This Court has considered this exemption three times, each time emphasizing that—like any other statute—it must be interpreted according to its text. The Court's first encounter with the exemption was two decades ago in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). There, the Court held that the exemption does not apply to all contracts of employment, but solely to the "contracts of employment of transportation workers." *Id.* at 109.

To reach this conclusion, the Court relied on the interpretive canon *ejusdem generis*: Where a statute lists specific categories followed by a general catch-all phrase, the catch-all phrase is interpreted to "embrace only objects similar" to the specifically enumerated categories. *Id.* at 114. The Court observed that the "wording" of the FAA's worker exemption—"seamen, railroad employees, or any other classes of workers engaged in commerce"—"calls for the application of th[is] maxim." *Id.*

The critical "linkage" between "seamen" and "railroad employees," the Court held, is that they are both "transportation workers." *Id.* at 121. Thus, the Court concluded that to be exempt from the Federal Arbitration Act, a class of workers cannot be engaged in just any "foreign or interstate commerce," but must be engaged in the kind of commerce "seamen" and "railroad employees" are engaged in: transportation. *Id.* The Court explained that the exemption reflects "Congress's demonstrated

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commerce" or "engaged in interstate commerce." Citations to "JA" are to the joint appendix filed in the Second Circuit, and citations to "Doc." are to the Second Circuit docket. In addition, unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

concern with transportation workers and their necessary role in the free flow of goods." *Id.*

2. This Court next revisited the FAA's worker exemption in *New Prime, Inc. v. Oliveira*, which held that the exemption applies to both employees and independent contractors. 139 S. Ct. 532, 539–43 (2019). In doing so, the Court stressed that the exemption's words should be given the meaning they had at "the time of the Act's adoption in 1925," not what comes to mind to "lawyerly ears today." *Id.* at 539. It observed that many of the exemption's terms—including "seamen" and "railroad employees"—"swept more broadly at the time of the Act's passage than might seem obvious today." *Id.* at 543. But, it emphasized, courts must still faithfully adhere to the meaning of those terms at the time the Act was passed. *See id.*

New Prime also rejected the contention that a "liberal federal policy favoring arbitration agreements" justified reading the exemption more narrowly than its text would otherwise suggest. *Id.* at 543. Accepting an "appeal to [] policy" over text, the Court explained, would "thwart rather than honor" congressional intent. *Id.* "By respecting" the exception's text, the judiciary "respect[s] the limits up to which Congress was prepared to go when adopting the Arbitration Act." *Id.*

3. This Court's most recent case involving the worker exemption, *Southwest Airlines Co. v. Saxon*, again reiterated the primacy of its text. 142 S. Ct. at 1783. The question in *Saxon* was whether a worker who loaded and unloaded cargo from airplanes was exempt from the FAA. *Id.* at 1787. To answer that question, the Court undertook a two-step analysis: "We begin by defining the relevant 'class of workers' to which [the plaintiff] belongs. Then, we determine whether that class of workers is 'engaged in

foreign or interstate commerce.'" *Id.* (quoting 9 U.S.C. § 1).

In defining the relevant "class of workers," *Saxon* explicitly rejected an approach based on "industry." *Id.* at 1788, 1791. The Court explained that the exemption "speaks of 'workers'" and the commerce in which those "workers" are "engaged," not the industry in which their employer operates. *Id.* at 1788. Its application, therefore, depends on "the actual work" a worker performs, "not what [their employer] does generally." *Id.* The Court also noted that in 1925, "seamen" was not an "industrywide categor[y]": "Seamen" were all those who worked aboard a vessel, not all those in the maritime industry. *Id.* at 1791. That meant that working in a particular industry couldn't be the "common attribute" that "seamen" and "railroad employees" shared—and therefore couldn't be what defined a "class of workers" for purposes of the *ejusdem generis* canon. *Id.* Thus, the Court held that the relevant class of workers in *Saxon* was workers who "physically load and unload cargo on and off airplanes"—not workers in a particular industry or who work for a particular kind of company. *Id.* at 1789.

Having identified the relevant class of workers, the Court then turned to deciding whether those workers are "engaged in foreign or interstate commerce" within the meaning of the FAA. Relying on sources contemporary with the passage of the statute, the Court concluded that cargo loaders are "plainly" so engaged. *Id.* at 1789, 1792. When the FAA was passed, there was "'no doubt'" that those who load and unload "cargo from a vehicle carrying goods in interstate transit" are directly involved in the interstate transportation of those goods. *See id.* (quoting *Erie R. Co. v. Shuart*, 250 U.S. 465, 468 (1919)). There was

no doubt, therefore, that they are "engaged in commerce." *See id.* Thus, the Court held, cargo loaders are a "class of workers engaged in foreign or interstate commerce," exempt from the FAA. *Id.* at 1793.

The Court expressly declined to limit the FAA's exemption to workers who personally cross state lines because that limitation has no basis in the text of the statute. *See id.* at 1791–93. Where the exemption's "plain text suffices to show that" a class of workers is "exempt from the FAA's scope," the Court explained, "we have no warrant to" deviate from that text. *See id.*

B. Factual and procedural background

1. The plaintiffs in this case are commercial truck drivers. App. 39a; JA36, 408. They worked full time hauling goods for Flowers Foods, the multibillion-dollar company that manufactures Wonder Bread and other packaged baked goods found on grocery shelves throughout the country. JA14, 17; *see* Flowers Foods, https://flowersfoods.com (last visited July 14, 2023).[2] Flowers ships its products across state lines from its manufacturing plants to stores like Walmart, Target, and Safeway. JA18, 36, 163. The plaintiffs in this case were responsible for the last leg of that journey—from Flowers' regional warehouse to stores throughout Connecticut. JA18.

Flowers classified the plaintiffs, like many of its truck drivers, as independent contractors. JA13, 15, 19. In doing so, the company required them to purchase the right to transport goods for the company, mandated that they

[2] Flowers Foods is a conglomerate, and the defendants in this case are Flowers and related entities. This petition refers to them together as Flowers.

form their own corporations to do so, and demanded that they pay for the trucks they drove on its behalf. JA 15, 18. And while Flowers required the drivers to sign contracts purporting to deem them "independent" distributors, their actual job was to transport Flowers' goods under Flowers' control. JA15–18. The company has never disputed that most of the plaintiffs' work hours were, in fact, spent transporting goods. *See* App. 67a n.1 ("[T]he defendants offer no evidence to counter the complaint's allegations that the actual delivery of product constituted the lion's share of the plaintiffs' work."); *cf. Canales v. CK Sales Co., LLC*, 67 F.4th 38, 45 (1st Cir. 2023) (reciting district court finding in another case involving Flowers truck drivers that they "transport[] goods for fifty hours or more each week").

2. In 2019, the plaintiffs filed this lawsuit, alleging that Flowers had misclassified them as independent contractors and violated state and federal wage laws. JA1. Having characterized its truck drivers as independent contractors, Flowers decided it could withdraw its own operating expenses from its drivers' paychecks, charge them for the privilege of working for the company, and decline to pay them overtime—none of which, the plaintiffs allege, is legal. JA20.

Flowers moved to compel arbitration based on an arbitration clause in its "Distributor Agreement," the company's employment contract with its drivers. JA48. The plaintiffs opposed the motion, arguing that they are exempt from the Federal Arbitration Act. JA161. They explained that commercial truck drivers who haul goods that are being transported from one state to another—even those who are only responsible for an intrastate leg of that journey—have long been understood to be

transportation workers "engaged in interstate commerce." JA 167–75. And thus their contracts of employment, the plaintiffs argued, are exempt from the FAA. *See id.*

The district court held otherwise. App. 100a–01a. In the court's view, even though they "spen[t] the majority of their working hours delivering" goods, the plaintiffs still were not transportation workers because Flowers' contract characterized them as independent businesses that performed other tasks in addition to transportation. App. 113a–17a.

3. A split panel of the Second Circuit affirmed, but it declined to adopt the district court's reasoning. App. 3a. Instead, the panel majority held that the plaintiffs are not exempt from the FAA solely "because they are in the bakery industry, not a transportation industry." *Id.* In other words, because the plaintiffs were hired by Flowers itself to transport its goods, rather than by a trucking company, the court concluded that the FAA's exemption does not apply. *See id.*

The majority did not locate its industry requirement in the text of the FAA, but rather in snippets of decades-old Second Circuit caselaw that mention the "transportation industry." App. 9a–10a. The majority read this old circuit precedent, along with a couple of cases from other circuits, as adopting a transportation-industry requirement to "narrow[]" the FAA's worker exemption. *Id.*

Because the term "transportation industry" does not appear in the statute, and the caselaw on which the majority relied doesn't define it, the majority crafted its own definition: "[A]n individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or

passengers, and the industry's predominant source of commercial revenue is generated by that movement." App. 11a. The majority did not explain how it arrived at this definition or cite anything to support it. *Id.*

But it did conclude that the plaintiffs here do not satisfy it. *Id.* The majority reasoned that when stores like Walmart buy Flowers' products, they are buying baked goods, "not transportation services." *Id.* So, in its view, the plaintiffs—despite being commercial truck drivers—were in the bakery industry, not the transportation industry. *Id.* And because the majority believed the FAA's exemption should be "narrow[ed]" by an industry requirement, that meant the plaintiffs were not exempt. *See id.*

Judge Pooler dissented. "Because the movement of goods through interstate commerce is a central part of the plaintiffs' occupation as truckers," she would have held "that they belong to a 'class of workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, and that the FAA does not apply." App. 30a. The majority's contrary conclusion, she wrote, "is supported by neither the FAA's text nor any case interpreting it." *Id.*

Judge Pooler emphasized that the text of the FAA "asks whether a worker belongs to a class of workers 'engaged in interstate or foreign commerce.' 9 U.S.C. § 1. It does not ask for whom the worker undertakes her transportation work." App. 33a. And it has long been clear that truck drivers who transport goods being shipped from one state to another—including drivers responsible solely for an intrastate leg of that journey—are "engaged in commerce." App. 27a, 33a. That's why the "one area of clear common ground among federal courts addressing

the transportation worker exemption [had been] that truck drivers qualify." App. 24a.

In holding otherwise here, the dissent noted, the majority did not just split with this longstanding consensus, but it directly conflicted with decisions from other circuits refusing to graft an industry requirement onto the FAA's text. App. 32a (citing several cases). The dissent pointed, for example, to the Seventh Circuit's decision in *International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast LLC, LLC*, 702 F.3d 954 (7th Cir. 2012), which held that a "trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party." App. 32a. (discussing *Kienstra*, 702 F.3d at 957).

4. Shortly after the Second Circuit issued its decision, this Court decided *Southwest v. Saxon*. The plaintiffs petitioned for panel rehearing or rehearing en banc, arguing that *Saxon* forecloses the majority's industry requirement. *See* Doc. 156.

The panel granted rehearing, but the majority adhered to its prior view. App. 45a–50a. It recognized *Saxon*'s mandate that courts "consider 'the actual work'" a worker performs, rather than the industry in which the employer operates. App. 48a. But it dismissed that mandate as inapplicable here. App. 48a–50a. According to the majority, because the plaintiff in *Saxon* worked for an airline, the decision applies only to those who work in the transportation industry. *Id.* And the majority had already decided that Flowers' truck drivers do not.

Judge Pooler again dissented. In addition to reiterating her view that the majority's decision is unmoored from the statute's text and conflicts with the decisions of other circuits, Judge Pooler also rejected the

majority's "limited" characterization of *Saxon*. App 70a. *Saxon*, the dissent pointed out, held that a worker is exempt "based on what she does, . . . not what [her employer] does generally." *Id.* (quoting *Saxon*, 142 S. Ct. at 1788). *Saxon* did not limit this holding to workers employed in an industry that "pegs its charges chiefly to the movement of goods [or] passengers." *See* App. 69a–70a. Yet the majority "conclude[d] that the plaintiffs are not" exempt "*[o]nly* by looking to what their employer does generally—making and selling bread." App. 68a (emphasis added). In the dissent's view, this approach is "squarely foreclosed" by *Saxon*. App. 70a.

5. The Second Circuit denied rehearing en banc, App. 77a, but several judges dissented, App. 79a. Although the dissenters recognized that rehearing en banc is "quite rare" in the Second Circuit, they believed that "this rare step [was] warranted" here because the panel's decision "directly conflicts" with *Saxon*. *Id. Saxon*, they said, "expressly rejects the notion . . . that the industry in which an employer operates, rather than the work that the employee does, determines whether the employee belongs to a 'class of workers engaged in foreign or interstate commerce.'" App. 80a.

In the dissenters' view, the panel majority did "the opposite of what *Saxon*'s reasoning and holding require." App. 81a. It "ignor[ed] Justice Thomas's textual reasoning" and "supplant[ed this] Court's clear interpretive directives with its own atextual test." *Id.* at 5. The "transportation industry requirement," the dissent concluded, "is, as *Saxon* demonstrates and holds, unsupported by the text of the FAA." *Id.* at 7.

REASONS FOR GRANTING THE PETITION

I. This case presents an important, frequently recurring issue over which there is a clear circuit split.

This case presents the clearest possible circuit split. Not only has the First Circuit (among others) explicitly rejected the Second Circuit's transportation-industry requirement, but it has also held that truck drivers for Flowers Foods specifically are exempt from the FAA. In other words, the circuit courts' disagreement about the question presented here has led to disagreement about whether workers who do the *very same work* for the *very same company* are entitled to the same statutory exemption.

This conflict is untenable, and the Court should grant certiorari to resolve it.

A. Two circuits have held that in addition to the requirements in the statute's text, transportation workers must also be employed by a company in the transportation industry to be exempt from the FAA.

Start with the Second Circuit. Under the decision below, in the Second Circuit it's not enough for a worker to be a member of a class of workers "engaged in interstate commerce" like "seamen" and "railroad employees." The worker's employer must also be in the "transportation industry"—which the court defines as an industry that "pegs its charges chiefly to the movement of goods or passengers" and generates its "predominant source of commercial revenue . . . by that movement." App. 48a.

Although it has not revisited the issue since *Saxon*, the Eleventh Circuit has also adopted an industry

requirement. In *Hamrick v. Partsfleet, LLC*, the court held that to be exempt, a worker must not only "actually engage in the transportation of goods in interstate commerce," but they must also be "employed in the transportation industry." 1 F.4th 1337, 1346 (11th Cir. 2021).

B. Several other courts, however, have rejected this approach. Almost immediately after the Second Circuit issued the decision below, the First Circuit explicitly disagreed with it. *Fraga*, 61 F.4th at 234–35 ("Premium urges us to follow the *Bissonnette* majority. . . . [W]e decline to do so."). The court held that the FAA's worker exemption does *not* depend on the industry in which a worker is employed, but rather "on the work in which [they are] actually engaged." *Id.* at 236.

In the First Circuit's view, that result follows directly from a faithful application of this Court's decision in *Saxon*—and the text of the FAA itself. The First Circuit noted that *Saxon* "focused" carefully on the words of the statute and concluded that they did not support a "broad, industrywide approach" to determining whether a worker is exempt from the FAA. *Id.* at 234. The text demands an approach "based on what the worker does at the company, not what the company does generally." *Id.* That's why *Saxon* issued a "repeated and emphasized command to focus on what the workers themselves actually do." *Id.* at 235. The Second Circuit's transportation-industry requirement, the First Circuit concluded, is inconsistent with this command. *See id.*

The court also highlighted the "odd results" that would follow if employment in the transportation industry were a "threshold requirement" for applying the FAA's worker exemption. *Id.* "[F]or example, a paper company that built

a rail link from its mill in New Hampshire to a pulp source in Maine" could hire railroad workers to run that rail link. *Id.* Under the Second Circuit's rule, those workers would not be exempt from the FAA—even though the statute explicitly excludes "railroad employees"—"merely because a paper company" rather than a transportation company "owned the railroad." *Id.* The First Circuit concluded that can't be right. *Id.* And if the rule "does not work for 'railroad employees,'" the court reasoned, "we do not see how it can work for 'any other class of workers' either." *Id.* (quoting 9 U.S.C. § 1).

Relying on its rejection of a transportation-industry requirement in *Fraga*, the First Circuit recently held that truck drivers for Flowers Foods specifically—the same workers at issue here—are exempt from the FAA. *See Canales*, 67 F.4th at 40. "[W]orkers who do transportation work," the court explained, "are transportation workers." *Id.* at 45. And Flowers' truck drivers "do transportation work." *Id.* at 45–47. The fact that they do so directly for Flowers itself, rather than for a trucking company, is irrelevant. *See id.* at 45. What matters, the court held, is the "worker's work," not "the company's industry." *Id.*

The First Circuit is not alone in adopting this view. The Seventh Circuit, too, has explicitly rejected the idea that a transportation-industry requirement should be grafted onto the FAA's exemption: "[A] trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party." *Kienstra*, 702 F.3d at 957 (holding that truck drivers for a concrete company are exempt); *see also 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.").

Other courts have done the same. *See, e.g.*, *Muro v. Cornerstone Staffing Sols., Inc.*, 20 Cal. App. 5th 784, 791 (2018) ("Absent specific direction from the United States Supreme Court, we decline to engraft additional language on section 1 by requiring that workers who are actually engaged in transporting goods in foreign or interstate commerce *also* prove that their employer is involved in the 'transportation industry.'"); *Brock v. Flowers Food, Inc.*, 2023 WL 3481395, at *3 (D. Colo. May 16, 2023) (explicitly rejecting the decision below as inconsistent with *Saxon* and the text of the FAA and holding that Flowers' truck drivers are exempt); *Valdez v. Shamrock Foods Co.*, 2023 WL 2624438, at *3 (C.D. Cal. Mar. 16, 2023) ("In determining the class of workers, this Court considers only the nature of the work [the plaintiff] performed, not the type of business [his employer] conducts.").

C. Thus, in the First and Seventh Circuits, the truck drivers responsible for getting bread to market are transportation workers exempt from the FAA. But in the Second and Eleventh Circuits, they are not. This split cannot stand.

As the supply-chain woes of the last three years have underscored, transportation workers—and particularly truck drivers—are central to our economy. *See* Madeline Ngo & Ana Swanson, *The Biggest Kink in America's Supply Chain: Not Enough Truckers*, N.Y. Times (Nov. 9, 2021), https://perma.cc/3RD3-GXED. The transportation of goods to market in the United States depends on the millions of truckers who haul them there. *See id.*; Jennifer Cheeseman Day & Andrew W. Hait, *Number of Truckers at an All-Time High*, U.S. Census Bureau (June 6, 2019), https://perma.cc/33RR-LTVA.

Many of these drivers work for companies like UPS or FedEx, which the Second Circuit would presumably hold are in the transportation industry. But even more of them work directly for companies like Flowers or Tyson Foods or Walmart—companies typically understood to be in the manufacturing or retail industry, not the transportation industry. *See* App. 69a; Mike Reiss, Bob Pitts & Josh Feinberg, *Private Fleet: A key differentiator in service*, Logistics (June 2, 2022), https://perma.cc/V8TP-ZJU5; Guy Frantz, *Transportation Report: The rise of private fleets (and dedicated operations*), DC Velocity (May 3, 2019), https://perma.cc/8D55-Z6V5; *2022 Top 100 Private Carriers*, Transport Topics, https://perma.cc/EG9L-VKHL (last visited July 17, 2023); Distribution, Fulfillment, & Drivers, https://careers.walmart.com/drivers-distribution-centers (last visited July 17, 2023) (truck drivers for Walmart's fleet drive approximately 700 million miles a year transporting Walmart's products to its stores).

As the dissent pointed out below, it makes no sense to hold that a truck driver transporting Walmart's goods is exempt from the FAA if that driver works for a trucking company, but not if Walmart hired the trucker directly. App. 69a. The truck drivers putting bread on the shelves play no less a "necessary role in the free flow of goods" if they work for Walmart than if they work for a trucking company hired to ship Walmart's goods. *See Saxon*, 142 S. Ct. at 1790. Nor does it make any sense to treat the same Walmart driver differently if their home base happens to be in the First Circuit rather than the Second. But, absent this Court's intervention, that's exactly what will continue to happen.

This issue is not going away. There are millions of truck drivers who do not work for a traditional trucking

company: Walmart drivers, Amazon drivers, Flowers Foods drivers. And courts are routinely asked to decide whether these drivers are exempt from the FAA. *See, e.g.*, *Valdez*, 2023 WL 2624438; *Reyes v. Hearst Commc'ns., Inc.*, 2021 WL 3771782 (N.D. Cal. Aug. 24, 2021), *aff'd*, 2022 WL 2235793 (9th Cir. June 22, 2022); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020); *Garrido v. Air Liquide Indus. U.S. LP*, 241 Cal. App. 4th 833 (2015); *Teamsters Loc. 331 v. Phila. Coca-Cola Bottling Co.*, 2007 WL 4554240 (D.N.J. Dec. 20, 2007).

Indeed, the issue arises so often that just in the last year, four different courts have considered it in the context of Flowers Foods truck drivers specifically—and, based on their view about whether there's a threshold industry requirement, split over whether these specific drivers are exempt. *See Canales*, 67 F.4th at 45; *Bissonnette v. Lepage Bakeries Park St., LLC*, 49 F.4th 655, 660–62 (2d Cir. 2022); *Brock*, 2023 WL 3481395, at *3–6; *O'Bryant v. Flowers Foods, Inc.*, 629 F. Supp. 3d 377, 386–88 (D.S.C. 2022).

Until this Court intervenes, the confusion the circuits' disagreement has generated will continue to recur, undermining fairness and predictability for transportation workers and the businesses and consumers that depend on them.

II. The Second Circuit's decision conflicts with *Saxon* and the plain text of the FAA and is unworkable.

The Second Circuit's decision also warrants review because it defies this Court's clear command in *Saxon* and disregards the plain text of the FAA—all to impose a transportation-industry requirement that is impossible to administer. This Court should step in.

A. In *Saxon*, this Court "expressly reject[ed] the notion . . . that the industry in which an employer operates, rather than the work that the employee does, determines whether the" worker is exempt from the FAA. App. 80a. That's because the exemption "speaks of '*workers*'" and the commerce in which *those workers* are "engaged." *Saxon*, 142 S. Ct. at 1788 (quoting 9 U.S.C. § 1, emphasis added). It does not mention employers or industries. To determine whether the exemption applies, *Saxon* therefore holds that courts must look to the "actual work" a worker performs for their employer, "not what [the employer] does generally." *Id.*

The Second Circuit here did precisely the opposite: It held that, regardless of the "actual work" a worker performs, if their employer is not in the transportation industry, the FAA's exemption does not apply. App. 48a. According to the panel majority, it was entitled to disregard *Saxon* because *Saxon* applies only once a court has determined that the worker's employer is in the transportation industry. *See id.* In other words, *Saxon* interprets the text of the FAA's worker exemption; but in the Second Circuit's view, apparently, that text doesn't come into play at all unless a worker satisfies the court's judge-made threshold requirement that the worker's employer be in the transportation industry. *See id.*

That is not how statutory interpretation works. A court may not condition the application of a statute's text on additional requirements of its own making—even if the court believes its version is narrower or more "reliable" than Congress's. App. 46a; *see Saxon*, 142 S. Ct. at 1788, 1791–93 (explaining that courts must apply the FAA's "plain text" and have "no warrant to elevate vague" policy concerns "over the words Congress chose"); *New Prime*,

139 S. Ct. at 543 (rejecting previous attempt to add atextual limitations to the FAA's worker exemption). As *Saxon* itself says, courts must apply the text of the FAA as Congress wrote it. *Saxon*, 142 S. Ct. at 1788, 1791–93. The decision below flouts this clear command.

B. Even absent *Saxon*, the decision below would warrant review because it lacks any basis in the text of the FAA. The FAA exempts "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. It does not exempt "seamen, railroad employees, and any other class of workers engaged in commerce, so long as the particular worker at issue happens to be employed by a company in the transportation industry."

None of the words that are actually in the FAA contain a hidden industry requirement. To the contrary, when the FAA was passed, those who transported interstate goods were well understood to be "engaged in interstate commerce" even if they didn't work for a transportation company. *See, e.g.*, *Mich. Pub. Utils. Comm'n v. Duke*, 266 U.S. 570, 576 (1925) (plaintiff whose "sole business" was to haul auto parts for a car manufacturer was "engaged" in "interstate commerce"). That's because the transportation of interstate goods was (and is) universally understood to be interstate commerce, regardless of who undertakes it. *See, e.g.*, *Rossi v. Commonwealth of Pennsylvania*, 238 U.S. 62, 66 (1915) (in a case in which liquor was transported by its seller, not by a transportation company, explaining that "the transportation of intoxicating liquor, as of other merchandise, from state to state, is interstate commerce"); *United States v. Simpson*, 252 U.S. 465, 466 (1920) (holding that the interstate transportation of goods is "transportation in interstate commerce," regardless of

who is responsible for the transportation—and if "Congress intend[s] to confine" a statute to transportation by "common carriers," it will say so); *Caldwell v. State of North Carolina*, 187 U.S. 622, 631–32 (1903) (transporting goods to an out-of-state purchaser is "interstate commerce," regardless of whether it is performed by a railroad company or an agent of the manufacturer).

The panel majority's only nod to the text of the statute is a conclusory assertion that the exemption's reference to "'seamen' and 'railroad employees' . . . locate[s] the 'transportation worker' in the context of a transportation industry." App. 46a. But the court did not actually examine the meaning of "seamen" or "railroad employees" in 1925. *See id.* If it had, it would have discovered that they were not, in fact, terms limited to workers in the transportation industry.

To the contrary, as *Saxon* explained, seamen included anyone "employed or engaged in any capacity on board any ship"—regardless of who employed them. *Saxon*, 142 S. Ct. at 1791 (quoting Webster's New Int'l Dictionary of the English Language 1906 (1922)). Thus, a worker employed by a fishing and canning company to work aboard a fishing boat was a "seaman." *Alaska Packers' Ass'n v. Indus. Accident Comm'n*, 276 U.S. 467, 468 (1928); *accord Haavik v. Alaska Packers' Ass'n*, 263 U.S. 510, 513 (1924); *see also The Paquete Habana*, 175 U.S. 677 (1900). So too was a worker who performed "stevedore work on a vessel" for a coal company. *N. Coal & Dock Co. v. Strand*, 278 U.S. 142, 143 (1928). As was a crane operator who worked on a dredge and was employed by a dredging company. *Ellis v. United States*, 206 U.S. 246, 259–60 (1907).

Similarly, many "railroad employees" did not work for railroad companies. Just as Flowers has decided to hire its own truck drivers, many companies in the early twentieth century employed their own railroad workers. *See, e.g.*, *Hemphill v. Buck Creek Lumber Co.*, 54 S.E. 420, 421 (N.C. 1906) (logging company); *Schus v. Powers-Simpson Co.*, 89 N.W. 68, 70 (Minn. 1902) (same); *Procter & Gamble Co. v. United States*, 225 U.S. 282, 285 (1912) (manufacturing company).

Thus, both "seamen" and "railroad employees" were commonly found in industries that do not "peg[their] charges chiefly to the movement of goods or passengers," App. 48a. The Second Circuit's transportation-industry requirement not only lacks support in the exemption's text; it is foreclosed by it. *Cf. Saxon*, 142 S. Ct. at 1791–92 (rejecting attempt to limit the exemption based on a characteristic not possessed by both seamen and railroad employees).

C. The Second Circuit's only justification for imposing a transportation-industry requirement contrary to the FAA's text and this Court's precedent is that it purportedly offers a "reliable principle" for identifying which workers are subject to the statute. App. 46a. But courts are not "free to pave over bumpy statutory texts" to make them easier to apply. *Saxon*, 142 S. Ct. at 1792.

And, in any event, there is nothing "reliable" about the Second Circuit's approach. Take this case: The panel majority believed Flowers' commercial truck drivers are not in the transportation industry because Flowers sells baked goods. App. 49a–50a. But the dissent believed they are in the transportation industry because they're truck drivers whose job is to transport goods. App. 72a.

The majority tries to avoid this problem by making up a definition of transportation industry that requires determining whether the industry "pegs its charges chiefly to the movement of goods or passengers" and whether "the industry's predominant source of commercial revenue is generated by that movement." App. 48a. But in addition to being invented out of whole cloth, this definition only raises more questions: How should courts determine an industry's "predominant source of commercial revenue" or the composition of its "charges"? Must they hold an evidentiary hearing? Do parties that dispute whether the FAA applies need to hire industrial experts? Or may courts simply assume, as the majority here apparently did, that if a company sells, for example, baked goods and transports them to its customers, the bulk of the baked goods' price is the goods themselves and not their transportation? How should courts handle companies like Amazon that transport both other people's goods and their own? And, again, why aren't commercial truck drivers who sell their driving services to a manufacturer part of an industry that "pegs its charges chiefly to the movement of goods," simply because the manufacturer they work for isn't?

Having abandoned the text of the FAA and this Court's precedent in the name of reliability, the Second Circuit has created a rule that is entirely unworkable. But, as the Second Circuit dissenters recognized, there is a "workable principle" available already. App. 84a. It's the one supplied by this Court's decision in *Saxon*—and the text of the FAA itself: The FAA exempts "any class of workers directly involved" in interstate transportation. *Id.* (quoting *Saxon*, 142 S. Ct. at 1789).

This Court should grant plenary review to resolve the circuit split and clarify that the only principle courts may apply is the one mandated by the FAA's text. Alternatively, because the decision below is in direct conflict with *Saxon*, the Court may wish to summarily reverse.

CONCLUSION

This Court should grant the petition for certiorari.

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